

FILED
Court of Appeals
Division III
State of Washington
6/22/2020 12:57 PM

NO. 37206-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB COX,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable John Lohrmann, Judge

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court denied appellant his rights to confrontation and to present a defense when it relied on the rape shield statute to exclude defense evidence. U.S. CONST., amends. 6, 14; CONST., art. I, §§ 3, 22.¹

2. Appellant assigns error to the Court's Finding of Fact No. 2, CP 122:²

2. Evidence barred by RCW 9A.44.020 (Rape Shield)

The defense has repeatedly stated their defense as "general denial," and not "consent". The court therefore finds that any testimony about any sexual/sexual type behavior, with anyone other than the defendant is irrelevant. The court agrees with the State's position that, where consent is not an issue, the victim's sexual behavior with anyone is irrelevant, violates RCW 9A.44.020, and is not admissible. The only reason such evidence is sought to be admitted by the defense is to show the victim in a negative light, which the Rape Shield statute forbids. Despite the defense arguing that the evidence may be admissible to "show how incredibly drunk everyone was", the court finds there are many other ways of demonstrating the level of intoxication of witnesses at the party, including the victim. Using that

¹ Constitutional provisions are in App. A.

² Findings of Fact Nos. 2 and 3 are actually conclusions of law and should be treated as such, reviewed *de novo*. *State v. Norris*, 157 Wn. App. 50, 66, 236 P.3d 225 (2010). Appellant assigns error in caution under RAP 10.3(g).

as a reason to admit otherwise inadmissible evidence is an attempt by the defense to do an "end run" around the Rape Shield statute.

3. Appellant assigns error to Finding of Fact No. 3, CP 122:

3. Reputation for sexual morality in the community evidence

Pursuant to the standard set forth in *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000), the court holds that the defense will have to lay a proper foundation for the proposed evidence. The defense must be able to lay more of a foundation than the witness has "never heard anything to the contrary".

4. The court erred by excluding the defense evidence of good reputation for sexual morality.

5. The court denied appellant his right of confrontation when it prohibited the defense from cross-examining the State's DNA expert about the possibility that trace DNA was from a male.

6. The court denied appellant his constitutional right to counsel when it prohibited counsel from using demonstrative illustrations of the burden of proof, and cut off counsel's discussion of beyond a reasonable doubt in closing argument. U.S. CONST., amends. 6, 14; CONST., art. I, § 22.

7. Appellant assigns error to the following language in Instruction No. 3, CP 63:

If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

8. The court denied appellant due process when it instructed the jury an "abiding belief" was sufficient proof beyond a reasonable doubt, prohibited the defense from arguing it required more evidence and greater certainty, and permitted the State to argue "abiding" belief meant one that merely "sticks with you."

9. Prosecutorial misconduct in opening and closing argument denied appellant due process and a fair trial.

10. The trial court violated due process and the appearance of fairness doctrine when it proposed how the prosecution could argue the evidence to support its case.

11. The trial court erred by denying a new trial.

12. Appellant assigns error to Finding of Fact 2.5 in the Judgment and Sentence, CP 98: "The defendant is not indigent as definied [sic] in RCW 10.101.010(3)(a)-(c)."

Issues Relevant to Assignments of Error

1. May the court exclude evidence that the complaining witness sat on the defendant's lap earlier in the evening she claimed he raped her, when that act offers an innocent explanation for how the defendant's DNA could be found on the complaining witness's underpants?

2. Does the rape shield statute preclude evidence that the same night as the alleged rape the complaining witness acted silly and flirtatious with the defendant and others?

3. May the court prohibit the defense from cross-examining the State's DNA expert on the parameters of his DNA analysis to challenge his conclusion?

4. What foundation is required to admit evidence of a defendant's good reputation for sexual morality in a rape case?

5. May a court prohibit defense counsel in closing argument from using illustrative aids or discussing the quantity or quality of evidence necessary for proof beyond a reasonable doubt?

6. Is proof beyond a reasonable doubt determined solely by the duration of a belief?

7. Does the "abiding belief" language convert the concept of proof beyond a reasonable doubt to one of the duration of a juror's belief rather than the certitude of that belief?

8. Did the prosecutor improperly impugn defense counsel and the defense expert in opening statement?

9. Did the prosecutor improperly shift the burden of proof in closing argument?

10. Did the trial court violate due process and the appearance of fairness doctrine when, after limiting the defense proposed evidence, it suggested how the prosecution could argue the evidence to its advantage?

11. Where the defendant's certification of finances showed he was indigent on the day of sentencing, did the court err by imposing discretionary financial obligations?

B. STATEMENT OF THE CASE

1. BIRTHDAY PARTY

On Saturday, June 18, 2016, JR threw herself a 40th birthday party. She held it at her one-bedroom house because she wanted to drink a lot,

have a lot of fun, and not worry about getting home, just "crash" when she was done. RP 225-26.

JR invited about 50 people. She specifically texted an invitation to Jacob Cox and his fiancée, Sydney. JR and Jacob met in nursing school. They worked together earlier. RP 227-30, 280, 315-16. Jacob and Sydney arranged a babysitter for their 6-month-old infant so they could attend. RP 830-33.

About 40 people came to the party. RP 280-81. Liquor was freely available for people to pour their own drinks. RP 279-81. JR hugged Jacob when he arrived. RP 846.

Sometime during the evening, Jacob cut the corner off his finger as he sliced a lime. His blood dripped on the counter and floor. JR took him into the bathroom and treated it with saline, gauze and a bandaid. She did not wear gloves; she came in contact with his blood. RP 236, 844-46.

Jacob used the toilet at the house four or five times through the evening. RP 853-54.

JR "was intent on having a blast." She drank until she "started to feel out of control." She couldn't control her walking or her talking; she "had to lean on people." RP 233-35. She did not

remember some things that happened at the party because of her drinking. RP 285.

