

NO. 69452-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND ABITIA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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153

TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

 1. The convictions should be reversed because trial counsel prejudiced the outcome of the trial by failing to object to extensive, highly prejudicial evidence that Mr. Abitia had sexual intercourse with the alleged victim on an uncharged occasion..... 1

 2. The trial court abused its discretion by overruling Mr. Abitia’s objection to expert testimony that categorized him as a liar 7

 a. Mr. Abitia preserved the argument and can raise it on appeal 7

 b. The trial court abused its discretion in overruling Mr. Abitia’s objection and allowing expert testimony that opined on Mr. Abitia’s credibility..... 9

 3. Reviewing the errors on the whole, Mr. Abitia was denied a fair trial..... 11

 4. As the State concedes, the trial court abused its discretion by imposing a lifetime no-contact order purporting to protect Mr. Abitia’s older daughter..... 11

 5. The court’s finding that Mr. Abitia had the ability to pay discretionary fees and costs is without support and should be vacated along with the imposed legal financial obligations 12

B. CONCLUSION..... 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001)..... 10

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) 9

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)..... 3

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)..... 10

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 12

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967)..... 10

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)..... 9

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008)..... 9

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004)..... 4

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)..... 3

Washington Court of Appeals Decisions

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) 11

State v. Bacotgarcia, 59 Wn. App. 815, 801 P.2d 993 (1990)..... 3

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991) 13

State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011) 13

State v. Blazina, 174 Wn. App. 906, 301 P.3d 492
review granted 311 P.3d 27 (2013) 12

State v. Calvin, __ Wn. App. __, 302 P.3d 509 (2013)..... 12, 13

State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991) 13

State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993)..... 3, 6

<i>State v. Hunter</i> , 102 Wn. App. 630, 9 P.3d 872 (2000)	12
<i>State v. Quaale</i> , No. 30933-9-III, Slip Op. (Nov. 7, 2013).....	8, 9
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 157 P.3d 901 (2007)	5
<i>State v. Warren</i> , 134 Wn. App. 44, 138 P.3d 1081 (2006)	4

Other Authorities

RAP 7.2	13
Slough and Knightly, <i>Other Vices, Other Crimes</i> , 41 Iowa L. Rev. 325 (1956).....	3

A. ARGUMENT IN REPLY

1. **The convictions should be reversed because trial counsel prejudiced the outcome of the trial by failing to object to extensive, highly prejudicial evidence that Mr. Abitia had sexual intercourse with the alleged victim on an uncharged occasion.**

The State did not charge Mr. Abitia with any misconduct relating to the party at Dawn White's house in Mt. Vernon, Washington. Yet, evidence relating to what occurred in Mt. Vernon occupied the trial. The State argued and the jury considered that, because witnesses could testify to sexual abuse and drug use in Mt. Vernon (the uncharged acts), Mr. Abitia was also guilty of the charged acts. Trial counsel failed to object to the admission of this propensity evidence. Thus, the evidence was admitted and no limiting instruction was provided. Trial counsel was ineffective.

The State's argument that trial counsel made a legitimate tactical decision not to object to the prejudicial propensity evidence fails on several grounds. First, Mr. Abitia's defense was that K.M.A. provided false testimony—he had never abused K.M.A. or distributed drugs to her. *E.g.*, 6/13/12 RP 331 (defense closing argument focuses jury immediately on credibility); 6/13/12 RP 332-33, 335 (continuing to argue credibility); 6/13/12 RP 209-20, 223-24, 234-35, 337

(testimony of Abitia); 6/13/12 RP 247-77 (testimony of only other defense witness, Abitia's nephew). The portions of closing argument relied on in the State's response brief patently do not show that trial counsel sought to "juxtapose the specific testimony about the incident in Mt. Vernon" with the very vague evidence regarding the Whatcom County allegations. *See* Resp. Br. at 17-18. In fact, in one of these excerpts, defense counsel is actually arguing against a finding of propensity—something he would not have had to do if the evidence had been excluded upon objection or a limiting instruction provided.

