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No. 36488-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NATHAN B. NAVE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF REPLY

Nathan Nave's trial was plagued by a series of erroneous evidentiary rulings which put minimally relevant and unduly prejudicial evidence before the jury while he was unduly constrained in his ability to present his defense. The result was a guilty verdict which was fundamentally flawed and ultimately based on insufficient to sustain his conviction.

B. ARGUMENT IN REPLY

1. Insufficient evidence was presented from which a jury could have found Mr. Nave sexually assaulted I.V. where she testified she never saw or spoke with her alleged assailant and the remaining circumstantial failed to support a reasonable inference of guilt

The State seeks to cobble together several disparate and incomplete or inconsistent pieces of circumstantial evidence to infer that Mr. Nave abused I.V's. Where I.V. insists she never saw or heard her alleged assailant, she cannot be said to have "identified" her abuser. Neither did Mr. Nave "confess," and the remaining evidence fails to provide sufficient evidence to support a finding guilt.

It certainly beyond dispute that the prosecution must prove the identity of the defendant as the individual who committed the offense beyond a reasonable doubt. State v. Thomson, 70 Wn.App. 200, 211, 852

P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877 (1994); State v. Hendrix, 50 Wn.App. 510, 515, 749 P.2d 210 (1988).

While the State asserts I.V. "repeatedly identified" Mr. Nave, with regard to the offenses which were alleged to have occurred at night in her bedroom, she testified repeatedly and unwaveringly that she never saw or spoke to the alleged assailant. RP 55, 58, 76-77. Although Mr. Nave was accused by name several times during her testimony, the record is clear that there was no perceptual identification made during any of the innumerable occurrences of this alleged conduct. Id. Neither was there any testimony that her alleged assailant could be identified by any sort of familiarity with mannerisms, body parts, scent, or breathing habits. See e.g. RP 54-60, 65, 68. In the absence of evidence of that I.V.'s allegations, e.g. opinions or inferences, that Mr. Nave assaulted her "rationally based on the perception of the witness," the State's case fails. ER 701.

Any effort to implicate Mr. Nave based on his mere proximity to I.V.'s bedroom must fail as well because I.V. acknowledged that she never made an earlier disclosure because she "didn't know if it was real," and she "didn't know if it was really happening." RP 73. This form of inherently contradictory and uncertain testimony regarding an essential element, the identity of the accused as the alleged assailant, fails to

provide the jury with sufficient evidence to sustain conviction. See e.g. In re A.W., 92 A.3d 1094, 1099-01 (D.C. 2014).

I.V.'s unequivocal testimony that she did not know if her perceptions were real and that she never saw her assailant and he never spoke to her, requires the State hinge its proof on circumstantial evidence. While the State may rely on inferences from the circumstantial evidence, they must be reasonable. State v. Salinas, 199 Wn.2d 192, 201, 829 P.2d 1068 (1992). In addressing the sufficiency of evidence, the law recognizes that there must be more than merely "close proximity in terms of time and distance," or "more than a mere coincidence of time and place is necessary." State v. Brown, 132 Wn.2d 529, 608, 940 P.2d 546 (1997). The mere proximity to an adjoining room is similarly insufficient to sustain conviction other contexts. State v. Mills, 80 Wn.App. 231, 907 P.2d 316 (1995) citing State v. Call, 75 Wn.App. 866, 869, 880 P.2d 571 (1994).

The State's assertion that "someone entered I.V.'s bedroom at night to abuse her," is not a foregone conclusion in light of her candid acknowledgement that at the time she "didn't know if it was really happening." Cf. BoR at 13; RP 73. The State cannot simply tie Mr. Nave by his presence in the area to then conclude both that the abuse must have occurred and that he must have done it based upon his proximity. The

incidents described by I.V. on the couch some years earlier in which Mr. Nave apparently massaged her legs fails to make the alleged abuse later, more or less likely and therefore fails to provide sufficient evidence from which to infer guilt.

With regard to the State's assertion that Mr. Nave "confessed to his crimes," it is neither logical, nor reasonable, to infer guilt from this ambiguous and unsubstantiated recollection of a single alleged exchange in the car on the way to school. Had Mr. Nave "confessed" the State would presumably have been obligated to invoke the "Confession Procedure" dictated by CrR 3.5.