Most people left by 1:00 a.m. Six people remained: JR, Cody, Melissa, Whitney, Jacob, and Sydney. By then, Sydney was asleep on JR's bed. She was fully dressed, curled up on the right foot of the double or queen-sized bed, on top of the covers. RP 237-38, 276, 441-43, 481, 489-90.

Jacob shared an e-cigarette being passed around on the deck about 2:30. JR also partook of it. Jacob went into the bedroom, where Sydney was asleep on top of the covers. He lay next to her and quickly fell asleep. He thought he was there 20-30 minutes. RP 847-50.

JR vomited in the bathroom, which she took as her cue it was time for bed. She remembered Melissa helped her at 2:00 take off her knee-length dress and bra and get under the sheet on the far side of the bed, away from Sydney. She wore only her panties. The sheet was up over her shoulders. She was so drunk she instantaneously passed out. RP 234-38, 277-78, 442-43.

Melissa testified she helped JR to bed about 1:00-1:15. RP 436-37. She didn't pull the covers

out from under Sydney; she pulled the covers back on the other side of the bed, JR got in, then she pulled the covers up over her. RP 472.

Whitney remembered JR took herself to bed without anyone's help at 3:00-3:30. RP 502, 512.

Jacob awoke to JR touching him on his hip bone over his clothes. He was on top of the covers. She was wearing her dress. He told her to stop touching him, it was inappropriate. She seemed angry as she left the room. RP 851-54.

Jacob woke Sydney so they could leave. As they neared the front door, Cody asked Jacob if he was all right. Jacob said yes, they shook hands and wished each other a good night. RP 536-38, 854-56.

2. ACCUSATION

JR had a sex dream. She felt sexually touched in the dream. She testified she heard a voice and woke up. She was lying on her right side facing the edge of the bed. She said Jacob was behind her with his hands in her vagina. His hands came from behind her; he was moving his hands back and forth. He whispered into her ear that he always wanted to get into her pussy. Deciding the voice and fingers

were not a dream, she pushed him away, got out of bed, put on her dress and left the room. RP 240-42.

When JR came out of the bedroom, Melissa and Whitney fixed her a bed on the sofa. Jacob and Sydney left, and JR went back to bed. RP 245-47.

The next evening, JR texted Jacob asking to meet with him and Sydney to express her great anger at him. She did not articulate what she was angry about or what she believed he had done. He ultimately declined the invitation. RP 251-56.

3. INVESTIGATION

On Monday, JR reported to the police she was sexually assaulted. After taking her report at the station, an officer came to her home and retrieved a pair of underpants from her laundry hamper that JR said she wore the night of the party. He did not recall if the pants were on the top of the pile or if he dug through other dirty clothes to find them. He took no photographs. RP 539-51.

The crotch of JR's underwear was stained with menstrual blood. She had started her menstrual period two days before her party. Ex. 5; RP 923.

JR had a sexual assault medical examination Monday evening. She told the nurse Jacob "spooned up against me," touched her breasts, belly and hands, and put his fingers in her vagina, reaching from behind into her underwear. She said he did a pumping action with his fingers, a forceful action likely to transfer DNA. RP 386-404. The nurse took swabs from her body, including oral, vaginal, perineal, and anal. RP 297, 380-81, 425.

Jacob Cox agreed to a police interview that same week. He reported he had gone into JR's bedroom and lay next to Sydney who was already on the bed. He fell asleep. He woke up to find JR rubbing on his pelvis over his clothes. He told her to stop. She got up and left the bedroom. He voluntarily gave a cheek swab for a DNA sample. RP 582-84, 597-610.

Jacob testified he never whispered in JR's ear about getting "into her pussy" or anything remotely like that, ever before or at the party. He did not put his hands inside JR's underwear or touch her in a sexual manner, ever. RP 858-59.

Cody confirmed that he shook hands with Jacob as he left. He did not see any blood on Jacob's

hands. If he had, he would have mentioned it to the police. RP 537-38.

4. CRIMINAL CHARGE

In April, 2017, only after receiving the DNA report, the State charged Jacob Cox with rape in the second degree. It alleged "Jane Doe" was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b); CP 1-2; Ex. 6.

5. DNA EVIDENCE

The state said in opening the defendant's DNA was found "in" JR's underwear. It asserted the defense would call its own expert.

What I anticipate the defense presenting is that DNA doesn't mean what it says, that the reality isn't what the reality is, that things aren't what they seem.

RP 208-09.

No male DNA was found on the oral, vaginal, perineal or anal swabs. RP 686.

JR's underpants were stained with her menstrual blood. RP 260-61. The crotch area tested positive for amylase, which is found in sweat, vaginal fluid, urine, fecal matter, blood serum, saliva, and other bodily fluids. Tests did not reveal the source of this amylase; it was not

tied to any DNA. RP 663-64, 683-84, 808-09. Amylase can be found in underpants with only the wearer's DNA present. RP 681.

Mr. Culnane of the WSP crime lab tested two cuttings from the edges of the underwear crotch for DNA. One, T2, visibly contained blood, the other, T1, appeared not to. Neither cutting was tested for blood. RP 702; Ex. 7. T2 contained DNA consistent with JR and a trace from an unidentified source. T1 contained DNA consistent with JR as the major contributor, not excluding Jacob as the secondary source, and a trace of a third contributor. RP 687-88.

A primary transfer of DNA can occur when a person has physical contact with an object or another person. A secondary DNA transfer occurs when a person or object bearing someone's DNA from a primary transfer touches something else and leaves that first person's DNA on that second thing. Thus JR could acquire someone else's DNA by hugging or shaking hands with them, then transfer it to her underpants when she touched them. RP 667-69, 698-700. One can never know whether DNA arrived by a direct or secondary transfer. RP 804.