6/13/12 RP 334 (arguing State wants jury to believe that because Abitia had "meth on that day" he also "had it some time before and that there had to be a first time"). But, even if the defense had sought to demonstrate that the State presented unspecific evidence of the charged counts that should raise a reasonable doubt, that argument easily could have been made without inducing the State's admission of highly prejudicial testimony related to the Mt. Vernon, uncharged incident.

The defense could have simply argued the jury should find a reasonable doubt because the evidence was insufficient and vague, as the accused often does at trial. Third, even if trial counsel found the propensity evidence strategically useful, an objection would have necessitated the

court to provide a limiting instruction. With a limiting instruction, the evidence could still have provided whatever strategic value the State imagines but the jury would have been prevented from considering it for propensity or other prejudicial purposes.

The State's argument fails for a more fundamental reason as well. There can be no legitimate strategic reason for admitting such highly prejudicial propensity evidence. In "sex cases[,] . . . the potential for prejudice" stemming from uncharged acts "is at its highest." *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (quoting *State v. Coe*, 101 Wn.2d 772, 780, 684 P.2d 668 (1984); *State v. Bacotgarcia*, 59 Wn. App. 815, 819, 801 P.2d 993 (1990)). The potential for prejudice is at its highest in cases like this because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 333-34 (1956)). Prejudice inheres in the admission of this evidence. *Id.* at 364. Counsel's failure to object to its admission cannot be an objectively reasonable trial tactic. *See State v.*

Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (performance deficient if no legitimate tactical explanation supports it).

Likewise, the State's argument that the evidence was admissible for another purpose is also unpersuasive. The State argues that the evidence was *res gestae* of the crime. But as set forth in the opening brief, the extensive evidence relating to party in Mt. Vernon, Dawn White's perception of sexual misconduct at that party, and K.M.A.'s testimony as to purported drug use and sexual abuse during the party was not so connected in time or place to the charged acts of prior misconduct in Whatcom County that such evidence was necessary to the State's case. Op. Br. at 18. The State's reliance on *State v. Warren* does not assist its argument. Resp. Br. at 13-14 (citing *State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006)). In *Warren*, this Court affirmed the trial court's admission of "limited evidence" regarding the alleged child abuse victim's disclosure to police, which occurred during investigation into a different allegation of abuse. 134 Wn. App. at 61-63. The evidence in *Warren* was substantially limited by the trial court's order to only the components essential for *res gestae* and a limiting instruction was provided. *Id.* at 61-62. Moreover, contrary to the State's argument, it is quite simple to imagine how the trial would

have occurred without extensive evidence of the Mt. Vernon incident—the State could have put Ms. White on the stand to testify that K.M.A. disclosed the Whatcom County abuse to her at a party at her house. *See* Resp. Br. at 16-17 (“It is hard to imagine how the trial would have occurred, and the defense presented, without testimony concerning the Mt. Vernon incident.”). The State arguably could have elicited that the disclosure arose after Ms. White viewed unspecified conduct that raised questions for her. But the State should not have been allowed to focus the trial on detailed specifics of an uncharged act, testified to by multiple witnesses.

Upon objection, the evidence also should have been excluded even if the State proffered a lustful disposition purpose. The State relies in part upon the Division Three case *State v. Sexsmith* to argue the evidence was probative of lustful disposition. Resp. Br. at 14, 15 (citing *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007)). That case is inapposite because the trial court admitted the evidence for a different purpose than lustful disposition; in *Sexsmith* evidence of uncharged abuse was admitted to show a common scheme or plan. 138 Wn. App. at 504. As the State has admitted, the record does not support a common scheme or plan argument here. Resp. Br. at 14 n.7.

Further, the lustful disposition purpose would only have permitted admission of some evidence of sexual misconduct, but would not have supported admission of any purported drug use in Mt. Vernon.

The State also overlooks the trial court's need to balance the evidence's probative value against the risk of unfair prejudice. As this Court noted in *State v. Dawkins*, trial counsel's failure to object deprived the trial court of its essential, discretionary determination on the admissibility of the evidence. 71 Wn. App. at 910. Like in that case, any probative value here was slight because identity was not at issue. *Id.* at 909. Yet, the prejudice from extensive evidence of the uncharged misconduct was "very great." *Id.*

But even more significantly, even if the evidence would have been admissible for one of these purposes and despite the balancing of relevance and prejudice, trial counsel was ineffective by failing to request an instruction that would limit the jury's consideration of the evidence. Without the instruction, the jury was free to consider the evidence as propensity. The State's argument that an instruction would have been "more confusing" to the jury lacks basis. *See* Resp. Br. at 20. The jury likely found Mr. Abitia guilty of the charged Whatcom County acts because they were persuaded he had provided K.M.A.

methamphetamine and then engaged in sexual misconduct on another uncharged occasion in Mt. Vernon.

