

FILED  
Court of Appeals  
Division III  
State of Washington  
6/17/2019 4:34 PM

NO. 36328-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MCGOVERN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR STEVENS COUNTY

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BRIEF OF APPELLANT

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## **A. INTRODUCTION**

The admission of improper evidence and repeated prosecutorial misconduct denied David McGovern a fair trial. The State charged Mr. McGovern with a single count of theft of a deposit bag discovered missing from the safe of the Walmart where he worked. No one witnessed the theft. Rather than simply play the inconclusive surveillance video for the jury and allow the jury to evaluate the evidence and determine the facts, the State bolstered their entirely circumstantial case by presenting improper “expert” opinion testimony from two Walmart managers who narrated the video and interpreted Mr. McGovern’s actions for the jury. The court admitted this improper “expert” opinion testimony invading the jury’s fact-finding domain despite Mr. McGovern’s in limine motion to exclude it and over his repeated objections.

In addition, Mr. McGovern’s case was littered with prosecutorial misconduct. The prosecutor repeatedly elicited opinions of Mr. McGovern’s guilt from three witnesses, expressed his own disbelief of Mr. McGovern’s testimony to the jury, and shifted and minimized the burden of proof throughout his opening statement and closing arguments.

The evidentiary errors and flagrant and ill-intentioned prosecutorial misconduct pervaded the trial and, whether considered separately or together, require reversal and remand for a new trial.

## **B. ASSIGNMENTS OF ERROR**

1. The court erred in denying Mr. McGovern's motion in limine and overruling his repeated objections and in permitting Walmart managers Kevin Fryer and Joseph Smith to narrate surveillance video to the jury, offer their interpretation of what the video showed, and give improper "expert" opinion testimony.

2. Multiple instances of prosecutorial misconduct in opening statement, direct and cross examination of witnesses, and closing arguments deprived Mr. McGovern of a fair trial.

3. Cumulative error denied Mr. McGovern a fair trial.

4. The court erred in imposing discretionary legal financial obligations (LFOs) without conducting the required individualized inquiry into Mr. McGovern's ability to pay.

5. The court erred in imposing discretionary LFOs without affirmatively finding Mr. McGovern was not indigent.

6. The court erred in imposing interest on nonrestitution LFOs.

## **C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. The constitutional rights to a fair trial by an impartial jury and to the presumption of innocence include the right to have the jury find the facts based on relevant, admissible evidence, and prohibit the admission of improper opinion testimony. ER 702 incorporates these concepts by

limiting expert opinion testimony to those instances in which an expert's specialized knowledge will help the jury to understand the evidence or determine the facts. Here, the court permitted the State to present two witnesses who narrated a surveillance video and offered their "expert" opinions as to what Mr. McGovern was doing on the video. Did the improper opinion testimony, which the court admitted over Mr. McGovern's in limine motion to exclude and repeated objections, invade the province of the jury and violate Mr. McGovern's due process right to a fair trial, requiring reversal of the conviction and remand for a new trial?

2. A prosecutor violates a defendant's fundamental right to a fair trial by jury where the prosecutor engages in improper and prejudicial conduct. Here, the prosecutor repeatedly elicited opinions of Mr. McGovern's guilt from three witnesses, employed a theme that minimized the State's burden of proof and the presumption of innocence, conveyed his own personal disbelief in Mr. McGovern's testimony to the jury, and shifted the burden of proof to the defendant. Did the prosecutor's repeated improper conduct prejudice Mr. McGovern, requiring reversal of the conviction and remand for a new trial?

3. The cumulative impact of multiple errors may deprive a person of a fair trial and require reversal even if each error viewed in isolation does not require reversal based on undue prejudice. Here, erroneous

evidentiary rulings led to the admission of improper opinion testimony through two witnesses, and the prosecutor's misconduct in opening statement, direct and cross examinations, and closing arguments collectively impaired the fairness of Mr. McGovern's trial. Did the combined effect of the evidentiary errors and numerous instances of prosecutorial misconduct prejudice Mr. McGovern, and should this Court reverse the conviction and order a new trial based on the cumulative effect of these multiple errors?

4. RCW 10.01.160(3) prohibits the imposition of discretionary LFOs on indigent individuals and requires courts to conduct an individualized inquiry into indigency before imposing any discretionary costs. Here the court found Mr. McGovern indigent for the purposes of trial and appeal but imposed multiple discretionary LFOs without asking any questions regarding Mr. McGovern's financial status. Should this Court strike imposition of the LFOs where the court failed to conduct an adequate inquiry?

5. RCW 10.82.090(1) prohibits interest accrual on nonrestitution portions of LFOs. Here the court imposed interest on all LFOs, including nonrestitution LFOs. Should this Court strike the accrual of interest on the nonrestitution portion of the LFOs because they are prohibited by statute?

#### **D. STATEMENT OF THE CASE**

David McGovern, a middle-aged man with no criminal record, worked as an assistant manager for Walmart during the overnight shift. RP 297-98, 358; CP 54. His position required him to enter the accounting room and access the safe on a daily basis. RP 195-206, 297-98. Mr. McGovern was one of 20-25 employees in the approximately 300 employee store who was authorized to access the safe in the accounting room. RP 199-200, 255-56.

One Monday, a Walmart employee discovered the safe in the accounting office was missing a deposit bag containing the cash deposits for one of the weekend days. RP 206-07, 263, 276-77, 284. A search of the safe by the employee and a manager did not reveal the missing bag. RP 263-265, 276-77. Surveillance video of the accounting office showed five employees in and out of the safe during the approximately one day period during which management believed the deposit bag went missing. RP 217, 288.

Managers Kevin Fryer and Joseph Smith immediately focused suspicion on Mr. McGovern to the exclusion of the other four employees also seen on the video. RP 217, 223-24, 283, 307-09. They believed the video showed Mr. McGovern behaving “abnormally.” RP 211, 298. Mr. McGovern’s “abnormal” behavior included: Mr. McGovern started work

early; he had a bag with him; he was on his cellphone while in the safe area; he did not open the safe door as wide as normal; he took too long in the safe; and he went home after being in the accounting office before returning to work. RP 211-215, 298-307.

From the start of the investigation through the trial, Mr. McGovern maintained his innocence and denied any knowledge of what happened to the missing deposit bag. RP 218-19, 326-27, 329-30, 335, 362-63.

Manager Smith, the lead investigator for Walmart who interrogated Mr. McGovern, freely admitted he was not interested in Mr. McGovern's denials. RP 219-20, 223-24. He acknowledged that, even before he spoke with Mr. McGovern, he had already made up his mind that Mr. McGovern was the guilty party and that nothing Mr. McGovern could have said during his interview of him would have changed his mind. RP 223-24.

Unsatisfied by his interrogation of Mr. McGovern, Mr. Smith called the police to report the theft. RP 220. Officer Gorst responded. RP 220, 324-25. Rather than conduct an independent investigation, Officer Gorst began his investigation by receiving the opinions of managers Smith and Fryer. RP 220, 325. The managers informed Officer Gorst why they believed Mr. McGovern was the one who took the deposit bag. RP 220-21, 325. Manager Smith showed Officer Gorst the video and explained to him "why I thought [McGovern] did it" and "where [McGovern] did it at."