JR could have picked up Jacob's DNA from his blood or skin if she bandaged his bleeding finger. DNA also could transfer from multiple people using the same toilet seat, faucet or towel. RP 811.

Mr. Culnane used his professional judgment to decide that two peaks on the DNA analysis were "artifacts," not real alleles. On cross, counsel questioned him about the process of making this judgment call; if he were incorrect, would he agree they would indicate the presence of another male's DNA? RP 692-94. The State objected as irrelevant and "close" to violating the rape shield statute. Defense counsel explained JR had not been sexually active with a man 14 days before the party. If another male's DNA appeared in her underwear without sexual activity, it demonstrated an innocent basis for getting there. The court sustained the objection, ruling the question was "speculative" and irrelevant. It instructed the jury to disregard it. RP 694-98.

Nonetheless, the court overruled the State's identical objection to permit the defense expert to testify the trace contribution was a real allele from male DNA, not an artifact. RP 772-800. But

it limited the defense expert to hypotheticals consistent with the admitted evidence, i.e., hugging and shaking hands; counsel could not ask about sitting on laps. The court then generously offered that with limited hypotheticals, the prosecutor could argue that if everyone was hugging and shaking hands, why didn't all their DNA show up in JR's underwear? RP 776-77.³

6. EVIDENCE EXCLUDED UNDER RAPE SHIELD STATUTE

The defense theory was that Jacob did not touch JR on the bed; she touched Jacob, whether during her "sex dream" or otherwise. He told her to stop, then she got out of bed and left the room.

³ "Having said that, we have some general testimony that there was hugging and that sort of thing. That's as far as I want you to go with that sort of thing, Mr. McCool. I don't want any back door testimony about 'Well, let's see, if the victim had, if Ms. Redberg had hugged somebody and touched them in this manner or that manner, would that account for?' I think the general testimony is sufficient.

"It strikes me that if there were transfers, again, **something the plaintiffs [sic] can point out I suppose**, if there were transfers by hugging or kissing or pressing up against somebody's clothing, there wasn't any DNA found in those other samples, so. **Again, those are points that the State needs to make**, but they're for the trier of fact." RP 777 (emphases added).

JR had sat on Jacob's lap earlier while they were on the deck. She had put her head on his shoulder. She pointed to him and said, "If I were into dudes, you would be my number one pick." She turned to Melissa and said, "If I were into girls, you would be my number one choice pick." Jacob didn't think she would have sat on his lap if she had been sober. RP 532-34, 823-25.

Counsel repeatedly explained this event could explain how Jacob's DNA came to be on JR's underpants. That JR did not remember sitting on Jacob's lap indicated she did things that night she did not remember because of her intoxication. The court excluded all evidence that JR sat on Jacob's lap, ruling it was prohibited by the Rape Shield Statute and ER 401-403. RPL 39-49; RP 199-200, 362-72, 532-35; CP 74-79, 122, 125-26.

The women at the party were drunk enough that they were kissing each other on the lips. They tried to get Jacob and Cody to kiss each other. RP 532-34, 823-25. This evidence supported the conclusion that JR was drunk enough to lower her inhibitions; she was doing things she would not normally do when sober. This evidence provided

context for her touching Jacob on her bed, even if she didn't remember it. The court excluded all evidence of kissing. RPL 39-49; RP 535. The court accused counsel of "doing an end run around" the rape shield statute. RPL 44-45; CP 122.

7. CHARACTER EVIDENCE EXCLUDED

The court also excluded offered character evidence that Jacob Cox had a good reputation for sexual morality in many communities. RPL 49-55; RP 711-16, 725-69; CP 122, 125-26.

The defense offered testimony of four witnesses. Each knew Jacob 4-7 years. Each shared a community with him of 100-400 people. Each was confident that if Jacob had anything but an excellent reputation for sexual morality within those communities, they would have heard of it. For example, Jacob was the private nurse for Betsy Hadden's husband. Ms. Hadden's family was very well known in the community. If anyone had thought Jacob had a poor reputation for sexual morality, as in cheating on his girlfriend or being sexually deviant, she was confident they would have told her. Having heard nothing, she concluded he had a good reputation for sexual morality. RP 742-49.

Orally, the court said "generally this type of character evidence is inadmissible as a starting point." RP 766. It found the term "sexual morality" too amorphous; some might believe it means "anti-abortion." And, despite Supreme Court authority, it ruled evidence that witnesses occupied a position in their community where, if someone had had knowledge of Jacob's reputation for sexual morality they would have heard of it, was an inadequate foundation for a good reputation. CP 122.

The trial court stated it would be "helpful for the Court of Appeals to take another look at that and give us some more guidance." RP 765-69.

8. JURY INSTRUCTIONS

The defense took exception to the last sentence of Instruction No. 3: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 63. Counsel anticipated the State's argument that an "abiding" belief referred only to a duration of time, not to the degree of certainty required for proof beyond a reasonable doubt. That is, a person could be persuaded the

defendant more likely than not was guilty, and hold that belief forever after, i.e., it was "abiding," yet the State had not met the quantum of proof beyond a reasonable doubt. RP 873-75. The court gave the instruction over objection.

9. CLOSING ARGUMENTS

The State argued:

Proof beyond a reasonable doubt has been given to you as the burden. And there is a relatively easy to understand definition of that contained in the instructions. It's called an abiding belief in the truth of the charge. That very same instruction tells you that after you fully and fairly consider all of the evidence or lack of evidence, if that belief in the truth of the charge abides with you, stays with you, sticks with you, rests with you, those are all synonyms for "abide," then the only thing you must do is return a verdict of guilty at that point.

RP 889. The State also argued the DNA evidence as proof of the crime. RP 896-98.

The court granted the State's motion in limine to prohibit defense counsel from using a "scales of justice" demonstrative aid in his closing argument. RPL 57-62; CP 76-77, 79, 123.