2. The trial court abused its discretion by overruling Mr. Abitia's objection to expert testimony that categorized him as a liar.

The trial court abused its discretion by admitting expert testimony that placed him in a category of liars. Contrary to the State's argument, Mr. Abitia preserved the issue for review by this Court. The error requires reversal.

- a. Mr. Abitia preserved the argument and can raise it on appeal.

As discussed in the opening brief, trial counsel objected to Dr. Joan Gaasland-Smith's testimony. He stated,

Your Honor, we would object it this. There is nothing here to indicate that she is discussing anything that occurred in this case. She is talking about things in general that by implication apply to this case, but don't in fact, apply to this case. So we object to this whole line of questioning as to what do other sexual predators do or what are their habits or whatever. There is nothing to indicate that any of that is occurring in this case.

...

What they are hearing is also highly prejudicial. It implies that all sex offenders act in a certain way and that she can recognize them and telling them what they can do to recognize this as well.

6/11/12 RP 106-07. The court ruled the testimony was admissible but instructed the State to “proceed with caution” “so that generalization does not directly or indirectly suggest to the jury that that is what has happened in the particular case that the jury is dealing with.” 6/11/12 RP 108-09.

Later, defense counsel renewed the objection but was cut off by the court, assuring Mr. Abitia that he did not need to make any further record. 6/11/12 RP 121.

MR. HENDRIX: Your Honor, I would renew my objection to the whole line of testimony of this expert. I’m not sure that she has told the jury anything that’s relevant to this case that, that would be helpful. And I think it’s highly prejudicial, implying that a lot of things occurred that –

THE COURT: I have already ruled on your objection, Mr. Hendrix. We don’t need a speaking objection. So the ruling stands.

6/11/12 RP 121.

The State tries to argue that Mr. Abitia’s objection was limited to ER 702 whereas his argument on appeal relates to ER 701. Resp. Br. at 21-25. But the State attempts to manufacture a meaningless distinction. “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Quaale*, No. 30933-9-III, Slip Op. at 7-8 (Nov. 7, 2013)

(quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). The rule is identical as relates to testimony on the veracity of the accused: “Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “Even where expert testimony is helpful to the jury, ‘[i]t is unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of guilt.’” *Quaale*, Slip Op. at 8 (quoting *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008)).

Mr. Abitia’s objection below sufficiently preserved the issue for appeal—even despite the trial court’s refusal to hear any more from trial counsel. *See* 6/11/12 RP 106-07, 121.

- b. The trial court abused its discretion in overruling Mr. Abitia’s objection and allowing expert testimony that opined on Mr. Abitia’s credibility.

The State spends considerably less effort disputing Mr. Abitia’s argument that the trial court abused its discretion by admitting the evidence. *See* Resp. Br. at 26-28. The State contends Ms. Gaasland-Smith’s testimony related to her “opinion that children frequently do not disclose abuse all at once.” Resp. Br. at 28. But the State fails to

explain why, in doing so, the witness was required to opine as to the veracity of Mr. Abitia or to otherwise implicitly group him with sexual predators. Ms. Gaasland-Smith told the jury that, in her professional opinion, sexual perpetrators “oftentimes . . . don’t tell the truth.” 6/11/12 RP 111. She explained that sexual deviancy evaluations summarize the perpetrators’ disclosures of misconduct and behaviors that are checked with a lie detector test because perpetrators cannot be trusted to provide the truth. 6/11/12 RP 110-11. She focused on the perpetrator, not the alleged victim. Moreover, she told the jury that it is standard practice to administer polygraphs to people like Mr. Abitia because they cannot be trusted.