RP 221, 325. Officer Gorst interviewed Mr. McGovern based on managers Smith's and Fryer's opinions of Mr. McGovern's guilt. RP 325-26. Mr. McGovern denied taking the missing deposit bag, both in his initial interrogation by Officer Gorst and in a second interrogation. RP 327, 329-30, 334-40. The State nevertheless charged Mr. McGovern with the crime 16 months later. CP 1-2.

At trial, Mr. McGovern testified and again denied taking the deposit bag. RP 357-73 (entire testimony), 362-64 (denials). Mr. McGovern explained he usually came into work approximately one hour early. RP 358. Videos from three other days played for the jury confirmed Mr. McGovern routinely started work early and that this was not unusual behavior for him. RP 315-17. Although Mr. Smith and Mr. Fryer testified Mr. McGovern took a longer than normal time in the safe on the day in question, spending "approximately five minutes" in the safe, Mr. Fryer also testified Mr. McGovern regularly took between "two to four minutes" in the safe. RP 214-15, 299-305. Mr. McGovern explained this unusual "delay" on the day in question occurred because one of the unsealed deposit bags fell off of the bags on which it was sitting and fell out of the safe. RP 359-60, 366. He had to pick it up, return its spilled contents to the bag, and place the bag back in the safe. RP 359. The other Walmart employees agreed the normal process of placing deposits in the

safe involves placing the deposit bags on top of other bags and intentionally leaving the deposit bags open and unsealed so that managers confirming the deposits later may check them. RP 204-05, 233-34, 241, 268, 291-93.

In addition, Mr. McGovern explained he went home on the day in question because he forgot his radio. RP 329, 339, 360. Managers Smith and Fryer verified managers carry radios. RP 216, 309-10. Mr. Fryer verified employees may take their work radios to and from work if they choose and that Mr. McGovern used a radio. RP 309-10, 316-17. Mr. McGovern also explained the source of several deposits to his bank account in the months following the missing deposit bag, including several loans from family members, money earned from “side jobs,” money withdrawn from his retirement account, and his last paycheck from Walmart. RP 364, 367-68. Two family members corroborated several loans. RP 348-56.

Five employees from Walmart testified about general procedures in preparing deposits to place into or take out of the safe, as well as to their activities in the safe area on the day the deposit bag went missing. *See generally* RP 225-36, 236-43, 252-68, 269-72, 272-28. In addition, the two Walmart managers, Fryer and Smith, who investigated the missing deposit bag, testified. *See generally* RP 189-225 (Smith), 278-320 (Fryer).

These two witnesses testified to not only the actions they took in investigating the missing deposit bag, but also narrated the surveillance video from the accounting office. Both managers offered their interpretation of Mr. McGovern's actions on the video and included their opinion that the video showed Mr. McGovern taking the missing deposit bag. RP 209-17, 284-309. The prosecutor acknowledged this could not be seen on the video.<sup>1</sup> RP 54. The court admitted this testimony as expert opinion testimony over Mr. McGovern's motion in limine and repeated trial objections. CP 27-29; RP 42-58, 213-14, 215, 292-3, 296, 304. Finally, Officer Gorst also testified as to his investigation based on the information he received from managers Fryer and Smith. RP 321-42 (entire testimony), 323-28 & 341 (describing information received from Smith and Fryer).

The jury convicted Mr. McGovern. CP 50-51; RP 412-15. The court sentenced Mr. McGovern to an exceptional sentence of 14 months'

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<sup>1</sup> In response to Mr. McGovern's motion in limine to preclude opinion testimony interpreting the video, the prosecutor explained:

The two loss prevention guys, both of them can watch the video and go, "That's the bag." And at various points in the video they can -- and they go, "And there it is here." And they can point it out. You [the court], Mr. Jones [defense counsel] and I, we can't see it, honestly. I mean, you -- you -- they see it, they're picking up on things. They understand how that safe is supposed to be organized and the behavior and what's going on and they're able to track it.

RP 54.

confinement and \$20,533.66 of restitution. CP 55-56, 60; RP 434-35.

Without asking any questions and after commenting that Mr. McGovern had an “excellent work history,” the court imposed \$1,100 of LFOs, including the \$200 criminal filing fee, \$50 jail booking fee, and \$250 fees for court appointed attorney. CP 59; RP 435. The court also ordered interest on all LFOs, both restitution and nonrestitution. CP 60.

## **E. ARGUMENT**

### **1. The court violated Mr. McGovern’s rights to a fair trial and to have the jury decide the facts when it admitted improper and prejudicial expert opinion testimony from two witnesses.**

#### **a. It is the role of the jury, not experts, to evaluate the evidence and decide the facts.**

“The role of the jury is to be held ‘inviolable’ under Washington’s constitution. The right to have factual questions decided by the jury is crucial to the right to trial by jury.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. Const. amend. VII; Const. art. I, §§ 21, 22). The constitutions require the jury, not experts, to consider the evidence and determine the facts. *Id.* “[I]mproper opinion [testimony] undermines a jury’s independent determination of the facts, and may invade the defendant’s constitutional right to a trial by a jury.” *State v. Olmedo*, 112 Wn. App. 525, 530-31, 49 P.3d 960 (2002) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Where expert opinion testimony is permitted, it is limited to opinions “concerning [the expert’s] fields of expertise,” where the subject matter is “not within the understanding of the average person,” and where “those opinions will assist the trier of fact.” *Montgomery*, 163 Wn.2d at 590 (citing ER 701 and 702). ER 702, governing expert opinion testimony, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert opinion testimony is only permissible if it will be helpful to the jury. ER 702; *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion which is not helpful to the trier of fact is not admissible from either a lay or an expert witness. ER 701, 702; *City of Seattle v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993). If the subject matter is “easy enough for the jury to understand without help from an expert,” an opinion does not meet the requirements of ER 702 and the expert testimony is inadmissible. 5B Karl B. Tegland, *Washington Practice Series: Evidence Law and Practice* § 704.4 (6th ed. 2018).

In addition, Washington courts have long held a witness’ opinion on the guilt of the defendant is improper and inadmissible. *See, e.g., State v. Trombley*, 132 Wn. 514, 518, 232 P. 326 (1925) (“[A] witness should be

confined in his testimony to facts and not permitted to give simply an opinion drawn therefrom.”); *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (“The question . . . ask[ing] the witness to express an opinion on whether or not the appellant was guilty of the crime charged . . . was solely for the jury and was not the proper subject of either lay or expert testimony.”); *see also* Tegland, *supra*, § 704.6 (“It is settled law that in a criminal case, it is improper for a witness to express a personal opinion on whether the defendant is guilty of the crime charged.”).