This description of vague innuendo, and the willingness to pin a finding of guilt it, illustrates the continuing importance of the doctrine of corpus delicti in protecting against convictions based on "false confessions." State v. Aten, 130 Wn.2d 640, 655-57, 927 P.2d 210 (1996). For that reason, a criminal defendant may raise corpus delicti for the first time on appeal as part of a challenge to the sufficiency of the evidence. State v. Cardenas-Flores, 189 Wn.2d 243, 247, 401 P.3d 19 (2017).[1] This

[1] The Washington Supreme Court has clearly stated that "a criminal defendant may raise corpus delicti for the first time on appeal as a sufficiency of the evidence challenge. Cardenas-Flores, 189 Wn.2d at 247. Mr. Nave has properly assigned error to the insufficiency of the evidence. Additional Brief of Appellant's Associated Counsel, at 1;. RAP 10.3 ("A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.") The trial court was not asked to

goes directly to what weight, if any, the reviewing court can give to the alleged "confession" in the context of Mr. Nave's sufficiency challenge.

Although the State argues that that there is independent evidence to corroborate that a crime occurred, that evidence is fundamentally flawed for the numerous reasons identified already. I.V.'s testimony itself was so internally inconsistent that it failed to establish either that (1) an injury or loss, or that (2) someone's criminal act was the cause thereof. City of Bremerton v. Corbett, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). The

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rule on the corpus issue so the rule does not appear to call for an assignment of error to that non-event. The trial court did enter a conviction in the absence of sufficient evidence particularly given the nature of the complaining witness's questionable identification. If so, the appellate court must then determine whether the remaining evidence is sufficient to sustain the conviction. Additional Brief at 2, 5-16. The corpus delicti question is, therefore, part and parcel of the sufficiency challenge to which Mr. Nave has assigned error.

Having assigned error to the sufficiency of the evidence, the Rules of Appellate Procedure simply require "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. RAP 10.3(a)(6). Mr. Nave has then provided the Court with the references to relevant arts of the record, legal authority and argument. Additional Brief, at 14-16.

Furthermore, RAP 1.2(a) states:

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

The clear language and import of the rules supports the conclusion that any potential technical violation of the rules, should normally be overlooked and the case should be decided on the merits. This result is particularly warranted where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court. State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995).

house of cards the State seeks to build out of the remaining circumstantial evidence is equally inadequate to establish either the injury or the criminal act. Neither I.V.'s repetition of the allegations where she acknowledged she "didn't know if it was really happening," nor Mr. Nave's "demeanor and behavior" when confronted by his wife and asked to leave the home, can be reasonably considered to provide independent evidence that a crime occurred.. In these circumstances, the accused's purported statements cannot sustain the conviction because the defendant's "confession" alone is not sufficient to establish that a crime took place." State v. Brockob, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006); State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

In this same vein, Mr. Nave's decision to leave the Spokane area following I.V.'s allegations and his wife's request that he leave the home, is equally ambiguous and remains similarly insufficient to sustain the conviction. The evidence of "flight" was inherently unclear and because of the prejudicial speculation it would spawn, should have been excluded pursuant to ER 403 and 404. Brief of Appellant, at 17-24. Nevertheless, even when evidence of "flight" is admissible, "it tends to be only marginally probative as to the ultimate issue of guilt or innocence." See State v. Jefferson, 11 Wn.App. 566, 571, 524 P.2d 248 (1974) (quoting U.S. v. Robinson, 475 F.2d 376, 384 (D.C.Cir.1973)); Wong Sun v.

United States, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime"). Here, evidence of "flight" fails to move the needle to a degree sufficient to sustain conviction.

What remains is evidence that merely raises a vague suspicion of guilt and is ultimately insufficient to support, beyond a reasonable doubt, this guilty verdict.

> Evidence which merely raises a strong suspicion of the defendant guilty is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.

People v. Tripp, 151 Cal.App.4th 951, 60 Cal. Rprt 534, 538 (2007). While the State may be entitled to reasonable inferences from the admissible evidence, an inference is unreasonable when it is based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work, and that is exactly where the case against Mr. Nave falls. Id.

