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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36169-1-III

STATE OF WASHINGTON, Respondent,

v.

JAMAICA CHRISTINA RILEY, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

In a trial alleging domestic violence by Jamaica Riley against her estranged husband, John Pink, without conducting an ER 404(b) analysis, the trial court allowed the State to present multiple allegations of unrelated incidents between them while also excluding defense witnesses who would have disputed Pink's account and demonstrated his motive to fabricate the allegations in the context of a child custody dispute. These rulings deprived Riley of the opportunity to impeach Pink for bias and present a defense, and require a new trial. The trial court also imposed a \$200 criminal filing fee in spite of Riley's indigence that should be stricken from the judgment and sentence.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in allowing the State to repeatedly introduce unrelated allegations of misconduct by Riley without complying with ER 404(b) and when the prejudicial effect of the testimony substantially outweighed its probative value.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in excluding defense witnesses proffered to rebut the complaining witness's account and establish his bias.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing a \$200 criminal filing fee when Riley was indigent, unemployed, and receiving public assistance.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether, in the absence of an on-the-record ER 404(b) analysis, the trial court improperly admitted allegations of prior misconduct that were not proven by a preponderance of the evidence.

ISSUE NO. 2: Whether, in the absence of an on-the-record ER 404(b) analysis, the trial court improperly admitted allegations of prior misconduct that were highly prejudicial while nominally relevant to establish whether Pink reasonably feared that Riley would carry out a threat to kill.

ISSUE NO. 3: Whether, after allowing the State to present numerous allegations of prior misconduct by Riley, the trial court erred in excluding defense witnesses who would have rebutted the allegations and established Pink's motive to fabricate them?

ISSUE NO. 4: Whether the criminal filing fee should be stricken when the trial court apparently found that Riley could not pay discretionary

LFOs and she receives public assistance within the meaning of RCW 10.101.010(3)(a)?

IV. STATEMENT OF THE CASE

Jamaica Riley and John Pink were in a relationship for 13 years and had two children together. RP 27, 121. They separated in 2016 and conflict between them escalated significantly, with both accusing each other of misconduct and obtaining protective orders against each other. RP 28, 40-41, 46, 49, 126-27. Pink moved out while Riley stayed in the family home with their children. RP 28, 129.

About two months after they separated, Pink contacted the power company to remove his name from the bill. RP 29. What happened next was disputed. According to Riley, a utility employee showed up on Friday afternoon and said the power was being disconnected to remove Pink from the account. RP 130-31. She was told to set up a new account and reactivate it, which would require a reactivation fee of several hundred dollars. RP 131. Although she would be able to come up with the money by Monday, Pink refused to wait over the weekend. RP 132. Riley was frustrated by his refusal because she had the children with her and there would be no electricity over the weekend. RP 132. They had several phone calls that got heated and both of them hung up on each other

multiple times. RP 133. However, Riley denied making any threats to Pink. RP 134.

In Pink's version, after he contacted the utility, Riley called him while he was at work and said that if he removed his name from the power bill, she would shoot him in the head. RP 30. He described her as screaming and shaky and believed that she wanted to kill him. RP 32. Pink called the sheriff, and a deputy responded and overheard part of the conversation between Pink and Riley. RP 35-37. During that phone call, Riley said that if Pink came to pick up the kids that night, he would leave in an ambulance. RP 37, 70. Pink also claimed that Riley later called him at work to say that if he did not lie about what she had said, she would shoot him, take the kids, and ruin him financially forever. RP 39.

Pink obtained a protective order against Riley in December. RP 45-46. Later that month, there was a winter storm and Riley texted Pink to tell him not to risk bringing the kids back to her house that night. RP 60, 138-39. Pink reported the text to police. RP 60.

The State charged Riley with two counts of felony telephone harassment, one count of witness tampering, and one count of violating a no contact order based on Pink's allegations, all designated as domestic violence offenses. CP 1-2. Before trial, during a discussion about the

witnesses the parties anticipated calling, the State voiced an objection to the defense witnesses, claiming that their participation would turn the trial into a “Jerry Springer show.” RP 8. Defense counsel explained that the State had named Misty Black as a witness, and her statement indicated she would testify that during two years of acquaintance, she saw Riley hit or slap Pink several times in anger. RP 9. Some of the defense witnesses would rebut this testimony with their own observations of the peaceful relations between Riley and Pink over several years. RP 9. Additionally, the defense argued that Pink had a motive to fabricate the allegations based upon the ongoing child custody disputes, and other defense witnesses would testify that he had fabricated similar allegations before. RP 17-18.