“Permitting a witness to testify as to the defendant’s guilt raises a constitutional issue because it invades the province of the jury and the defendant’s constitutional right to a trial by jury.” *Olmedo*, 112 Wn. App. at 533 (citing *Demery*, 144 Wn.2d at 759). Because it is exclusively the role of the jury to decide questions of fact and the issue of the defendant’s guilt, testimony expressing opinions of guilt are unconstitutional. Const. art. I, §§ 21, 22; *Montgomery*, 163 Wn.2d at 590-91. “Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

This prohibition applies whether the witness offers a direct statement of guilt or an implied inference. *State v. Quaale*, 182 Wn.2d

191, 199, 340 P.3d 213 (2014); *Montgomery*, 163 Wn.2d at 594; *Olmedo*, 112 Wn. App. at 530. “Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *Quaale*, 182 Wn.2d at 199 (citing *Kirkman*, 159 Wn.2d at 927).

- b. The expert opinions from managers Fryer and Smith narrating the video and interpreting Mr. McGovern’s actions were not based on any specialized knowledge, were not helpful to the jury, and invaded the province of the jury.

Mr. McGovern objected before trial and throughout the trial to the two managers’ “expert” opinions that the video showed Mr. McGovern taking the deposit bag, as well as their “expert” opinions interpreting Mr. McGovern’s actions, which they narrated to the jury. CP 27-29; RP 42-58, 213-14, 215, 292-3, 296, 304. First, Mr. McGovern moved in limine “to exclude improper opinion testimony from witnesses, including a description of what is happening in the videos.” CP 27-29; RP 42-58. Mr. McGovern argued the testimony interpreting the video was improper and that the State should “simply show the video” to the jury without narration. RP 45. Mr. McGovern objected that the general narration that involved “describing things” that are not apparent on the video was not only improper opinion testimony but also included implied opinions of

guilt. RP 52. Mr. McGovern requested that the court limit the State to playing the video for the jury and prohibit witnesses from “interpreting what’s on the video.” RP 53. Mr. McGovern summarized his objection as “They [the witnesses] are simply -- looking at a video, and -- and -- speculating as to what is what” and that “for them to comment on what a particular thing is while it’s happening” is improper opinion testimony. RP 53, 54.

Mr. McGovern objected to the witnesses describing things on the video that cannot be seen from the video and to speculating as to what the video shows. RP 52-54. Specifically, Mr. McGovern moved to prevent managers Fryer and Smith from testifying that the video showed Mr. McGovern taking the deposit bag where the video showed no such thing. The State acknowledged that the witnesses would explain things happening on the video that cannot actually be seen. The prosecutor explained to the court:

The two loss prevention guys, both of them can watch the video and go, “That’s the bag.” And at various points in the video they can -- and they go, “And there it is here.” And they can point it out. You, Mr. Jones [defense counsel] and I, we can’t see it, honestly. I mean, you -- you -- they see it, they’re picking up on things. They understand how that safe is supposed to be organized and the behavior and what’s going on and they’re able to track it.

RP 54.

In addition to objecting to the opinion testimony narrating the videos and offering opinions on what Mr. McGovern was doing, Mr. McGovern also objected to the admission of any opinions of guilt. The court granted the motion to preclude the witnesses from offering their opinions as to Mr. McGovern's guilt but denied the motion in limine with respect to the narration issue and specifically permitted the State to present "'experts' testifying to deviation from standard protocols."<sup>2</sup> CP 29; RP 55-56.

Consistent with the court's denial of Mr. McGovern's motion in limine, the State offered expert opinion testimony from managers Smith and Fryer narrating the video and offering the jury their interpretation of what the video showed. *See generally* RP 209-17 (Smith's testimony interpreting video), 284-309 (Fryer's testimony interpreting video). Specifically, Mr. Smith's testimony offered his opinion of what he saw in the video that was unusual and described his interpretation of Mr. McGovern's actions. RP 211-17. Mr. Smith also testified the video showed Mr. McGovern swing the deposit bag out of the safe. RP 215.

Mr. Fryer narrated the video as the jury watched it. He testified, "Based on [his] training and experience" the deposit bag had not moved at

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<sup>2</sup> This section address the improper expert testimony narrating and interpreting the video. The improper testimony offering opinions of Mr. McGovern's guilt, which the court ruled inadmissible, is addressed in Section E.2.b below.

certain times during the video during which other employees were present, implying other individuals could not have taken it. RP 294-97. He also told the jury Mr. McGovern was acting “unusually” and “just acting completely abnormally.” RP 298, 299. Mr. Fryer also offered a second-by-second narration of the video and described Mr. McGovern’s actions. RP 301-06. He described the “key point” of the video as the deposit slip from the missing deposit bag “floating,” then “mov[ing],” and “disappear[ing]” during the time Mr. McGovern is in the safe. RP 303-05.

In addition to the motion in limine, which the court denied in relevant part, Mr. McGovern made multiple objections throughout managers Smith’s and Fryer’s testimonies pertaining to their narration of the video and their “expert” opinions as to what the video showed. *See, e.g.*, RP 213-14 (objecting to Smith describing video – best evidence), RP 215 (objecting to Smith describing video – best evidence), RP 292-3 (objecting to Fryer describing video – failure to establish training and experience), RP 296 (objecting to Fryer describing video – improper opinion testimony), RP 304 (objecting to Fryer describing video).

- c. Admission of the improper opinion testimony violated Evidence Rule 702 and Mr. McGovern’s constitutional rights to a fair trial and to have the jury decide the case.

The court erred in permitting expert opinion testimony from managers Fryer and Smith because the testimony did not meet the

requirements of ER 702.<sup>3</sup> Managers Fryer's and Smith's opinions were not helpful to the jury. First, the video spoke for itself, and the jury should have been permitted to watch the video and decide the facts without opinions from witnesses as to what the video showed. Second, the opinions were too speculative to be helpful to the jury. As even the State admitted, no one could see what the testifying experts opined was occurring. RP 54. A proper opinion cannot be to see something that is not present on the video. Each witness explained the actions of Mr. McGovern, which he did not personally observe, with the added weight of his interpretation of those actions. The former was unnecessary because the jurors should have been allowed to see Mr. McGovern's actions for themselves from the video. The latter was improper because the witnesses lacked specialized knowledge to support their opinions of what Mr. McGovern's actions were and meant.

No special skill, experience, knowledge, or education is required to formulate an opinion upon a matter that can be judged by people of ordinary experience and knowledge.

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<sup>3</sup> Nor would such opinion testimony have been permissible from lay witnesses. ER 701 only permits lay opinion testimony where it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." In addition, lay witnesses may only testify to matters within their personal knowledge. ER 602. Here, neither Mr. Smith nor Mr. Fryer perceived the events in question, either in person or live via the video system. Neither witness had firsthand knowledge of the events and, therefore, failed to meet the first of the three mandatory requirements for admission of lay opinion testimony. In addition, neither's opinion was helpful to a determination of a fact in issue. Instead, the opinions offered a legal conclusion of guilt.

In such situations, the jury does not need the assistance of an expert, and the courts tend to exclude expert testimony as overkill. In this sort of situation, an expert's opinion is objectionable under Rule 702 because it is not helpful, i.e., because the opinion does not offer the jurors any insight that they would not otherwise have.