Given the lack of any physical evidence offered in support of the allegations, the only evidence available to the jury was the trial testimony of I.V. in which she was insistent that she never saw her alleged assailant and nothing was spoken during the encounters she described. The

remaining circumstantial evidence is woefully insufficient to support a finding of guilt beyond a reasonable doubt. Reversal is, therefore, required.

2. The admission of evidence of Mr. Nave's travel to New York following I.V.'s allegations was erroneous because it failed to indicate consciousness of guilt and the inevitable speculation that followed was highly prejudicial

In Washington, evidence of "flight" is insufficient in itself to establish guilt, but such evidence may be considered by the jury in certain limited circumstances in determining whether or not a person is guilty. State v. Pettit, 74 Wash. 510, 133 P. 1014 (1913); State v. Jefferson, 11 Wn.App. 566, 524 P.2d 248 (1974).

In order to admit this evidence, the relationship between "flight" and the inference guilt "must be substantial and sufficient to create a reasonable and substantive inference that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965) (emphasis added); State v. Wilson, 26 Wn.2d 468, 482, 174 P.2d 553 (1946). Mr. Nave's departure following I.V.'s allegation and being asked to leave the family home, however, was only indicative of a man with nowhere else to go rather than an "instinctive" or "impulsive" effort to

avoid any nascent prosecution. See Bruton, 66 Wn.2d at 112. Neither was it indicative of an effort to evade arrest as there was no indication he was aware the police had been contacted. Ultimately, when contacted by police Mr. Nave was cooperative and made himself available for the Court as soon as he was advised of the warrant. RP 136-38.

The absence of a nexus between the allegations and Mr. Nave's departure is particularly troubling in light of the Supreme Court's having "consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun, 371 U.S. at 483 n. 10. Evidence of "flight" is only probative of a consciousness of guilt if there is a substantial degree of confidence each of the four separate inferences that must be drawn:

> (1) from the defendant's behavior to flight;
> (2) from flight to consciousness of guilt;
> (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and
> (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

United States v. Peltier, 585 F.2d 314, 323 (8th Cir. 1978) (internal quotation marks omitted). Courts must "carefully consider whether there are a sufficient number of evidentiary manifestations to support these inferences." United States v. Hankins, 931 F.2d 1256, 1261 (8th Cir. 1991). They were not.

Given that the basis for Mr. Nave's departure is unclear, the evidence fails at each of the inferential steps identified in Peltier. The probative value of "flight" evidence is, therefore, minimal at best and the potential prejudice from the speculation is inevitably eroded the jury's ability to do its job. This is a problem because when balanced against pure unmoored speculation, the evidence runs the very real risk of violating due process by depriving Mr. Nave of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). In Mr. Nave's case, his travel reflects little more than the reality that he had lost home when he left at the direction of his wife.[2]

In light of the limited probative value, the prejudicial speculation engendered by this evidence far exceeded what was necessary for the prosecution to tell its story and compromised Mr. Nave's ability to receive a fair trial. The evidence distracted the jury from its central function of weighing the credibility of the State's witnesses regarding the allegations of criminal conduct. United States v. Benedetti, 433 F.3d 111, 116 (1st Cir. 2005). For that reason, the prejudicial impact of this sort of irrelevant

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[2] Although the State attempts to bolster the inference of guilt by asserting "Mr. Nave chose instead to quit his job, sell his car, and travel to the opposite side of the country," the evidence only established he did not "continue going to his job at Umpqua Bank," and that his truck was later seen at a "used car dealership." RP 95. The inferential leap the State seeks to make requires more. Bruton, 66 Wn.2d at 112.

evidence has been well noted by the courts. See United States v. Williams, 33 F.3d 876, 879 (7th Cir.1994); United States v. Russell, 662 F.3d 831 (7th Cir. 2011). This testimony illustrates the danger of admitting minimally probative and unfairly prejudicial evidence; because it compromises an accused's right to a fair trial which is a fundamental to due process of law. United States v. Solerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, secs 3, 22. Reversal is, therefore, required.