Defense counsel addressed "abiding" in Instruction No. 3. He explained to the jury that civil cases are decided on a preponderance of the

evidence, which means 51%, more likely than not, verbally suggesting a teeter-totter; and will contests require clear and convincing evidence, a high probability.

But in a criminal case, ladies and gentlemen, unlike those two 50-pound kids on a the teeter totter, a defendant is presumed innocent. He starts out with the law saying that Jacob Cox did not commit this crime. He did not. And the only way the State can overcome that presumption is by proof that is much higher than a preponderance of 51 percent, much higher than a high probability. Another way of perhaps saying it is that we require really good quality work out of the State's case. We're talking B+, A- type stuff.

The court sustained the objection. RP 916-18.

Counsel emphasized no male DNA was found on the vaginal or anal swabs; if Sydney was on top of the covers and the sheet was pulled up on JR's shoulders, there was no way Jacob could be between them and reach between JR's legs from behind because the bed covers were in the way; and no one saw blood on Jacob's fingers as he left, not even Cody who shook his hand. RP 921-29.

On rebuttal, the State emphasized the burden of proof was not 51% or 75% or some letter grade. "Only what you believe to be the truth of the charge and if that belief sticks with you as you

consider all the evidence." RP 940. And it argued:

And the defense still can't explain to you why the defendant was the next biggest contributor of DNA in the sample taken by William Culnane aside from Joselyn. They still, despite all of this effort, call these reasons to doubt, they still can't explain that away.

The court overruled the defense objection that this argument shifted the burden of proof. RP 943-44.

10. VERDICT, MOTION FOR NEW TRIAL, AND SENTENCING

The jury found Jacob guilty as charged. CP 73. The Court denied the defense motion for new trial primarily on issues previously raised. CP 74-79, 90-93, 125-26; RP 955-74.

The court sentenced Jacob to life in prison with a minimum term of 90 months. CP 94-100.

The court imposed legal financial obligations. "One of the findings that I need to make before I do that is to determine whether or not you're indigent." The court acknowledged Jacob would lose his nursing license. It asked Jacob about his education. It determined his counsel was retained, but did not ask who paid counsel. It concluded he was not indigent. RP 1012-15. The court did not mention the PSI indicated Jacob owed about \$75,000,

part in student loans. The court imposed costs of \$1,335.70.⁴ CP 98, 103-04; Supp. CP (Subno. 91).

Five days later, the court found Jacob indigent based on his certificate of assets signed the day of sentencing. CP 119-20; Supp. CP (Subno. 101). This appeal timely follows. CP 117-18.

C. ARGUMENT

1. THE COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE BY EXCLUDING CRUCIAL DEFENSE EVIDENCE AND LIMITING COUNSEL'S ARGUMENT.

A criminal defendant has the constitutional right to defend against criminal allegations and present evidence in his defense.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.

Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); U.S. CONST., amends. 6, 14; CONST., art. I, §§ 3, 21, 22.

⁴ \$500 victim assessment, \$100 crime lab fee, \$100 DNA collection fee, \$200 criminal filing fee, \$185.70 witness costs, and \$250 jury demand fee.

A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and offer testimony, is basic in our system of jurisprudence.

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Defendants have a right to present only relevant evidence.

If relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." ... [F]or evidence of *high* probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const., art. 1, § 22."

Jones, 168 Wn.2d at 720 (Court's emphasis).⁵

"Since Jones argues that his Sixth Amendment right to present a defense has been violated, we review his claim de novo." *Jones, supra* at 719.

a. *Exclusion of Evidence that JR Sat on Jacob's Lap Denied His Right to Present a Defense.*

State v. Jones controls this case. In *Jones*, the defendant was charged with raping his niece. She claimed he put his hands around her throat, threatened to kill her, and forcibly raped her. He offered to testify the night of the incident she

⁵ Quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002), and *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983).

used alcohol and cocaine and she and another woman engaged in consensual sex with him and two other men in return for money. The trial court ruled Mr. Jones could not testify to or cross-examine the niece on this evidence as it was barred by the rape shield statute, RCW 9A.44.020.⁶ *Jones*, 168 Wn.2d at 717-18.

The Supreme Court reversed, holding the trial court violated Mr. Jones's Sixth Amendment rights.

This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

Jones, 168 Wn.2d at 721.

The *Jones* Court further held the rape shield statute applied only to "**past** sexual behavior." *Id.* at 722 (Court's emphasis).

The statute was not designed to prevent defendants from testifying as to their version of events but was instead created

⁶ The text of this statute is in App. B.

to erase the misogynistic and antiquated notion that a woman's past sexual behavior somehow affected her credibility. ...

Jones's evidence refers not to past sexual conduct but to conduct on the night of the alleged rape.

Jones, 168 Wn.2d at 722-23 (citation omitted; emphasis added). The rape shield statute therefore did not apply to the offered evidence. *Id.* at 724.

As in *Jones*, here the defense offered evidence that on the same night as the alleged rape, JR sat on Jacob's lap. This was not "past sexual conduct." It was not "past" -- it happened the same night. And it was not "sexual conduct." The rape shield statute therefore did not apply. See *State v. Sheets*, 128 Wn. App. 149, 158, 115 P.3d 1004 (2005), review denied by *State v. Porter*, 156 Wn.2d 1014 (2006).

Sheets presents a strikingly similar scenario: After drinking heavily at a birthday party, the complaining witness accused Mr. Sheets of trying to rape her when she was asleep. The State's theory was she was too intoxicated to consent. Her male friend testified that she had been flirtatious with him that evening, which he found uncharacteristic and evidence of how intoxicated she was. The trial

court granted a mistrial for violating the rape shield statute. This Court reversed, holding the evidence was not barred by the statute.