Tegland, *supra*, § 702.16 (6th ed. 2018). As Mr. McGovern objected, the “experts” did not not have specialized knowledge in viewing surveillance videos, in investigating thefts of deposit bags, or any other area that permitted them to testify under ER 702. CP 27-29; RP 42-58, 213-14, 215, 292-3, 296, 304.

Finally, the two witnesses stated their opinions as fact, informing the jury, among other things, “you’ll see the clear deposit bag,” and “it’s a deposit slip,” despite the State’s admission that the deposit slip and bag could not actually be seen on the video. RP 54 (State’s admission), 215 (Smith’s testimony), 305 (Fryer’s testimony).

In addition to failing to qualify as proper expert opinion testimony under ER 702, the opinions of managers Fryer and Smith violated Mr. McGovern’s constitutional rights to a fair trial and to have a jury decide the facts. Both witnesses testified as to what the video showed. This was a matter of dispute and a fact the jury was required to determine, not a fact the witnesses could decide for the jury. It is exclusively the role of the jury to decide questions of fact. U.S. Const. amend. VI; Const. art. I, §§

21, 22. The witnesses' testimony interpreting the video and informing the jurors of what the video showed presented as established fact a disputed issue. This violated Mr. McGovern's constitutional right to have a trial by jury in which the jury decided the factual questions. *Montgomery*, 163 Wn.2d at 590.

- d. Admission of the improper opinion testimony over Mr. McGovern's objections unduly prejudiced Mr. McGovern, and reversal is required.

The expert opinion testimony from managers Smith and Fryer was improper under ER 702 and violated Mr. McGovern's constitutional right to have the facts critical to his guilt determined by the jury. Such constitutional error is harmless "only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." *Quaale*, 182 Wn.2d at 202. Here, the State cannot sustain its burden to show harmless error.

The State presented an entirely circumstantial case based on an ambiguous video and evidence Mr. McGovern experienced financial struggles in his life. The main evidence against Mr. McGovern was the video. Rather than play the video, witnesses Fryer and Smith offered their "expert" opinions of what the video showed and interpreted it. The State also highlighted the managers' opinions in its closing argument. RP 394-95.

The court erred in permitting managers Fryer and Smith to offer their “expert” opinions narrating and interpreting the video. The testimony was not proper expert opinion under ER 702 and violated Mr. McGovern’s constitutional and evidentiary right to have the jury decide the facts of the case. The extensive testimony addressed the core issue in the case – whether Mr. McGovern took the missing deposit bag – and the admission of the improper opinions denied Mr. McGovern his right to a fair trial. This Court should reverse the conviction and remand for a new trial.

**2. The prosecutor engaged in a pattern of improper behavior which pervaded the trial and denied Mr. McGovern his right to a fair trial.**

The prosecutor engaged in a pattern of misconduct that pervaded the case – from opening statement, through direct examination of the State’s witnesses and cross-examination of Mr. McGovern, through closing arguments. The cumulative impact of this misconduct prejudiced Mr. McGovern and denied him his right to a fair trial. This Court should reverse and remand for a new trial.

a. A defendant’s right to a fair trial prohibits prosecutors from engaging in misconduct.

Every person accused of a crime is entitled to a fair trial by an impartial jury. *United State v. Salerno*, 481 U.S. 739, 750, 107 S. Ct

2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amends. VI, XIV; Const. art I, §§ 3, 21, 22. The right to a fair trial also includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Implementing the presumption of innocence requires a court to “be alert to factors that may undermine the fairness of the fact-finding process.” *Id.*

When a prosecutor engages in improper conduct that prejudices the defendant, this prosecutorial misconduct “deprive[s] a defendant of his constitutional right to a fair trial.” *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). To establish misconduct, the defendant must show improper conduct. Reversal is required if the misconduct prejudices the defendant. *Id.* at 704. Where there is a substantial likelihood that the misconduct affected the jury’s verdict, prejudice is established. *Id.* Even without an objection, misconduct requires reversal where the misconduct is “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

b. The prosecutor repeatedly elicited three witnesses’ impermissible opinions of Mr. McGovern’s guilt.

As discussed above, the court erred in permitting mangers Fryer and Smith to offer their “expert” opinions that the video showed certain

actions because those opinions were not based on specialized knowledge, were not helpful to the jury, and invaded the fact-finding province of the jury. *See* Section E.1 *supra*. Apart from the evidentiary error described above, portions of the testimony were also improper because they conveyed the witnesses' opinions that Mr. McGovern was guilty. Because the admission of a witness' opinion that the accused is guilty is unconstitutional, the court properly granted Mr. McGovern's motion to exclude such testimony. CP 29; RP 56. Nevertheless, the prosecutor repeatedly violated the court's order granting Mr. McGovern's motion in limine. The prosecutor's elicitation of the opinions of guilt and violation of the motion in limine were misconduct.

Here Mr. McGovern moved in limine to exclude testimony from the witnesses expressing their opinions as to his guilt, preserving the issue.<sup>4</sup> The court granted the motion. CP 29; RP 56. Despite this, the prosecutor repeatedly violated the court's in limine ruling by introducing testimony on the witnesses' opinions as to Mr. McGovern's guilt. A prosecutor commits misconduct when he violates an in limine ruling.

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<sup>4</sup> Mr. McGovern included this motion as part of his larger motion in limine to exclude opinion testimony and the witnesses' descriptions of the videotape. CP 26-29. The court denied the motion to exclude the witnesses' testimony describing the video and their expert interpretations of the video, which is discussed above. The court did, however, grant Mr. McGovern's testimony "as to opinion on guilt" and excluded the State from introducing evidence of its witnesses' opinions as to Mr. McGovern's guilt. CP 29; RP 56.

*State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006),  
*overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d  
1134 (2014); *State v. Easter*, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285  
(1996); *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). In  
addition, the State has an affirmative duty to inform their witnesses of a  
court's in limine rulings that impact their testimony. *Montgomery*, 163  
Wn.2d at 592 (recognizing attorney's duty to prepare witness for trial such  
that their testimony complies with evidentiary rules and court's rulings);  
*see also Easter*, 130 Wn.2d at 242 n.11 (criticizing "cavalier violation" of  
pretrial rulings disallowing mention of defendant's silence.

The prosecutor introduced opinion testimony as to Mr.  
McGovern's guilt through three witnesses: manager Smith, manager  
Fryer, and Officer Gorst. Rather than simply play the video and have the  
witnesses testify to what they did, the witnesses offered their opinion of  
Mr. McGovern's guilt by needlessly explaining to the jury *why* they took  
the actions they did.

For example, the prosecutor had the following exchange with  
manager Smith.

Q: Okay. After you reviewed all of the video, what did  
you do.

A: After reviewing all the video, it was my determination  
that I had enough evidence -- have -- interview David  
McGovern.

Q: Okay. Why not the other employees.

A: 'Cause I ruled -- my -- the evidence that I -- I observed ruled them out.

Q: Okay. How many other employees did you see in that accounting office.