3. Irrelevant and prejudicial testimony regarding Mr. Nave's physical contact with I.V. years before the alleged offenses was erroneously admitted

The admission of evidence of prior potential misconduct risks appealing or enticing the jury to punish the accused for something other than the charged offense. Carson v. Fine, 123 Wn.2d 206, 222, 867 P.2d 610 (1994); ER 403. I.V.'s testimony regarding relatively isolated and innocuous incidents years before the charged offenses created exactly this dilemma. I.V. testified that in first incident, when "I fell asleep on the couch, and I woke up to [Mr. Nave] touching me." RP 50. He was "just massaging my legs" RP 51. I.V. did not describe manifestly criminal behavior and did not tell her mother because the behavior was so innocuous that she "didn't think it was a big deal." RP 52.

As to the second incident, "I'd fallen asleep watching a movie … and I woke up to him touching me in the same, similar spot." RP 52. This time, however, she described that "spot" as "my vagina." RP 52. Again, I.V. did not tell her mother, but later told the officer she did not really remember anything about that second incident. RP 53, 73.

Admitting this evidence, however, contravenes "ER 404(b) [which] is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of prior "bad acts" are admissible only when the evidence is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the witness's propensity to commit certain acts, and (3) substantial probative value outweighs its prejudicial effect. ER 404(b); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Here the evidence was neither material to an essential element, nor relevant for any purpose other than propensity and should have been excluded. Smith, 106 Wn.2d at 776.

Here the trail judge admitted the evidence to prove "lack of accident, mistake or intent, [and] an aggravating, as an ongoing pattern of sexual abuse…." RP 10. The judge's decision was based on untenable

grounds or untenable reasons, however, because the testimony failed to prove "an ongoing pattern of sexual abuse," where the conduct in the first incident was not criminal and in the second incident I.V. indicated she did not remember anything about the incident.

Furthermore, as to the question of "accident, mistake or intent," the alleged misconduct was years earlier, occurred in a different location, under very different circumstances. The evidence failed to address a contested fact where Mr. Nave simply testified categorically that he never touched I.V. with his fingers on her vagina and never touched her inappropriately at all. RP 16. As such, there is no contact for which the criminal intent is in dispute or to which he claimed accident or mistake. In applying the balancing test, therefore, the "relevance of the evidence to prove an element of the crime," was negligable. State v. Fisher, 165 Wn.2d 727, 745,202 P.2d 937 (2009).

Where the evidence was admitted for untenable reasons, or on untenable grounds, then the question of prejudice becomes central. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). In Mr. Nave's case, when this miniscule hint of potential probative value is weighed against the prejudicial effect, the result is tipped toward undue prejudice. Notwithstanding the effort to minimize the adverse impact on re-direct, the irrelevant evidence was admitted and the burden on the right to a fair

trial and the exercise of Mr. Nave's Sixth Amendment rights was substantial. Mr. Nave timely moved to exclude this testimony because it was irrelevant and was a burden on the exercise of his Sixth Amendment right to counsel. Instead the evidence distracted the fact-finder from its thoughtful evaluation of the evidence and improperly colored the jury's weighing of the evidence. The result is a lack of confidence in the result reach below and reversal is required.

4. Excluding evidence I.V.'s cousin, with whom she was very close, made similar disclosures of sexual abuse in the same time frame.

Evidence I.V.'s cousin disclosed to her that she had been sexually abuse by a family member was highly relevant because the disclosure of these allegations occurred contemporaneously with the disclosure in this case where they were described as very close if not inseparable. RP 20-21. As defense counsel explained,

> one of the questions [the jury will] have is why would this ever have come into the child's mind if this hadn't occurred, and they're entitled I think under that scenario to know that one of her best friends or best cousin had disclosed to her similar allegations.

RP 21.

The trial judge expressed concern that the evidence would be hearsay, but Mr. Nave did not seek to establish the truth of the allegations, just its effect on I.V. upon hearing it and its likely influence on her

decision to make these allegations. RP 22-23; In re Dependency of Penelope B., 104 Wn.2d 643, 654-55, 709 P.2d 1185 (1985).