As in *Sheets* and *Jones*, the evidence that JR sat on Jacob's lap was of extremely high probative value. Jacob's DNA found on clippings of the edge of JR's underpants crotch was a major part of the State's evidence. JR wore a knee-length dress the night of the party. Thus if she sat on Jacob's lap, it is highly possible her underpants came in contact with his leg or pants. Thus DNA could easily transfer from his lap to her underpants, offering an innocent explanation for how it got there. And this incident distinguished Jacob from others at the party whose DNA was not on her pants.

The extremely high relevance of this evidence is shown in closing argument. The State emphasized the DNA evidence, and that the defense could not explain it away. RP 896-98, 943-44. In fact, the defense had evidence to explain it, but could not present it. Other than JR's testimony, it was the only evidence suggesting penetration.

JR told police she did not recall sitting on Jacob's lap, but had been told she did so. Cody

told police she sat on Jacob's lap. RP 532-35. Jacob testified she also put her head on his shoulder, which he doubted she would have done if she had been sober. RP 821-25. Thus this evidence also is relevant to establish JR did things with Jacob that she did not remember doing, and likely would not have done if she had been sober. Her intoxication lowered her inhibitions as well as affected her memory. These facts were extremely relevant for the jury to decide between JR's memory and Jacob's perceptions.

The State had no compelling interest to exclude this highly relevant evidence. Excluding evidence that JR sat on Jacob's lap denied appellant his constitutional right to present a defense. This Court must reverse this conviction.

b. *The Court Erroneously Excluded Evidence of JR Kissing Women and Urging Men to Kiss Each Other.*

The same analysis applies to the exclusion of evidence that JR pointed to Jacob and one of the women to express her attraction or fondness for them; and that the women were kissing each other and urging the men to kiss each other. As in *Jones and Sheets, supra*, this was not "past sexual

conduct" excluded by the rape shield statute. It was context for how intoxicated JR was, and how that intoxication affected her, e.g., lowering her inhibitions to do things she might not do if sober, and things she did not remember.

This contextual evidence was crucial for the jury to understand when considering the defense -- that JR touched Jacob on his pelvic area when he was on her bed. If while highly intoxicated she was willing to express an interest in Jacob, and kiss people she might not kiss when sober, the defense had a right to present this evidence of lowered inhibitions and lack of memory to the jury. As in *Jones*, the State had no compelling interest to exclude this highly relevant evidence.

c. *The Court Denied Confrontation, the Right to Present a Defense, and Abused its Discretion By Limiting Cross-Examination of the State's Expert.*

Part of the right to present a defense is the right to confront witnesses through cross-examination. U.S. CONST., amends. 6, 14; CONST., art. I, § 22.

The expert [witness] may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless

the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

ER 705. A DNA analyst's ability to override the computer to decide whether an allele is or is not present is properly the subject for cross-examination. *State v. Copeland*, 130 Wn.2d 244, 275-77, 922 P.2d 1304 (1996) (analyst's opinion despite computer readout goes to weight, not admissibility, of DNA evidence; application of typing procedure in a particular case is proper subject of cross-examination).

Since at least 1921, it has been proper in cross-examining the plaintiff's expert to use hypothetical questions based on what the defense expects to establish in its case. *Levine v. Barry*, 114 Wash. 623, 626-31, 195 P. 1003 (1921). Here the court ruled such questions were "speculative" and so inadmissible. It was wrong.

Here counsel's challenge to how the State's expert reached his conclusion allowed the jury to consider the extent and basis for his disagreement with the defense expert who testified later. Posing the hypothetical based on the defense expert's analysis was completely proper. If the

State's expert could agree with the defense expert's approach, the jury could realize the human judgment was the only difference in the opinion, and consider the basis for that judgment.

Without this evidence, the jury was left with the State's improper argument in opening that the defense expert will claim the DNA is not what it appears, "that the reality isn't what the reality is, things aren't what they seem," RP 208; and in closing that an opinion that there "could be" a second male's DNA is "not evidence," RP 938.

The court's ruling that this line of questioning was irrelevant was an abuse of discretion and denied the defense right of confrontation. It is logically impossible for the same line of questioning to be relevant for one expert and not the other.

- d. *The Court Erroneously Excluded Evidence of Appellant's Reputation for Sexual Morality.*

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. "[T]he threshold for relevance is extremely low under ER 401." *Kennewick v. Day*, 142 Wn.2d 1, 8, 11 P.3d 304 (2000).

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

ER 404(a).

METHODS OF PROVING CHARACTER

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

ER 405(a).

"A defendant has a constitutional right to present a defense consisting of relevant and admissible evidence." *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000).

Through the use of character evidence, "the defendant generally seeks to have the jury conclude that one of such character would not have committed the crime charged." ...

Day, supra, 142 Wn.2d at 6.

i. *Pertinent trait of character*

"Pertinent" is synonymous with "relevant."

A pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait. *Day*, 142 Wn.2d at 6.

In *Griswold*, the defendant was charged with molesting his 15-year-old student. His lawyer⁷ offered his employer's testimony that he had a good reputation "as to general moral character" and she was not "aware of anything in the way of a negative character or reputation as regards his moral, his sexual moral character." 98 Wn. App. at 822. Five other witnesses would have testified similarly. The trial court would have admitted the evidence except for *State v. Jackson*, 46 Wn. App. 360, 730 P.2d 1361 (1986),⁸ which it believe compelled exclusion. 98 Wn. App. at 828.

On appeal, this Court held "sexual morality is a pertinent character trait in cases such as the

⁷ William McCool, trial counsel below, also was trial counsel for Mr. *Griswold*. RP 713-15.

⁸ *Jackson* is distinguishable, as it involved sexual abuse of a 5-year-old; people's reputations rarely encompass anything as secretive as child sexual abuse.

present one." However, it concluded Griswold's offer of proof went only far enough to address "general moral character," not specifically "sexual moral character." *Griswold* at 829-30.