A: --see. I think there was a total of four, maybe five.

Q: Okay. And why, again -- what made you rule that four or five individuals out.

A: It was clear that they didn't touch the deposit bag.

RP 217. By repeatedly asking Mr. Smith why he did not interview other employees, the prosecutor improperly elicited Mr. Smith's opinion that Mr. McGovern was guilty.

Later, when Mr. Smith testified about his interview of Mr.

McGovern, the prosecutor again elicited Mr. Smith's opinion of Mr.

McGovern's guilt:

Q: Okay. What did you do next at that point.

A: I let him know that -- how I conducted an investigation, or let him know a little bit about what I've observed, and I advised him that I wasn't really asking him if he did it, I was wanting to try and understand why he did it.

RP 219.

Finally, in his testimony about how he explained the situation to Officer Gorst -- a completely irrelevant subject matter -- Mr. Smith once again told the jury not only his own opinion of Mr. McGovern's guilt but about how he conveyed his opinion to Officer Gorst.

Q: Okay. After law enforcement go on the scene, what happened.

A: Well I took them into the office, and reviewed them the

evidence that I was using to make my determination on why I -- I felt like -- Kevin -- or, excuse me -- David [McGovern] was the one, -- why I was interviewing him and why I thought he did it. --

Q: Okay.

A: I showed them where he did it at. And from that point I exited the room and let the law enforcement have their conversation with him.

RP 220-21.

The prosecutor also elicited multiple instances of improper opinion testimony as to Mr. McGovern's guilt from manager Fryer. In response to the prosecutor's question regarding to what folder he was referring during his testimony, Mr. Fryer explained:

Q: And will it help you -- Was that prepared at or near the time that all of these--

A: Same time--

Q: --events occurred?

A: Once we figured out what was -- what was missing, -- we researched all the video, watched all the video, determined who we suspected was -- person that did it,--

Q: Okay.

A: --and we built this folder based off that.

RP 283. The prosecutor again elicited improper opinion testimony in questioning Mr. Fryer about his actions in contacting manager Smith and the police.

Q: After you compiled all of the -- Or after you'd gone through all of the videos what did you do.

A: After I went through all the video I called my boss, Joe -- Smith--

Q: Okay.

A: --and informed him of what we found, what we've seen on the video, and he came up from Yakima.

Q: Okay. And then after Mr. Smith arrived from Yakima, -  
- what did you do.

A: We reviewed the video, showed him all the, you know, evidence that we had, and the, you know, the case that we felt that we had built, and he reviewed all that and made the decision to interview David -- on the basis of what we saw in the video.

Q: Okay. (Inaudible) interview any other employees?

A: No.

Q: Why not.

A: 'Cause nobody acted -- any different than they normally would.

Q: Okay. How--

A: (Inaudible)--

Q: --long between beginning to end of your investigation was it before you arrived at the conclusion that Mr. McGovern was responsible.

A: Well after we watched the video, I mean it was pretty apparent what had transpired--

Q: Okay. To you.

A: To me.

RP 308-09.

Finally, the prosecutor elicited managers Smith's and Fryer's opinions of Mr. McGovern's guilt through his questioning of Officer Gorst. Rather than ask Officer Gorst what he did when arrived at Walmart, or have Officer Gorst testify that he watched the surveillance video and then interviewed Mr. McGovern, the prosecutor had the following exchange with Officer Gorst about meeting with managers Fryer and Smith when he arrived at Walmart:

Q: Okay. So, did they get you up to speed on what was going on?

A: Yes, they did. They told us that they believed that they had a deposit stolen from an employee, and they provided

their -- their evidence in the form of a video--

Q: Okay. Did you--

A: --explained -- I'm sorry.

Q: Sorry. Go ahead.

A: They explained -- as we watched the video, which I think was your next question, they -- they showed me what was going on in the video, and why they were led to believe that the particular individual in that video was responsible for taking -- the deposit.

RP 325. This exchange served no purpose other than to inform the jury that managers Smith and Fryer told Officer Gorst they believed Mr. McGovern was guilty.

In addition, in inquiring about his interrogation of Mr. McGovern, the prosecutor also elicited Officer Gorst's opinion of Mr. McGovern's guilt.

Q: Okay. After you had interviewed all of the employees, did you end up investigating any of the other individuals more -- closely?

A: I did not.

Q: Why not.

A: When investigating a crime, the first thing that I look for is evidence. And -- when I have something that leads me in a certain direction, that's the direction that I go. We follow clues. And none of the other people that I interviewed or viewed on the video tape during my investigation, there was nothing that led me to believe -- that I needed to investigate them any further.

RP 330-31.

In all of these instances, the prosecutor elicited impermissible testimony of the witnesses' opinions of Mr. McGovern's guilt and directly violated the court's in limine ruling.

- c. The prosecutor repeatedly and improperly conveyed his opinion to the jury that Mr. McGovern was lying.

“It is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or innocence of the accused in a jury argument.” *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (citing *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984)); accord *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (“It is improper for a prosecutor personally to vouch for the credibility of a witness.”). A prosecutor’s clear expression of his a personal opinion of the credibility of a witness prejudices a defendant. *Sargent*, 40 Wn. App. at 344.

In *Sargent*, this Court found the prosecutor’s comments in closing argument, conveying to the jury his personal belief in the credibility of a witness, required reversal even absent a defense objection. 40 Wn. App. at 345. Noting the evidence was “circumstantial” and “not overwhelming,” the Court held the improper remarks “could not have been cured with an appropriate instruction, and the remarks were so prejudicial as to deprive [the defendant] of a fair trial.” *Id.*

Here, the prosecutor conveyed his personal disbelief of Mr. McGovern's testimony by characterizing his testimony as "convenient" three separate times in cross examination of Mr. McGovern and referring to it as "convenient" twice in closing arguments. RP 366, 368-69, 404. First, in cross examining Mr. McGovern, the prosecutor asked the following questions:

Q: Okay. Do you recall Ms. Bidstrup testifying about her practices with how the money would be packaged in the deposit bags.

A: Yes.

Q: Do you remember her saying that she would rubber-band the stacks of cash and then rubber-band the deposit bag.

A: She said she would rubber-band the deposit bag.

Q: Right. So the bag was secure.

A: (Inaudible), yes.

Q: With a rubber band.

A: Yeah.

**Q: Yet somehow the money managed to fall out when you touched it.**

**A: Yes.**

**Q: Convenient, isn't it?**

A: Don't know how to answer that. I'm--.

**Q: I'm just asking. I mean, -- the bag is bundled together with a rubber band, and yet when you touch it it conveniently falls out for you to pick up.**

**A: I suppose.**

RP 366 (emphasis added). The prosecutor soon returned to his obvious display of his own disbelief in Mr. McGovern's testimony.

Q: Okay. So you had between -- nineteen -- two hundred -- two -- \$20,300 -- (inaudible) right?

A: Yeah, (inaudible).

Q: Okay. How much money was taken from the store.

A: \$20,500.