Mr. Nave's ability to cross examine the complaining witness against him on this critical point is at the core of the constitutional right to confrontation.[3] U.S. Const, amend. VI; Wash. Const, art. I § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) ("The primary and most important component [of the Confrontation Clause] is the right to conduct a meaningful cross-examination of adverse witnesses.")

> The defendant's right [to present a defense] is subject to reasonable restrictions and **must yield** to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

State v. Donald, 178 Wn.App. 250, 263-64, 316 P.3d 1081 (2013) (emphasis added).

As Mr. Nave argued, the evidence of I.V.'s cousin's report of a contemporaneous disclosure of sexual abuse at the hands of a relative was relevant and necessary to explain "why would this ever have come into the child's mind if this hadn't occurred, and they're entitled I think under that scenario to know that one of her best friends or best cousin had disclosed to her similar allegations." RP 21. The evidence was relevant to establish a

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[3] "[G]reat latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony." State v. Knapp, 14 Wn.App. 101, 107, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975).

potential cause for making the charge and explained that the complaining witness in this case was aware of her cousin doing the same sort of thing and making a disclosure and what ensued after that." RP 21-22. To that end, Washington courts have recognized evidence providing a reason for a child-victim's knowledge and descriptions of sexual activity is admissible "'to rebut the inference [the child] would not know about such sexual acts unless [he or she] had experienced them with defendant.'" State v. Kilgore, 107 Wn.App. 160, 179-80, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002) (alteration in original) (quoting State v. Carver, 37 Wn.App. 122, 124, 678 P.2d 842 (1984)). The same rationale applies here as well.

The evidence Mr. Nave sought to elicit was offered as circumstantial evidence that I.V.'s explicit sexual knowledge was not incongruent with her age or maturity because of the experience shared by her cousin. In a matter involving child sexual abuse, evidence of a child's advanced knowledge of explicit sexual matters tends to create an inference that the child had gained such knowledge through prior episodes of sexual abuse. State v. Swan, 114 Wn.2d 613, 648-49, 790 P.2d 610 (1990). Identifying an alternative source, was essential to Mr. Nave's defense.

The erroneous exclusion of this relevant and material evidence which was necessary to the defense establishes a constitutional violation. State v. Cayetano-Jaimes, 190 Wn.App. 286, 300, 359 P.3d 919 (2015).

Constitutional error of this magnitude requires reversal unless it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). In Mr. Nave's case, this evidence was critical in order to make the jury aware of the potential source of I.V.'s sexual knowledge and basis for the allegations of sexual misconduct. A reasonable jury that heard of these contemporaneous disclosures of sexual abuse by a close confidant of I.V.'s would have been inclined to see the allegations in a far different light. The jury would have heard a completely different theory about the events surrounding I.V.'s disclosure and it is highly likely that a reasonable jury would have thereafter reached a different result. The trial court's error prevented Mr. Nave from presenting this explanation regarding the source of the allegations. The constitutional error was not harmless, so reversal and remand for a new trial is required.

5. The trial court abused its discretion in permitting cross-examination of Mr. Nave which went far beyond the limited scope of the direct examination.

On cross-examination, the prosecutor sought to go far beyond the limited scope of his direct examination and inquire into topics ranging from Mr. Nave's relationship with I.V. to the sleeping arrangements in their Spokane home. RP 139-40. Mr. Nave also

objected to questioning regarding leaving his employment and traveling to New York. RP 143.

The general rule in both civil and criminal cases is that the cross-examination of a witness is limited to the scope of the direct examination. ER 611; State v. Jeane, 35 Wn.2d 423, 431, 213 P.2d 633 (1950). A defendant in a criminal case is subject to the same rules relating to the cross-examination of other witnesses. Id. Mr. Nave argues that the scope of his examination far exceeded that contemplated by the rules and caselaw so as to constitute an abuse of the discretion granted the trial court.

The limits on the cross examination of a defendant in a criminal case are illustrated by Coe, where the Washington Supreme Court found the trial court abused its discretion by allowing the prosecuting attorney to question the defendant Coe about the details of his writings in an effort to show a lustful disposition. State v. Coe, 101 Wn.2d 772, 780, 684 P.2d 668 (1984). But the evidence had no bearing on any element of the charges against Coe and would have been inadmissible had it been offered on direct examination. Id.; State v. Golladay, 78 Wn.2d 121, 143, 470 P.2d 191 (1970) (trial court abused its discretion by allowing cross examination of rape defendant as to prior visit to house where prostitute lived).