Mr. McCool corrected that error in this case. Each of the four character witnesses offered evidence that Jacob had a good reputation for "sexual morality." RP 736-58. One narrowed it further to sexual morality for not having affairs on his girlfriend. RP 736-40.

The Day Court reversed a conviction of possessing drug paraphernalia because the trial court excluded character evidence of defendant's sobriety from drugs. The charge required proof of intent to use the paraphernalia to ingest drugs. The defense was unwitting possession.

[T]he question is whether evidence of Day's reputation for sobriety from drugs and alcohol makes it less probable that he used or intended to use the marijuana pipe to smoke marijuana. Considering that the threshold for relevance is extremely low under ER 401, we must answer in the affirmative. ... We believe that a jury could conclude that a person who does not use drugs (by reputation at least) is less likely to use a marijuana pipe to smoke marijuana.

Day, 142 Wn.2d at 8.

Here the State charged Jacob with sexually penetrating JR while she was too drunk to consent, and while he was on the same bed with his fiancée. A jury could conclude that his good reputation for sexual morality in general, and for not cheating on his girlfriend in particular, made him less likely to commit this charged crime in this way. It was error to exclude this evidence.

ii. *Method of proving character*

The character witnesses offered that in their communities they shared with Jacob, they had never heard anything bad about his sexual morality. This method of proving reputation has long been approved by the Washington Supreme Court.

[W]here a character witness testifies that he knows the defendant and his associates in the community in which he lives, and that he has never heard defendant's character called in question, such character is good. This is no doubt the law

State v. Underwood, 35 Wash. 558, 572, 77 P. 863 (1904). *Accord: State v. Turfey*, 100 Wash. 5, 10, 176 P. 563 (1918) (witness who testified he'd never heard anyone in community question defendant's honesty "in effect, testified to his good reputation").

Under the rule that a defendant in a criminal case is entitled to introduce evidence of his good character,

even negative testimony, ... namely, that the witness has never heard the defendant's character called in question, is admissible. We have ourselves so held. ...

But to invoke such rule with respect to negative testimony, it must be shown that the witness was duly qualified to speak upon the subject, that is, that the witness was so situated that he would likely have heard any comments concerning the defendant's character.

State v. Arine, 182 Wash. 697, 698-99, 48 P.2d 249 (1935) (citing *Underwood and Turfey*).

While these cases are old, they have never been overruled by the Supreme Court. Thus they remain binding authority on the lower courts.

Appellant's witnesses testified they were members of large communities with Jacob, they were so situated they would have heard if he had a bad reputation for sexual morality, and they had never heard anything bad. This is a valid method of proving a good reputation. It was an adequate foundation for this character evidence. The court erred by excluding it.

e. *The Court Improperly Limited Defense Counsel's Closing Argument.*

The Sixth Amendment right to counsel includes the right to make closing argument for the defense. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Closing argument is the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt." *Id.*; *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Improperly limiting closing argument may infringe on the defendant's right to due process.

Courts prohibit the State from trivializing the burden of proof beyond a reasonable doubt. *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014); *State v. Johnson*, 158 Wn. App. 677, 243 P.d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

Here the trial court relied on *Lindsay* and *Johnson* which held it was prosecutorial misconduct to "quantify" the State's burden of proof, in particular, to argue 50% was sufficient proof beyond a reasonable doubt. *Lindsay*, 180 Wn.2d at 434; *Johnson*, 158 Wn. App. at 682. But the State has a greater burden than does the defense, and the rules do not apply to both equally.

[A] jury need do nothing to find a defendant not guilty. ... [T]he State

bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.

State v. Emery, 175 Wn.2d 741, 759-60, 278 P.3d 653 (2012). The State must function in the interest of doing justice, not merely winning at all costs. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

The defense has a right to emphasize the gravity of the State's burden of proof, to illustrate it for the jury with more familiar concepts. Because of these different burdens, what may properly limit the prosecution may not limit the defense.

There is no question that a preponderance of the evidence means "more probably true than not true." See WPI 21.01; *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). That concept commonly is compared to surpassing a 50% balance. Nor can there be disagreement that proof beyond a reasonable doubt requires a greater degree of proof and certainty than a preponderance. Defense counsel may properly use an analogy for the jury to understand these concepts.

The court prohibited counsel from using a model or diagram of the scales of justice, and sustained the State's objection to counsel suggesting the jury consider letter grades on the quality of evidence to establish proof beyond a reasonable doubt. These rulings improperly limited counsel's ability to argue these basic concepts to the jury. They denied appellant his right to counsel.

f. *Denial of Appellant's Constitutional Right to Present a Defense Was Not Harmless Beyond a Reasonable Doubt.*

Constitutional error can be harmless if the State can establish beyond a reasonable doubt that "the jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724. It cannot do so in this case.

In *Jones*, the Court reversed the rape conviction although the defendant had fled the state, refused to provide a DNA sample, and had no witnesses to corroborate his version of events. Here Jacob voluntarily gave the police an interview the same week as the incident, voluntarily gave a DNA sample, and had another witness to corroborate that JR sat on his lap. It was the only way he

could "explain away" the DNA evidence, which the prosecutor argued he failed to do. Other than the DNA evidence, the State was left with the testimony of a highly intoxicated woman who did not recall many things that happened that night and who was having sex dreams. There is a high probability with this evidence, the jury would have reached a different verdict. This Court must reverse this conviction on that error alone.

Certainly the cumulative effect of excluding crucial defense evidence and limiting counsel's argument to the jury greatly disabled the defense. It is highly likely if the jury had heard all of this evidence and argument, it would have reached a different verdict.

2. THE COURT ERRED AND DENIED APPELLANT DUE PROCESS BY DEFINING PROOF BEYOND A REASONABLE DOUBT AS AN "ABIDING BELIEF IN THE TRUTH OF THE CHARGE."