The trial court granted the State’s motion and excluded all of the defense witnesses. RP 20. The State then called Pink as its first witness at trial. RP 27. Pink testified that during the phone call, Riley said that if he removed his name from the power bill she would shoot him in the head. RP 30. According to Pink, the statement scared him because Riley owned firearms and knew how to shoot, and she usually meant what she said. RP 31-32. The State then asked if there were other occasions when Riley had threatened him and Pink said yes, although the threat to shoot him was new. RP 32. When the State asked how Riley had threatened him, Riley

objected and invoked ER 404(b). RP 32. The trial court did not engage in the required ER 404(b) analysis and simply overruled the objection. RP 32.

Thereafter, Pink testified that if Riley was angry at him, she would speed excessively with him and their children in the car, drive aggressively, throw things at him, smack or kick him, and scratched his forearm from elbow to wrist, stating, “She’s just very aggressive.” RP 32-34. On redirect, the State continued to question Pink about prior incidents and he reported that Riley once kicked him in the ribs and out of bed and screamed at him daily. RP 63. When Pink stated that he sought full custody after Riley ran from the police for twelve days and abandoned her children, the trial court sustained Riley’s objection and struck the answer. RP 63-64.

Pink also testified about prior incidents in which he contacted law enforcement about Riley. RP 38. In response to prodding from the State, Pink described Riley contacting him again after a protective order was in place as well as an incident when Riley approached him to “speak her piece again” while trying to pick up the kids when the no contact order was in place. RP 38-39. Riley’s attorney objected repeatedly to the testimony and was overruled. RP 39.

After Pink's testimony, counsel for Riley again proffered the testimony of a defense witness who had known both Pink and Riley and would testify as to her observations of their relationship – namely, whether Riley was violent or loud toward Pink and how Pink acted toward her. RP 77. The testimony was offered to rebut Pink's testimony about the history of violence and aggression in their relationship. RP 77. The witness would have testified that she had known Riley and Pink since the second grade, had been around them through their entire relationship, and allegations of Riley's aggression toward Pink was entirely inconsistent with her observations. RP 78-79. Reasoning that it would not be relevant to admit evidence of the occasions when a bad act did not occur, the trial court declined to reverse its prior ruling excluding the witness. RP 80-81.

Next, the defense moved to exclude the State's witness, Misty Black, arguing that her testimony that she had seen Riley be argumentative and strike Pink in the back of the head was not relevant to Pink's fear of being shot. RP 90-91. The State argued that an ongoing pattern of domestic violence was relevant and the court allowed the witness to testify. RP 91.

Accordingly, Black testified that over the two years she knew Riley and Pink, she saw Riley emotionally abuse Pink by belittling him

and putting him down. RP 94-95, 103. According to Black, Riley was not violent but was abusive. RP 100. She described an incident where Riley called Pink “fucking stupid” for ordering the wrong size pizza. RP 97. Black did witness Riley strike Pink “upside” the head and on the shoulder and yell at him, but apparently did not categorize what she saw as violence. RP 95, 96, 100.

After the State rested, the defense renewed its motion to call its witnesses. RP 104, 110. Specifically, two of the witnesses observed one of the prior incidents in which Pink called the police about Riley and contradicted his account, undermining Pink’s credibility. RP 110-11. Reasoning that because the jury would be instructed to consider the testimony about the prior acts for a limited purpose it would not be helpful to refute that testimony, the trial court again reaffirmed its ruling excluding the defense witnesses. RP 112-13.

Riley called as a witness the utility worker who had responded to disconnect the power on the day she allegedly threatened Pink on the phone. RP 114-15. Testifying that he overheard pretty much the entire conversation, the witness denied that Riley threatened to shoot Pink or kill him, but stated she did threaten to drive a motorcycle into town and beat his ass. RP 117.