Evidence regarding Mr. Nave's relationship with his step-daughter did not relate to the topics covered in the direct examination, nor did it help to inform the jury as to Mr. Nave's credibility. RP 139. Further inquiry regarding family finances and sleeping habits were similarly beyond the scope of the direct examination and not germane to evaluating Mr. Nave's trustworthiness. See e.g. RP 140, 146-47. Instead, the testimony was inflammatory and prejudicial because it sought to paint Mr. Nave as simply abandoning his family and thereby distracted the jury from its task of evaluating the relevant evidence and determining if the elements of the alleged offenses were proven beyond a reasonable doubt. Because the prosecutor's inquiries did not bear upon the questions presented by the direct examination or the credibility of the Mr. Nave, the trial court's ruling was untenable and an abuse of this discretion granted by ER 611.

6. Appellant is entitled to relief from fees where the record at sentencing established he has no source of income or savings, and received a 192 month sentence.

The State acknowledges that Mr. Nave was found to be indigent and appointed counsel at the outset of the case. BoR 1-2 n.1. The testimony at trial established that Mr. Nave had worked at Umpqua Bank before I.V.'s allegations, but notified the bank he would not be returning there afterward. RP 90, 95, 147.

After the jury returned its verdict, Mr. Nave was taken into custody pursuant to the mandatory remand statute and has not been subsequently released. RP 203. The Pre-Sentence Investigation prepared by the Department of Corrections for sentencing noted with regard to Mr. Nave's finances:

> Mr. Nave advised that he made approximately $46,000 per year with his last job at Umpqua Bank, however, despite this he said they were always pay check to pay check. He indicated that at this time he has no source of income or saving and his attorney fees have been paid by his cousin, Tim Quick, with whom he has been living with in Idaho Falls.

CP 113, 126 (emphasis added). No further inquiry was made by the court or the parties regarding Mr. Nave's income or ability to pay costs and fees. RP 205-26. An order of indigency for purposes of appeal was subsequently entered after sentencing on January 3, 2019. CP 174-76.

Despite his undisputed indigency, the State argues Mr. Nave is not entitled to relief citing RAP 2.5. BoR at 2. As the Washington Supreme Court has noted, however, "trial courts have an obligation to conduct an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary legal financial obligations." State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Given the obligation of the trial court and the discretionary nature of RAP 2.5, this Court should address the costs issue as it represents an action beyond the

statutory authority granted to the trial courts, represents a failure to establish facts upon which such an order should have been based and represents a failure of process that is arguably constitutional in scope. RAP 2.5(a).

> State law 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. See RCW 10.01.160(3).

State v. Ramirez, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018). RCW 10.01.160(3) specifically states that the sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them."[4]

As for the court costs, RCW 36.18.020(2)(h) provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a

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[4] RCW10.101.010(3) (a) through (c) then defines indigency as:

> (3) "Indigent" means a person who, at any stage of a court proceeding, is:
>
> ...
>
> (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; ....

(emphasis added).

> defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

(emphasis added). House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h) (2015), to prohibit courts from imposing the $200 filing fee on indigent defendants. LAWS OF 2018, Ch. 269, § 17(2)(h). State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

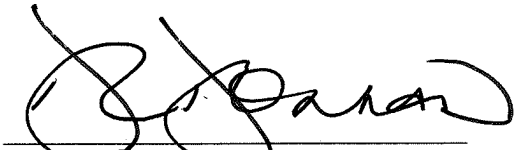
Where these statutes make it improper to impose these fees on an indigent defendant, and the court has found Mr. Nave to be indigent, the court abused it discretion by imposing costs contrary to the statute. Mr. Nave should be provided relief.

C. CONCLUSION

Mr. Nave's conviction should be reversed based on the numerous evidentiary errors, insufficiency of the evidence of identification, and cumulative impact of the cited errors on his right to a fair trial.

DATED this 31st day of March, 2020.

Respectfully submitted,



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