In any criminal case, the government must prove beyond a reasonable doubt every element of a charged offense.⁹

It is critical that the moral force of the criminal law not be diluted by a

⁹ *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); U.S. CONST., amend. 14; CONST., art. I, § 3.

standard of proof that leaves people in doubt whether innocent men are being condemned.

Winship, 397 U.S. at 364. Thus in every criminal case, the court's instructions to the jury must inform the jury of the reasonable doubt standard by a specific instruction. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

In *Bennett*, the Supreme Court instructed our state's trial courts to use the WPIC 4.01 instruction to inform the jury of the government's burden of proof "until a better instruction is approved." *Id.* at 318. Nonetheless, it observed that the "abiding belief" phrase is bracketed in WPIC 4.01. The bracketed language indicates the language is optional. WPIC 0.10.

As *Bennett* describes, over the years courts have approved varied instructions defining proof beyond a reasonable doubt. Language can change meaning over time. See, e.g., *Victor v. Nebraska*, 511 U.S. 1, 8-17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (discussion of "moral evidence" from more than a century earlier).

In *Victor*, the Court specifically held that the concept of an "abiding conviction" impressed on the jurors "the need to reach a subjective state of near certitude of the guilt of the accused." *Victor*, 511 U.S. at 14-15. Our Court of Appeals adopted the same interpretation:

"[A]n abiding belief in the truth of the charge" connotes both duration and the strength and certainty of a conviction. Defense counsel properly relied on the abiding belief language in the reasonable doubt instruction to emphasize the attorney was seeking to impress on the jurors the need "to reach a subjective state of near certitude of the guilt of the accused."

State v. Osman, 192 Wn. App. 355, 375, 366 P.3d 956 (2016). In doing so, defense counsel "did not overstate or improperly quantify the State's burden of proof." *Id.* The trial court erred there by sustaining the State's objection to the defense argument.

"Abiding" means "continuing for a long time, enduring."¹⁰ The word itself does not convey "a subjective state of near certitude" to today's common juror. Yet proof beyond a reasonable doubt requires that degree of certainty; it must be more than a preponderance of the evidence. One may have an "enduring" belief that something has been proven to be more likely than not. But that enduring quality alone does not establish proof beyond a reasonable doubt.

Here the defense objected to the "abiding belief" language the State proposed, on the grounds that it converted the concept of proof beyond a reasonable doubt to a measurement of time, of duration, rather than degree or weight of evidence and certainty. Indeed, that is precisely how the State argued the instruction: it referred the jury to a "relatively easy to understand" definition, that single sentence completely defining "beyond a reasonable doubt."

[I]f that belief in the truth of the charge abides with you, stays with you, sticks with you, rests with you, those

¹⁰ MERRIAM-WEBSTER.COM DICTIONARY, Merriam-Webster, <https://www.merriam-webster.com/dictionary/abiding> (last visited 6/16/2020).

are all synonyms for "abide," then **the only thing you must do is return a verdict of guilty at that point.**

RP 889.

The cases that have approved this language in the past did not include an argument like the prosecutor made here. This argument, supported by the court's instruction given over objection, demonstrates why this language is improper and can mislead a jury to reduce the State's burden of proof. It requires reversal.

3. PROSECUTORIAL MISCONDUCT IN OPENING AND CLOSING DENIED APPELLANT A FAIR TRIAL.

As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.

[S]uch officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008) (Court's emphasis). A prosecutor's comments can be improper because they undermine the presumption of innocence, impugn the defense, shift the burden of proof, or misrepresent the law

regarding the burden of proof. Prosecutorial misconduct denies appellant a fair trial and due process if the State's comments were improper and prejudicial. *Lindsay*, 130 Wn.2d at 430.

a. *The Prosecutor Misstated the Law on the Presumption of Innocence and Proof Beyond a Reasonable Doubt.*

As discussed above, the State's argument reducing proof beyond a reasonable doubt to a matter of time rather than level of certainty, "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *State v. Johnson*, 158 Wn. App. at 685-86. As in *Johnson*, it was flagrant and ill intentioned. It was incurable by an instruction because the court had overruled an objection to the instruction on precisely these grounds.

b. *The Prosecutor Shifted the Burden of Proof.*

A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. It is improper for the State to argue that the defense has failed to disprove the State's case. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076

(1996), *review denied*, 131 Wn.2d 1018 (1997); *State v. Traweek*, 43 Wn. App. 99, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986).

In *Fleming*, as here, the prosecutor argued there were several things the defense "never explained." 83 Wn. App. at 214-15. The argument improperly shifted the State's burden of proof to the defense.

Here this argument was particularly prejudicial because the State knew the excluded evidence -- that JR sat on Jacob's lap -- could explain how the DNA got on her underpants. Thus after successfully excluding the evidence, it argued because the defense had not presented such evidence, the jury must convict.

This case thus differs from *Osman*, 192 Wn. App. at 366-68. In *Osman* the prosecutor did not argue that defense failed to present the very evidence it had managed to exclude.

c. *The Prosecutor Impugned the Defense.*

[A] prosecutor must not impugn the role or integrity of defense counsel. ... Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible.

State v. Lindsay, 180 Wn.2d at 431-32; see also *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (prosecutor said defense counsel was "being paid to twist the words of the witnesses"); *State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (prosecutor impermissibly contrasted own role with defense counsel: defense counsel's duty to criminal client, prosecutor's duty "to see that justice is served").

Here the prosecutor didn't even wait for closing argument, but informed the jury in opening, before it heard any evidence, that the defense would lie to the jury and claim "the reality isn't what the reality is, that things aren't what they seem."

[T]he obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth.

Bruno v. Rushen, 721 F.2d 1193, 1194 (9th Cir. 1983), *quoted with approval* in *Lindsay*, 180 Wn.2d at 433.