**Q: So \$200 more than you can explain. Convenient, isn't it.**

A: I have records of showing the money I was loaned. My 401(K) -- final paycheck and (inaudible) money I have.

RP 368-69 (emphasis added).

The prosecutor also capitalized on this improper transmittal to the jury of his own disbelief of Mr. McGovern in closing argument, again twice referencing Mr. McGovern's "convenient" explanations.

The money. **Everything's got a convenient explanation.** But when does the list of **convenient explanations** for everything that Mr. McGovern does get so long that it is unreasonable.

RP 404 (emphasis added).

As in *Sargent*, the effect of the prosecutor's three comments on the "convenience" of Mr. McGovern's answers in cross examination was to convey to the jury his personal incredulity of Mr. McGovern's testimony and communicated to the jury the prosecutor's opinion that Mr. McGovern was lying. By twice reminding the jury in closing argument of his own personal opinion that Mr. McGovern was lying, this improper conduct was not limited to Mr. McGovern's cross examination.

- d. The prosecutor's theme throughout opening statement and closing arguments urging the jurors to be guided by Occam's Razor trivialized the presumption of innocence and the burden of proof.

Prosecutors commit misconduct when they employ arguments that “trivialize[e] and ultimately fail[ ] to convey the gravity of the State’s burden and the jury’s role in assessing [the State’s] case.” *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Courts have found improper and trivializing arguments explaining reasonable doubt by analogizing to everyday situations. *See, e.g., State v. Johnson*, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010) (finding prosecutor’s comparisons to jigsaw puzzle were prejudicial misconduct requiring reversal); *Anderson*, 153 Wn. App. at 431-32 (finding improper prosecutor arguments comparing reasonable doubt to making every day decisions such as choosing babysitter or changing lanes while driving).

In *Lindsay*, the prosecutor used an example of crossing the street to explain the sort of certainty reasonable doubt required. 180 Wn.2d at 434-36. The Supreme Court found the analogy improper because, “When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury’s role.” *Lindsay*, 180 Wn.2d at 436 (quoting opinion below).

Thus, prosecutors have an obligation not to trivialize the jury's role by comparing the jury's duty to everyday commonplace events.

Here, the prosecutor trivialized the jury's important role and minimized both the presumption of innocence and the State's burden of proof by repeatedly encouraging the jury to adopt Occam's Razor, which it described as the principle that the simplest explanation is generally the correct explanation, as its guiding principle in considering the evidence and in deliberations. RP 182. The theme of Occam's Razor permeated the State's opening and closing statements. RP 182, 185, 390, 397 (four references to Occam's Razor in opening and two references to Occam's Razor in closing). Not only did this trivialize the jury's role and dilute constitutional principles, but the prosecutor urged the jury to adopt *this* principle, *not* the principles of the presumption of innocence and the burden of proof beyond a reasonable doubt, as their one guiding principle. This theme permeated the case, and the prosecutor employed the theme to supplant the principles of the presumption of innocence and proof beyond a reasonable doubt.

The prosecutor began his opening statement by saying:

So there is a principle that is present in physics, biology, religion and even the court system. It's called Occam's Razor. You may not know the name Occam's Razor but the principle stands for the idea that the simplest explanation to a problem is generally the right one. I'm

going to ask that you keep Occam's Razor in mind as you listen and evaluate the testimony that's going to be presented during the course of this trial.

RP 182. The prosecutor then ended his opening statement by reminding the jury of this principle and urging the jury to use it – not the presumption of innocence – as the lens through which the jury should view the case.

“Ladies and gentlemen, at the conclusion of all of the evidence I'm going to ask you to apply Occam's Razor to the facts that will be presented and find Mr. McGovern guilty of the crime he's been charged with.” RP 185.

Later, the prosecutor began his closing argument by reminding the jury of the principle of Occam's Razor and again urging them to apply this principle, not the principles of the presumption of innocence and proof beyond a reasonable doubt, to their deliberations.

Yesterday during my opening statements I told you about Occam's Razor, about the simplest explanation to a problem is generally the right one. **I would like you to keep that one principle in mind as you go back and you deliberate this case.** I'd like that to be your mantra. So please repeat it as you're deliberating.

RP 390 (emphasis added). The prosecutor also ended his closing argument by urging the jury to apply Occam's Razor – not the presumption of innocence or proof beyond a reasonable doubt – to their deliberations. “So again I ask that you evaluate all of the evidence, apply

your common sense, apply Occam's Razor and find Mr. McGovern guilty." RP 397.

By asking the jury to adopt Occam's Razor as its guiding principle, the State urged the jury to supplant the constitutional guiding principles of the presumption of innocence and proof beyond a reasonable doubt. The State also trivialized the jury's role and diluted the importance of these constitutional principles. The theme minimized the critical nature of the jury's duty.

Nor was the prosecutor's reference a single, isolated comment. In addition to the pervasive nature of the improper argument, the prosecutor's placement of the argument – at the beginning and end of his opening statement, as well as the beginning and end of his closing argument – magnifies its impropriety. In *State v. Ramos*, this Court found improper the State's argument that the case was about preventing drug dealing in the neighborhood and recognized the placement of the improper argument, as well as its repetition, heightened its impact. 164 Wn. App. 327, 340, 263 P.3d 1268 (2011). "[T]he prosecutor's argument was not based on the evidence and was not isolated. . . . Rather than an isolated instance of misconduct, the prosecutor's improper comments were made at the beginning of closing argument as a prism through which the jury should view the evidence." *Id.*

A prosecutor minimizes the gravity of the standard of proof beyond a reasonable doubt and trivializes the jury's role when he or she compares the reasonable doubt standard to everyday decision making. *Lindsay*, 180 Wn.2d at 436. Here, the prosecutor did not merely compare the reasonable doubt standard to Occam's Razor, instead he urged the jury to supplant the reasonable doubt standard with the theory of Occam's Razor and to adopt this, not the presumption of innocence and the burden of proof beyond a reasonable doubt, as its guiding principle. Such comments also serve to alleviate any feelings of grave responsibility a jury might have.

e. The prosecutor's improper question and argument shifted the burden of proof to Mr. McGovern.

Prosecutors commit misconduct when they shift the burden of proof to the defendant. *Glasmann*, 175 Wn.2d at 713 (noting shifting burden of proof "amounts to flagrant and ill intentioned misconduct"); *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) ("[I]t is flagrant misconduct to shift the burden of proof to the defendant."). Arguments that the defendant has an affirmative duty to present evidence or an explanation are a form of burden shifting. *See, e.g., Johnson*, 158 Wn. App. at 684 (finding argument improper where it implied defendant bore burden of providing jury reason not to convict). It is improper to

argue to the jury that the defendant has failed to offer a reasonable explanation for the charges. Such arguments violate both the presumption of innocence and the State's burden of proof.

Here, the prosecutor impermissibly pressed Mr. McGovern to speculate about his guilt. In addition, the prosecutor improperly argued to the jury that Mr. McGovern offered no explanation. First, the prosecutor questioned Mr. McGovern as follows:

Q: Okay. But if you were going to steal from the store how would you do it.