Put simply, Ms. Gaasland-Smith told the jury Mr. Abitia is a liar. The trial court allowed her to so testify even though it is the jury’s job to assess the credibility of witnesses and determine whether guilt has been shown beyond a reasonable doubt. *E.g.*, *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001); *State v. Atsbeha*, 142 Wn.2d 904, 925, 16 P.3d 626 (2001); *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). The testimony invaded these exclusive provinces of the jury and prejudiced Mr. Abitia’s right to testify in his

own defense. The trial court abused its discretion by admitting the evidence.

3. Reviewing the errors on the whole, Mr. Abitia was denied a fair trial.

As discussed in Mr. Abitia's opening brief, even if the Court disagrees that an individual trial error requires reversal, the aggregate effect of the errors denied Mr. Abitia a fundamentally fair trial. Op. Br. at 37-38. The remedy is to remand for a fair trial. *See, e.g., State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Notably, the State declined to respond to Mr. Abitia's cumulative error argument.

4. As the State concedes, the trial court abused its discretion by imposing a lifetime no-contact order purporting to protect Mr. Abitia's older daughter.

The State concedes that the lifetime protection order as to Mr. Abitia's adult daughter, who was not the victim of the charged crimes, should be vacated. For the reasons set forth in both parties' briefs, this Court should accept the State's concession. Op. Br. at 38-42; Resp. Br. at 34-35.

5. The court's finding that Mr. Abitia had the ability to pay discretionary fees and costs is without support and should be vacated along with the imposed legal financial obligations.

Alternatively, if the convictions are affirmed, this Court should strike the erroneous imposition of discretionary fees because the evidence did not show Mr. Abitia has or likely will have the ability to pay. In response, the State contends that Mr. Abitia did not preserve the issue for appeal. Resp. Br. at 36. But the State's argument is premised upon a Division Two case which has since been accepted for review by our Supreme Court. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 review granted 311 P.3d 27 (2013), consolidated on review with *State v. Paige-Colter*, No. 89109-5.

Moreover, "established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "This rule applies likewise to a challenge to the sentencing court's authority to impose a sentence." *State v. Hunter*, 102 Wn. App. 630, 633, 9 P.3d 872 (2000) (reviewing challenge to imposition of financial contribution to drug fund raised for the first time on appeal). This Court should follow its precedent and review the sentencing issue on appeal. See, e.g., *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521-22 (2013); *State v.*

Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991); *State v. Baldwin*, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991).

Furthermore, like in *Calvin*, this Court should reject the State's argument that Mr. Abitia must show he "does not have the ability to pay his legal financial obligations in the future." *Compare* Resp. Br. at 35 with *Calvin*, 302 P.3d at 521. In *Calvin*, the record merely showed that the appellant "used to be a carpenter. There was no evidence at all of present or future employment." 302 P.3d at 521. The same is true here: the State argues Mr. Abitia used to paint houses, Resp. Br. at 35, 38-39, but the record fails to show current or future employability and Mr. Abitia was found indigent and sentenced to an indeterminate sentence of 136 months to life. *See* CP 142.¹

The error should be reviewed and the imposition of costs stricken.

¹ This brief cites to the amended judgment and sentence filed on December 12, 2012 and approved pursuant to the State's RAP 7.2(e) motion. CP 140-53. Because the RAP 7.2 motion was filed after Mr. Abitia's opening brief, that brief cites to the original judgment and sentence, at CP 65-77, which is identical for all purposes material to this appeal.

B. CONCLUSION

As set forth above and in Mr. Abitia's opening brief, his convictions should be reversed because he was denied his constitutional right to the effective assistance of trial counsel when trial counsel had an obvious basis to object to the admission of the State's key evidence, yet failed to do so. Reversal is also required because the trial court admitted expert testimony categorizing Mr. Abitia as a liar, because the court's instruction and the prosecutor's misconduct diluted the burden of proof, and because these errors in the cumulative denied Mr. Abitia a fair trial.

In the alternative, the Court should accept the State's concession and strike the lifetime protective order to the extent it includes Kerry Abitia. The Court should also strike the imposition of discretionary fees and costs totaling \$2,850.

DATED this 13th day of November, 2013.

Respectfully submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 69452-9-I
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RAYMOND ABITIA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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x _____ 

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