Riley also testified on her own behalf, admitting that she was frustrated and yelling during the phone call but denying that she threatened him at that time or in the past. RP 133-35. She denied that the conversation Pink described where she asked him to lie in court ever happened. RP 136. She explained the text message to Pink after the protective order was in place as arising from concern about bad weather conditions that would have made it unsafe to drive the children home. RP 138-39. Addressing Black's allegations of abuse, Riley denied them. RP 150-51.

On cross-examination, the State revisited the line of questioning the trial court had stricken during Pink's testimony, asking, "So, where were the kids in July of 2016 when you took a week to go off with Mr. (Inaudible)?" Riley responded that she was sleeping in her car in the Fred Meyer parking lot because Pink refused to stay out of her bed and was trying to have sex with her when she wanted a separation. The State then asked, "So, you wanted separation from this idyllic, fairy tale relationship. So, who was taking care of your kids for the twelve days when you were with Mr. (Inaudible) later in the year?" RP 141. Defense counsel objected and the court asked the prosecuting attorney if she had a good faith basis for the question. RP 141-42. When she answered that she had asked Pink, before completing her explanation and without acknowledging

that the court had stricken Pink's answer, the trial court overruled the objection. RP 142. Riley responded that Pink was taking care of the kids at that time. RP 142. On redirect, she explained that he sought custody the very next day and obtained a no-contact order barring her from seeing the children. RP 148. The State again revisited the subject on re-cross, eliciting that during the 12-day period, several people knew where she was, but not Pink. RP 152. The defense then rested. RP 154.

The parties agreed on language to be included in a limiting instruction about the prior bad acts testimony. RP 176. The State also amended the information to charge the second count of harassment as a misdemeanor rather than a felony. RP 173, CP 19. The jury convicted Riley of counts 1, 2, and 4, but acquitted on the charge of witness tampering. RP 223-24, CP 54-61. At sentencing, the court imposed 10 months in jail and \$700 in LFOs, including a \$200 criminal filing fee. RP 245, CP 64, 67. Riley now appeals and has been found indigent for that purpose. CP 73, 75.

V. ARGUMENT

By allowing the State to present disparaging and minimally relevant accusations of misconduct by Riley without conducting an ER 404(b) analysis on the record, and thereafter excluding Riley's witnesses

who would have rebutted the accusations, the trial court improperly admitted “bad acts” evidence and deprived Riley of the opportunity to present a defense. The trial court also erred in imposing the \$200 criminal filing fee when Riley was indigent. These errors require remand.

1. The trial court erred in failing to conduct the required ER 404(b) analysis on the record before admitting numerous inflammatory and minimally relevant allegations that served only to disparage Riley to the jury.

Under ER 404(b), admissibility of a defendant’s prior wrongdoing is limited. ER 404(b) provides, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, “other acts” evidence may be admissible for other purposes, so long as it is not proffered to show propensity and a limiting instruction is given to that effect. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

In reviewing a challenge to admission of ER 404(b) evidence, the appellate court considers *de novo* whether the trial court correctly interpreted the rule and, if so, whether the trial court abused its discretion in admitting the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Discretion is abused if it is manifestly unreasonable or

exercised on untenable grounds or for untenable reasons. *State v. Alexander*, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

Before admitting such evidence, the trial court must determine, on the record, (1) that the prior misconduct occurred by a preponderance of the evidence; (2) that there is a lawful purpose for admitting the evidence; (3) whether the evidence is relevant to prove any of the charged elements; and (4) that the probative value outweighs the prejudicial effect.

Gresham, 173 Wn.2d at 421. The burden is on the party proffering the evidence to establish its admissibility under the first three factors. *Id.* Thus, a trial court should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The analysis must be conducted on the record. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). “We cannot overemphasize the importance of making such a record . . . [T]he absence of a record precluded effective appellate review.” *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue. *Id.*

As a threshold matter, the court must identify the purpose for which the evidence is sought to be introduced and determine whether the evidence is relevant to establish an essential element of the charge. *State v. Brown*, 113 Wn.2d 520, 526, 782 P.2d 1013 (1989). In cases where the court does not conduct ER 404(b) balancing on the record, resolving doubtful cases in favor of the defendant, the appellate court may independently determine that the prejudicial effect of the evidence outweighs its probative value. *See State v. Trickler*, 106 Wn. App. 727, 733, 25 P.3d 445 (2001).