MR. JONES: Objection. Relevance.

THE COURT: Overruled.

A: I wouldn't.

Q: I'm asking if you would how would you do it.

A: I wouldn't steal from the store. I don't have a way -- steal money from the store.

Q: A deposit bag would be a handy thing to steal, wouldn't it?

A: That's accountable. Any cash in the store is accountable.

Q: Okay. I'm just asking you if a deposit bag would be an easy thing to steal since it's a brick of cash that you could hide.

A: No, it wouldn't be easy to steal.

RP 371. The court erred in overruling the objection. As the defense properly identified, the question was irrelevant. How Mr. McGovern *would* steal money is irrelevant to the issue of whether or not Mr. McGovern *did* steal the money he was charged with stealing. The

question was improper, irrelevant, and required Mr. McGovern to speculate and to offer an explanation to the jury.

In addition, in closing argument, the prosecutor improperly shifted the burden of proof to the defense when he argued Mr. McGovern could not provide an explanation for what happened. The prosecutor made two separate arguments that Mr. McGovern failed to offer a reasonable explanation.

Mr. McGovern testified that somehow when he touched it the money fell out of the bag. **But he can't provide an explanation for how that happened.**

RP 392 (emphasis added). In addition, the prosecutor argued, "They were able to explain that one away," referring to deposits to Mr. McGovern's account, but that "**they can't explain**" other cash deposits. RP 404 (emphasis added).

The improper question and repeated improper arguments shifted the burden to prove the crime from the State to Mr. McGovern to disprove the crime and explain the charge. A criminal defendant has no obligation to explain the evidence, and it is improper for a prosecutor to suggest otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 80 (2003).

- f. The multiple instances of improper conduct by the prosecutor prejudiced Mr. McGovern and require reversal.

The prosecutor committed misconduct in eliciting three witnesses' opinions as to Mr. McGovern's guilt because such testimony violated the motion in limine and violated Mr. McGovern's constitutional right to have his guilt determined by the jury. Such constitutional error is harmless "only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." *Quaale*, 182 Wn.2d at 202; *Olmedo*, 112 Wn. App. at 533; see *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Here, the State cannot sustain its burden.

In addition, improper questions, comments, or arguments that are flagrant and ill-intentioned may require reversal even absent any defense objection. *Glasmann*, 175 Wn.2d at 704; *State v. Echevarria*, 71 Wn. App. 595, 597, 860 P.2d 420 (1993) (finding prosecutor's comments on war on drugs were largely unobjected to by defense but so flagrant and ill-intentioned that prejudice resulted and reversal was required). A defendant's failure to object may "not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (reversing conviction for prosecutorial misconduct despite absence of defense objection). In

analyzing the prejudice, courts are to consider the improprieties in the context of the case in its entirety, including arguments, issues, and evidence as a whole. *Walker*, 182 Wn.2d at 477-78; *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (court must consider cumulative effect of repetitive misconduct).

Here, the multiple instances of prosecutorial misconduct pervaded the entire trial process, beginning in the prosecutor's opening statement, continuing through the direct examinations of witnesses Smith, Fryer, and Gorst, through the cross examination of Mr. McGovern, and through closing arguments. The evidence against Mr. McGovern was far from conclusive. The prejudicial impact of repeated misconduct is increased in the absence of overwhelming evidence. The main evidence against Mr. McGovern was the video. The repeated improper opinions of guilt offered by the witnesses narrating the video and opining on Mr. McGovern's actions is particularly significant. In addition, the State's repeated presentation of Occam's Razor, particularly at the beginning and end of both the opening statement and closing argument, suggested to the jury they should use this concept as the "prism through which the jury should view the evidence" and diluted the constitutional burden of proof. *Ramos*, 164 Wn. App. at 340.

The repeated and persistent misconduct invaded the entire trial, was not isolated, and created an enduring prejudice that could not have been cured by an instruction. *Walker*, 182 Wn.2d at 478-79 (recognizing impact of multiple instances of misconduct in context of entire case); *Glasmann*, 175 Wn.2d at 707 (addressing “pervasive” nature of misconduct); *State v. Pierce*, 169 Wn. App. 533, 556, 280 P.3d 1158 (2012) (“Taken together, there is more than a substantial likelihood that the above three improper arguments affected the verdict.”). Considering all of the misconduct collectively, the improprieties were prejudicial and could not have been cured with an instruction. The prosecutorial misconduct deprived Mr. McGovern of his right to a fair trial. This Court should reverse the conviction and remand for a new trial.

**3. Cumulative error denied Mr. McGovern a fair trial in violation of his due process rights.**

If the Court agrees that two or more of the multiple above prosecutorial or court errors occurred but finds each individual error harmless in isolation, it should nonetheless reverse because the errors are prejudicial in the aggregate. “The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.” *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (reversing and

remanding for new trial on combined basis of three errors); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (reversing convictions based on “accumulated evidentiary errors” where “the combined effect of the accumulation of errors most certainly requires a new trial”); *State v. Salas*, 1 Wn. App. 2d 931, 952, 408 P.3d 383, *review denied* 190 Wn.2d 1016 (2018) (cumulative error of prosecutorial misconduct and ineffective assistance of counsel required reversal); *State v. Venegas*, 155 Wn. App. 507, 526, 228 P.3d 813 (2010) (cumulative error of prosecutorial misconduct and evidentiary error required reversal); U.S. Const. amend. XIV; Const. art. I, § 3.

Courts may also consider unpreserved errors in assessing the cumulative effect of errors. *See State v. Alexander*, 64 Wn. App. 147, 150-151, 822 P.2d 1250 (1992) (finding cumulative error denied defendant of fair trial even where some of errors were not properly preserved for appeal).

In *Venegas*, this Court reversed convictions based on the cumulative impact of several errors, including prosecutorial misconduct in closing argument and a court’s erroneous evidentiary rulings that admitted improper evidence. 155 Wn. App. at 511. Notwithstanding significant evidence of the defendant’s guilt, the Court found the “cumulative impact” of the improper admission of a prior bad act of the defendant, the improper

exclusion of medical testimony, and the prosecutor's improper statements in closing arguments were "severe enough to warrant reversal of [the defendant's] convictions under the cumulative error doctrine." *Id.* at 527.

Here, the court erred in admitting improper opinion testimony when it permitted manager Smith and Fryer to narrate the video and interpret what Mr. McGovern was doing. In addition, the prosecutor committed numerous improprieties in opening statement, direct and cross examinations, and in closing arguments. The errors permeated every phase of the trial. The evidence was not one-sided and was far from overwhelming. Mr. McGovern testified, denied the charges, and offered innocent explanations for his "abnormal" behavior. Had the State been limited to simply playing the video and having witnesses testify, devoid of the interpretive narration, repeated opinions of guilt, and trivialization of the burden of proof, the jury likely would have reached a different result. The cumulative harm generated by errors in this case had an overarching prejudicial effect, and these errors, taken together, undermined the fairness of Mr. McGovern's trial. This Court should reverse and remand for a new trial.