This statement in opening was flagrant and ill-intentioned. Since the prosecutor spoke specifically of the DNA evidence, and since the

court limited the defense cross-examination of the State's DNA expert, it also was highly prejudicial. It gave the jury permission to dismiss any difference between the State's and defense DNA experts because the State told them the defense would lie.

4. THE TRIAL COURT IMPROPERLY SUGGESTED HOW THE PROSECUTION COULD ARGUE THE EVIDENCE TO SUPPORT ITS CASE.

Criminal defendants have a due process right to a fair trial by an impartial judge. CONST., art. I, §§ 3, 22; U.S. CONST., amends. 6, 14. Impartial means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992); *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Colloquies between the court and counsel can be the basis for a fair trial challenge. *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

Public confidence in the administration of justice requires the appearance of fairness and actual fairness. *In re Murchison*, 349 U.S. 133,

136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999).

The due process right to a fair trial is implicated where the court crosses the line from neutral arbiter to advocate. *Moreno*, 147 Wn.2d at 509-11. "A trial court should not enter in the 'fray of combat' or assume the role of counsel." *State v. Ra*, 144 Wn. App. 688, 705, 175 P.3d 609 (2008).

In *Ra*, the trial court proposed theories for the State to use in admitting improper ER 404(b) evidence. *Id.* Here, the trial court improperly excluded defense evidence, then proposed how the State could argue the remaining evidence to thwart what remained of the defense theory. It literally suggested that without evidence that JR sat on Jacob's lap, the State needed to make the points that DNA transfer was equally likely from anyone at the party.

This comment crossed the line from neutral arbiter to advocate. It requires remand for a new trial before a different judge. *Ra, supra.*

5. CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

While it is possible that an individual error above, standing alone, might not be sufficiently grave to constitute grounds for a new trial, the combined effect of the accumulation of errors denied appellant a fair trial and due process. *State v. Coe, supra*, 101 Wn.2d at 789. The standard of review is *de novo*.

Here the multiple errors also overlap, increasing the prejudice of each. E.g., the erroneous exclusion of evidence that JR sat on Jacob's lap was exacerbated by the court limiting cross-examination of the State's DNA expert, and the prosecutor's improper argument shifting to the defense the burden of explaining away the DNA evidence. This Court should reverse the conviction for cumulative error.

6. THE COURT ERRED BY FINDING APPELLANT WAS NOT INDIGENT AND IMPOSING COSTS.

a. *The Trial Court Did Not Have the Discretion to Impose Discretionary Costs.*

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).

RCW 10.01.160(3). Before this statute was amended in 2018, it permitted the court to consider a defendant's future ability to pay. Since the amendment, courts no longer have the discretion to impose these costs if the defendant is indigent at the time of sentencing. *State v. Ramirez*, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018).

Mr. Ramirez's motion for an order of indigency, which the court granted, "unquestionably qualified" him as indigent at the time of sentencing. He had no source of income or assets and no savings, and owed more than \$10,000.

Here Jacob lost his nursing license and was going to prison for life with the possibility of parole after 7-1/2 years. He had no assets, no savings, and owed about \$75,000. Supp. CP (Subno. 101). The Court was on notice of the debts from the PSI. It did not inquire about his savings or assets. Jacob's certification was signed November 14, the date of sentencing. He was indigent on that date. The court did not have the discretion to impose the discretionary costs.

b. *This Court Must Remand to Strike All Costs Except the \$500 Victim Penalty Assessment.*

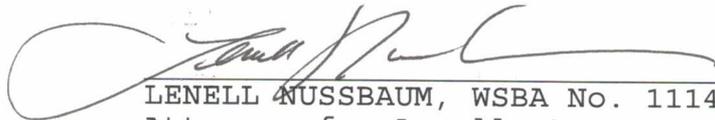
In *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019), the Court vacated the filing fee of \$200, but affirmed the mandatory \$500 victim fund assessment. It also vacated, however, the \$100 assessed for the DNA sample because the State previously had collected a DNA sample. *Id.* at 259.

Here the record establishes the State collected a DNA sample from Jacob. It was part of the State's evidence against him. This Court should vacate all costs, including the \$100 fee for repeating this procedure, affirming only the \$500 victim assessment.

D. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and remand for a new trial before a different judge.

DATED this 22d day of June, 2020.


LENELL NUSSBAUM, WSBA No. 11140
Attorney for Appellant Mr. Cox

APPENDIX A
Constitutional Provisions

UNITED STATES CONSTITUTION

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14, section 1:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON CONSTITUTION

Article I, § 3

Personal rights. No person shall be deprived of life, liberty, or property, without due process of law.

Article I, § 21

Trial by jury. The right of trial by jury shall remain inviolate ...

Article I, § 22

Rights of the accused. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. ...

APPENDIX B
Statutes

RCW 9A.44.020. Testimony -- Evidence -- Written Motion -- Admissibility.

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape, ... evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent, except where prohibited in the underlying criminal offense, only pursuant to the following procedure:

....

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

DECLARATION OF SERVICE

LENELL NUSSBAUM declares:

On this date I caused this document to be served electronically on the following parties by filing a copy in the Court of Appeals Division Three Portal:

Mr. James Lyle Nagle
Office of the Pros Attorney
240 W Alder St Ste 201
Walla Walla, WA 99362-2807
jnagle@co.walla-walla.wa.us

As well as:

On June 20th, 2020, I caused this document to be served on the following entities by depositing them in the United States Mail Service, postage prepaid, addressed as follows:

Mr. Jacob Nathaniel Cox
DOC# 418997
PO Box 769
Connell, WA 99326

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

June 22, 2020 - Seattle, WA
Date and Place


LENELL NUSSBAUM

LAW OFFICE OF LENELL NUSSBAUM PLLC

June 22, 2020 - 12:57 PM

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