If “bad acts” evidence is admitted for other purposes than to show propensity, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Powell*, 126 Wn.2d 244, 258–59, 893 P.2d 615 (1995). The trial court must find that the evidence is logically relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting prior bad acts in a criminal prosecution. *Id.* at 258.

In determining the admissibility of evidence of defendant’s prior bad acts, the court balances the probative value of the evidence against its potential for prejudice. *State v. Nelson*, 131 Wn. App. 108, 115-16, 125

P.3d 1008, *review denied*, 157 Wn.2d 1025 (2006). The Supreme Court held long ago that “[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted.” *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury, or an undue tendency to suggest a decision on an improper basis, commonly an emotional one. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), *abrogated on other grounds in State v. Lough*, 125 Wn.2d 847, 89 P.2d 487 (1995). Evidence of other bad acts “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal ‘presumption of innocence’ is stripped away.” *Bowen*, 48 Wn. App. at 195.

Erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004). Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and

in no way affected the outcome. *State v. Oswald*, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

Here, the trial court engaged in none of these steps before allowing the State to elicit numerous unproven and disparaging allegations of misconduct by Riley, including that she slapped Pink, yelled at him, and abandoned their mutual children. When challenged, the State merely argued that the allegations were admissible as prior domestic violence incidents relevant to establish the element of “reasonable fear” in the harassment charges. This argument for admissibility falls short in several respects.

First, the State bears the burden of proving by a preponderance of the evidence that the prior misconduct actually occurred. *Gresham*, 173 Wn.2d at 421. Here, both parties accused the other of fabricating allegations of abuse, and Riley and Pink disputed the circumstances surrounding their separation. Moreover, the trial court refused to allow testimony from defense witnesses who would have directly contradicted Pink’s allegation that Riley continued to contact him after a protective order was in place, and others who knew Pink and Riley for years who could dispute the accusation that abusive behavior was at all normal in their relationship.

Second, the State bears the burden of establishing a logically relevant purpose for admitting the evidence. Here, the cases cited by the case illustrate the marginal relevance of Pink and Black's allegations. In *State v. Barragan*, 102 Wn. App. 754, 757, 759, 9 P.3d 942 (2000), evidence that the defendant had previously bragged about winning fights in prison was relevant when the defendant swung at a cellmate and threatened to kill him, shortly before embedding a pencil into his temple. In *State v. Ragin*, 94 Wn. App. 407, 409-10, 972 P.2d 519 (1999), the defendant's prior admissions that he was convicted of armed robbery, had been involved in domestic violence with his wife, was well known by the police department, and suffered episodic rages, were relevant to establish the victim's reasonable fear that the defendant was unstable and dangerous.

Much of the State's evidence here is far from the evidence in *Ragin* and *Barragan*. For example, Black's testimony that Riley once belittled Pink in public for buying the wrong size pizza sheds little to no light on Riley's capacity to kill Pink or his fear that she might do so. Similarly, whether Riley "abandoned" her children for 12 days during her separation from Pink or was with another man were completely gratuitous disparagements that had nothing to do with whether Pink feared Riley would kill him. Even the evidence at the margin of admissibility – that

Riley would drive aggressively when angry¹, or strike or scratch Pink – gives little reason to infer that Riley would suddenly and drastically escalate to committing an actual murder. Thus, much of the evidence is completely irrelevant, and the value of the remaining evidence is minimal.

Third, the State has the burden to show the relevance outweighs the potential for unfair prejudice. Here, the evidence cast little light on Pink's belief that Riley would shoot him, but significantly undermined Riley's character and served to unnecessarily emotionalize the case by suggesting Riley was a terrible mother and an out-of-control wife who had gotten away unpunished too many times. The accounts of Pink and Black – particularly when the defense was unable to contradict them with their own witnesses – created a significant risk that jury's attention was shifted from the truth of the charges to Riley's alleged propensity for criminality. *Bowen*, 48 Wn. App. at 195.