**4. The court imposed prohibited legal financial obligations, requiring this Court to strike the costs or remand for an indigency hearing.**

The court did not conduct an adequate individualized indigency inquiry before imposing discretionary LFOs, and the record does not affirmatively establish that Mr. McGovern was not indigent. The court also imposed prohibited interest. Because courts may not impose discretionary LFOs where a defendant is indigent, and because interest is prohibited on nonrestitution LFOs, the court erred in imposing these costs, and they must be stricken from the judgment and sentence.

- a. Courts must conduct an individualized indigency inquiry and may not impose discretionary costs where a person is indigent.

RCW 10.01.160(3)<sup>5</sup> categorically prohibits a sentencing court from imposing costs on indigent defendants and “requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *State v. Ramirez*, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018). Courts must conduct an individualized inquiry into a person’s

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<sup>5</sup> RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

current and future ability to pay before it may impose any discretionary LFOs or set a payment schedule. *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Such an inquiry must include consideration of certain itemized factors, including a person’s incarceration, other debts, restitution, past and future employment, income, assets, financial resources, and living expenses, but may include consideration of any relevant factor. *Ramirez*, 191 Wn.2d at 743-44; *Blazina*, 182 Wn.2d at 839 (describing list of relevant factors as “nonexhaustive”). Absent an individualized inquiry affirmatively establishing a person’s ability to pay, the statute prohibits a court from imposing discretionary costs.

This Court has found an inquiry inadequate where the court “asked only about [the defendant’s] work history and whether there was any reason she could not work,” but “failed to inquire at all about other debts,” “failed to examine her financial situation, such as the extent of her assets,” and generally failed to consider other important factors. *State v. Glover*, 4 Wn. App. 2d 690, 695-96, 423 P.3d 290 (2018) (reversing imposition of the LFOs and remanding for a new sentencing hearing). In addition, this Court specifically noted that a later finding of indigency, presumably for purposes of the appeal, “call[s] into question [the defendant’s] ability to pay” LFOs. *Id.* at 695.

Appellate courts review de novo the adequacy of the trial court's inquiry. *Ramirez*, 191 Wn.2d at 740-42.

- b. The court conducted an inadequate inquiry, made no indigency determination, and erred in imposing discretionary costs without affirmatively determining that Mr. McGovern was not indigent.

At sentencing, the court did not ask Mr. McGovern any questions regarding his financial situation.<sup>6</sup> The court made no inquiry as to Mr. McGovern's income, assets, financial resources, expenses, debts, incarceration, or restitution. The court made no inquiries into Mr. McGovern's financial circumstances and made no individualized inquiry at all into Mr. McGovern's ability to pay. The court simply commented on the fact that Mr. McGovern was employed and then imposed all costs. RP 435 ("I will impose, given Mr. McGovern's excellent work history, the \$500 crime victims assessment, the \$200 filing fee, the \$250 -- attorney's fee reimbursement, the \$50 booking fee and the \$100 DNA collection fee."). The court's inquiry was inadequate to find Mr. McGovern was not indigent. The court failed to conduct any individualized inquiry under the statute.

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<sup>6</sup> The court sentenced Mr. McGovern on August 14, 2018, after the June 7, 2018, effective date of the recent amendments to the various LFO statutes.

- c. The evidence before the court did not affirmatively establish Mr. McGovern was not indigent.

The court imposed multiple discretionary LFOs because Mr. McGovern was employed. RP 435. The court made no affirmative finding Mr. McGovern was not indigent, and the court conducted an insufficient indigency inquiry. In addition, the evidence before the court fails to demonstrate Mr. McGovern was not indigent.

Here, the court found Mr. McGovern indigent for purposes of the entire trial proceedings as well as for purposes of appeal. Supp. CP \_\_\_\_, sub. no. 10.99 (determining Mr. McGovern “[e]ligible for a public defender at no expense” for superior court proceedings); CP 86-89 (order authorizing Mr. McGovern to proceed in Forma Pauperis for purposes of appeal); RP 437 (finding Mr. McGovern indigent for purposes of appeal); *see Glover*, 4 Wn. App. 2d at 696 (relying on post-sentence finding of indigency to question defendant’s ability to pay LFOs). In addition, the record before the sentencing court established Mr. McGovern had monthly expenses equal to \$1,230, financially supported his daughter, and had \$15.34 in his savings account. CP 87-88. The 14 months’ confinement would obviously deprive Mr. McGovern of his immediate ability to continue to work, and a felony conviction would presumably complicate his ability to continue employment after his release. Finally, the court also

imposed \$600 in mandatory LFOs, and \$20,533.66 in restitution. CP 59-60. Although Mr. McGovern was working at the time of sentencing, employment history is but one of the factors courts must consider in determining indigency. All other considerations support the conclusion that Mr. McGovern was indigent.

- d. This Court should strike the discretionary legal financial obligations from the judgment and sentence.

The record before the trial court and this Court fails to affirmatively establish Mr. McGovern was not indigent. Therefore, the court lacked the statutory authority to impose discretionary LFOs. A resentencing hearing is unnecessary, and this Court may remand with a directive that the discretionary LFOs<sup>7</sup> be stricken from the judgment and sentence. *Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike discretionary LFOs); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396, 429 P.3d 1116 (2018) (following *Ramirez* and reversing imposition of discretionary LFOs and remanding).

Alternatively, this Court should find the sentencing court conducted an inadequate individualized inquiry as required by RCW 10.01.160 and remand for a hearing. *Glover*, 4 Wn. App. 2d at 694-96

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<sup>7</sup> Specifically, the \$200 criminal filing fee, \$50 jail booking fee, and \$250 fee for court appointed attorney. CP 59.

(finding inquiry inadequate where court asked only about work history but not debts, assets, or overall financial situation, and reversing and remanding for hearing on indigency and LFOs).

- e. The interest accrual on nonrestitution LFOs is prohibited by statute and must be stricken.

Interest accrual is prohibited on LFOs except for restitution. RCW 10.82.090(1) (“no interest shall accrue on nonrestitution [LFOs]”). The judgment and sentence contains a directive that interest shall accrue from the date of judgment through payment in full. CP 60. The judgment does not limit the interest to restitution LFOs. CP 60. This Court should remand with a directive to the court to strike the accrual of interest from Mr. McGovern’s judgment and sentence for all nonrestitution LFOs. *State v. Catling*, \_\_\_ Wn.2d \_\_\_, 438 P.3d 1174, 1177 n.5 (2019) (noting House Bill 1783 “eliminated interest accrual on all LFOs except restitution” and remanding with directive “to revise the judgment and sentence to eliminate such interest on any qualifying remaining LFOs.”); *Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike prohibited LFOs).

**F. CONCLUSION**

This Court should reverse Mr. McGovern's conviction and remand for a new trial. Alternatively, the discretionary LFOs and nonrestitution LFOs must be stricken from the judgment and sentence.

DATED this 17th day of June 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long, sweeping underline.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36328-7-III
	)	
DAVID MCGOVERN,	)	
	)	
APPELLANT.	)	

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