Accordingly, the evidence of prior misconduct, including the allegations that Riley yelled at Pink, called him stupid for ordering the wrong size pizza, belittled him, drove aggressively with their children in the car, abandoned her children for 12 days while she was with another

¹ It is even less clear what relevance the children's presence in the car has except to, again, disparage Riley's parenting.

man, and behaved in an emotionally abusive manner should not have been admitted. Its admission was not harmless because the heightened emotionalism and sympathies of the jury likely affected the verdict. Pink's claim that Riley threatened to kill him was not witnessed by any third-party (and was contradicted by the utility service provider who witnessed Riley make the phone calls), so the jury's evaluation of the facts was likely tainted by the slurs against Riley's character. Moreover, the evidence was not trivial or of minor significance in relation to the case as a whole. *Oswalt*, 62 Wn.2d at 122. It was pervasive, cumulative and repeated throughout the trial without any opportunity for Riley to present witnesses to corroborate her account. It is inevitable that the jury would have listened to Riley's testimony already having formed an impression of her from Pink and Black's testimony.

Because the trial court erred in admitting allegations of Riley's prior misconduct without considering them on the record as required by ER 404(b), because the evidence should not have been admitted under ER 404(b), and because its admission likely tainted the verdict, the convictions should be reversed and the case remanded for a new trial.

2. The trial court deprived Riley of the opportunity to present a defense by excluding defense witnesses who would have disputed the complaining witness's credibility and established his motive to fabricate the allegations to obtain leverage in the child custody dispute.

Having improperly admitted Pink and Black's testimony about various allegations of misconduct by Riley without properly weighing the evidence under ER 404(b) or even ascertaining whether it occurred, the trial court compounded its error by excluding the defense witnesses that would have controverted their testimony. Because the ruling deprived Riley of a reasonable opportunity to present a defense, to establish Pink's bias, and to fully and fairly elicit the facts to assist the jury in determining the truth. The error was not harmful, and requires reversal.

Both the Washington and the U.S. Constitutions guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). In particular, the Confrontation Clause guarantees the right to explore a witness's bias or ulterior motives. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Defense counsel must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and

credibility, could appropriately draw inferences relating to the reliability of the witness.” *Id.* at 318.

“Bias” is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis*, 415 U.S. at 316. “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’s testimony.” *U.S. v. Abel*, 469 U.S. 45, 52, 83 L. Ed. 2d 450, 105 S. Ct. 465 (1984). Indeed, proof of a witness’s bias is so critical to the truth-seeking function of the jury that a defendant always has a right to prove bias by extrinsic evidence. *Id.*; *State v. Jones*, 25 Wn. App. 746, 750-51, 610 P.2d 934 (1980).

Because the right of cross-examination is constitutionally guaranteed, defendants enjoy wide latitude to cross-examine and impeach state witnesses as to their biases. *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”). Evidence which might ordinarily be inadmissible

on other grounds may still be admissible to show bias. *Abel*, 469 U.S. at 55 (specific instances of misconduct, although inadmissible under ER 608(b) to show “character for untruthfulness,” were admissible to show bias); 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 607.10 at 331 (4th Ed. 1999) (“When acts of misconduct or criminal convictions are offered to show bias [as opposed to a general tendency towards untruthfulness], the restrictions in Rules 608 and 609 are inapplicable.”). When evidence is central to establishing a valid defense, the balance should be struck in favor of admitting the evidence. *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

Furthermore, a criminal defendant has a fundamental constitutional right to call witnesses in her defense. The right to compel witnesses is guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The constitutional right to compel a witness's presence in the courtroom embraces the right to have the witness's testimony heard by the trier of fact; thus, the right to offer testimony is "grounded in the Sixth Amendment even though it is not expressly described in so many words." *Taylor*, 484 U.S. at 409.

In addition, the right to call witnesses in one's own behalf has long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297(1973); *Smith*, 101 Wn.2d at 41. In *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained that a defendant's right to present witnesses is essential to the right to present a defense:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Thus, courts must jealously guard a criminal defendant's right to present witnesses in her defense. *Smith*, 101 Wn.2d at 41.

Further, a criminal defendant's right to present witnesses is "an essential attribute of the adversary system itself" and therefore necessary to the truth-finding function of the trial:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public

confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Taylor, 484 U.S. at 408-09. Thus, a court order that entirely excludes the testimony of a material defense witness may not only offend the defendant's fundamental constitutional right to offer testimony in her favor, but may also undermine the integrity of the adversary process.

Taylor, 484 U.S. at 409, 414.

Here, after allowing the State to disparage Riley with accusations that she was mean and a bad parent, the trial court precluded Riley from presenting witnesses who would corroborate her account. Most significantly, Pink claimed in response to questioning from the State that Riley had contacted him in his car to “say her piece” after the protection order was in place, leading him to contact to police. But Riley’s witnesses, who disputed that account and would have testified that Pink deliberately provoked the encounter and Riley avoided saying anything to him, were not allowed to set the record straight, even though Riley’s witnesses would have impeached Pink’s testimony and supported Riley’s argument that Pink was biased because of the ongoing child custody dispute.

Moreover, the trial court allowed the State to present a witness, Black, who knew Riley and Pink for only a short period and claimed to observe Riley behave abusively toward Pink, but did not allow Riley to call as witnesses individuals who had known them since childhood and had observed them together for decades. As a result, the jury heard only a distorted account of their relationship and lacked context to evaluate Black's and Pink's allegations. Furthermore, the omission allowed the State to mock Riley's description of their marriage as "fairy-tale" and suggest the description was dishonest.

The State bears the burden to show allowing Riley to present witnesses supporting her account would not have changed the outcome at trial beyond a reasonable doubt. The parties' credibility was critical in the case, and the trial court's ruling left Riley unable to show that Pink had previously called police to report false allegations in an effort to gain leverage in their child custody case. This evidence bore directly on Pink's bias in testifying about the events constituting the charges. Excluding Riley's witnesses instead undermined the truth-finding function of the trial process, particularly once the State opened the door. A jury aware that lifelong friends witnessed no abuse by Riley at any point would be more likely to question why a single, short-term friend of Pink's would make such claims. A jury aware that Pink had previously made false

accusations to police about Riley would be more likely to believe he was engaged in the same behavior here. Consequently, there is overwhelming doubt that the outcome would have been the same had Riley been allowed to defend against the State's accusations.

Because Riley was unfairly prevented from presenting evidence of Pink's bias and from calling witnesses on her behalf, the integrity of the verdicts are undermined. Accordingly, the convictions should be reversed and the case remanded for a new trial.

3. The trial court erred in imposing the \$200 criminal filing fee due to Riley's indigence.

Trial courts may not impose discretionary legal financial obligations unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39.

Recently-enacted House Bill 1783 applies to Riley's case because it became effective while her appeal was pending. *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714, 722 (2018). Under House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Id.* at 722; RCW 36.18.020(2)(h).

Here, the record reflects that the trial court declined to impose discretionary costs based upon Riley's lack of employment. RP 245. Her report as to continued indigency, filed contemporaneously with this brief, indicates that Riley receives public assistance including food and medical benefits. These are the types of benefits that render a defendant indigent within the meaning of RCW 10.101.010(3)(a), and preclude imposition of the criminal filing fee under House Bill 1783.

Accordingly, the criminal filing fee should be stricken from the judgment and sentence.

4. If Riley does not prevail on appeal, costs should not be imposed.

Pursuant to this court's General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Riley's report as to continued indigency is filed contemporaneously with this

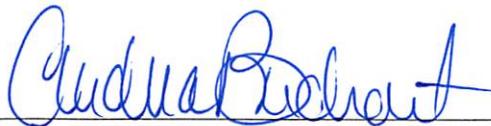
brief. She was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). She has fully complied with the General Order and remains unable to pay, having few assets, no income, and substantial debt. A cost award is, therefore, inappropriate.

VI. CONCLUSION

For the foregoing reasons, Riley respectfully request that the court REVERSE her convictions and REMAND the case for a new trial; or, alternatively, STRIKE the \$200 criminal filing fee from her judgment and sentence..

RESPECTFULLY SUBMITTED this 5 day of December,
2018.

TWO ARROWS, PLLC



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Attorney for Appellant

CERTIFICATE OF SERVICE

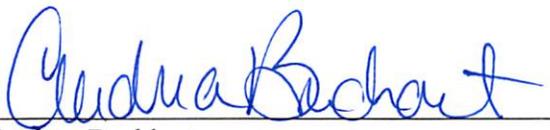
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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Gregory Lee Zempel
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 5 day of December, 2018 in Kennewick,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

December 05, 2018 - 2:29 PM

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