

69452-9

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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 OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Ineffective assistance of counsel resulted in the admission of highly prejudicial propensity evidence without a limiting instruction. Considering this evidence without limitation, a jury convicted Mr. Abitia. The unfairness of Mr. Abitia's trial extended further—an expert testified people like Mr. Abitia are liars and the court's instructions and the prosecutor's argument lessened the State's burden of proof. Based on each of these errors individually or in the cumulative, the resulting convictions should be reversed.

B. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to object to the admission of propensity evidence.
2. Trial counsel was ineffective for failing to secure a limiting instruction for other acts evidence under ER 404(b).
3. The trial court abused its discretion by admitting expert testimony that implicated Mr. Abitia's guilt and infringed on his right to testify.
4. Instruction 2 misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

5. Prosecutorial misconduct denied Mr. Abitia his due process right to a fair trial.

6. Cumulative error denied Mr. Abitia his due process right to a fair trial.

7. The lifetime protective order is overbroad to the extent it includes no contact for life with Mr. Abitia's adult daughter Kerry, who was not alleged to be a victim of the charged crimes.

8. The sentencing court erred in imposing discretionary costs and fees.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee criminal defendants the right to effective assistance of counsel at trial. An attorney's failure to object to trial error constitutes ineffective assistance of counsel under the Sixth Amendment where there is no reasonable tactical justification for the omission and it prejudices the accused. Evidence of uncharged wrongs or acts is inadmissible to prove propensity to commit the charged wrong. Was trial counsel ineffective where he failed to object to extensive evidence of an uncharged act of misconduct that would not have been admissible for any non-propensity purpose or, if it had been so admissible, should

have been excluded because the probative value was substantially outweighed by the prejudice or should have been accompanied by a limiting instruction?

2. Testimony that opines on the defendant's guilt or credibility invades the exclusive province of the jury to assess credibility and determine guilt. It also compromises a defendant's fundamental constitutional right to testify in his own behalf. Did the trial court abuse its discretion by admitting the State's expert's testimony that perpetrators like Mr. Abitia "oftentimes . . . don't tell the truth?"

3. The jury's role is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." When it is not the jury's job to determine the truth, did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

4. A prosecutor commits misconduct by telling the jury its role is to determine the truth. Was Mr. Abitia denied a fair trial where the prosecutor emphasized the jury's role was to find the truth?

5. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Abitia denied a fundamentally fair trial?

6. A condition of community custody that affects a fundamental constitutional right, such as the right to parent, must be narrowly-tailored to achieve a compelling state interest. Should this Court order stricken a lifetime prohibition against all contact with Mr. Abitia's adult daughter who was not a victim of the crimes of conviction, where the state did not justify the unlimited prohibition and the court did not consider alternatives, such as indirect or supervised contact?

7. Courts may not impose discretionary costs on defendants unless they have a present or likely future ability to pay. A finding of ability to pay must be supported by the evidence. Though the trial court found Mr. Abitia indigent and no evidence of his ability to pay discretionary costs was presented, the court entered a generic finding that he had the present or future ability to pay and imposed discretionary costs and fees. Did the sentencing court err in ordering Mr. Abitia to pay discretionary fees and costs?

D. STATEMENT OF THE CASE

The State charged Mr. Abitia with rape of a child in the second degree, RCW 9A.44.076 (count one), and delivery of a controlled substance to a minor, RCW 69.50.406(2) & RCW 69.50.401(1) (count two). The charged acts were alleged to have occurred in Whatcom County between March 24, 2009 and April 3 or 4, 2011.

At trial the evidence focused on an uncharged allegation stemming from a family party in Mt. Vernon, Skagit County, rather than the facts underlying the charged Whatcom County counts. Dawn White—the State’s first witness, Mr. Abitia’s niece and a resident of Mt. Vernon—testified she hosted a birthday party for her children at her Mt. Vernon home in April 2011. 6/11/12 RP 36-37. Mr. Abitia attended with his 14-year-old daughter, K.M.A. 6/11/12 RP 37, 130-31. Mr. Abitia testified that he was in a bedroom he regularly used when he visited, when K.M.A. came in and started changing her clothes. 6/13/12 RP 209-12.

Ms. White perceived events differently. According to her testimony, which was received by the court without objection, after many guests had left Ms. White went upstairs and noticed her son’s bedroom door was closed. 6/11/12 RP 39-40. She opened the door to

find Mr. Abitia breathing hard, sweating and shaking, and K.M.A. on the edge of a mattress with one pant leg completely removed. 6/11/12 RP 36-83. Ms. White described the layout of her home, the details of the party during which the incident allegedly occurred, and the bedroom in which it allegedly occurred. 6/11/12 RP 36-39, 68, 70; Exhibits 2, 3, 4. She provided further detail when recalled as a rebuttal witness. 6/13/12 RP 298-300. Other witnesses expanded on these details related to the uncharged incident. 6/11/12 RP 84-92. The evidence also focused on Ms. White and the extended family's reaction to the event. 6/11/12 RP 44-50, 57-59, 84-92, 148-51. Focusing on the Mt. Vernon incident, the State also presented testimony from K.M.A. regarding what occurred at the Mt. Vernon home of Ms. White. 6/11/12 RP 130-36, 139-50. K.M.A. provided detailed testimony about Mr. Abitia providing her methamphetamine that day and then having intercourse with her until the point that Dawn White came to the door. 6/11/12 RP 134-36, 142-47.

The evidence regarding the charged acts was much less detailed. K.M.A. testified that she first tried methamphetamine when she was 12 years old and used it regularly for two years. 6/11/12 RP 136-38, 162-63, 173-74. She got it from Mr. Abitia and others. 6/11/12 RP 162-63,

173-75. She also testified Mr. Abitia first had intercourse with her in a spare bedroom of their home on Wisner Lake when her brother and his friends were just a few rooms away. 6/11/12 RP 154-59. Others testified there was no spare room in that home. 6/13/12 RP 240, 286. She also testified vaguely about two other incidents: The first, where Mr. Abitia digitally penetrated her in her grandparents' house, while her grandparents were asleep, ended within less than a minute when her cousins came into the room. 6/11/12 RP 159-60. The second, she said, on unspecified occasions, her father took her to an "abandoned" home and "did the same thing." 6/11/12 RP 163-66.

The State also presented the testimony of Joan Gaasland-Smith, a sexual assault case specialist for the Whatcom County Prosecuting Attorney's Office. 6/11/12 RP 101. She had not participated in interviewing K.M.A. 6/11/12 RP 119-20, 125. She testified about her opinion on the disclosure patterns of sexually abused children. *E.g.*, 6/11/12 RP 105-06, 110-17. She also opined that most sexual predators lie. 6/11/12 RP 110-12.

Mr. Abitia's testimony was limited to the Mt. Vernon party. 6/13/12 RP 209-20, 223-24, 234-35. He did not testify about events prior to April 2011. His nephew, Steven White (Dawn's brother),

testified in Mr. Abitia's defense; he did not find K.M.A.'s allegations credible. 6/13/12 RP 247-77. Mr. White believed Dawn White and K.M.A.'s older step-sister, Kerry, pushed K.M.A. to fabricate the allegations. 6/13/12 RP 276. Once K.M.A. reported the alleged abuse she began living with her mother, apparently enjoying the lack of supervision at her mother's home. 6/11/12 RP 168-70, 179-81; 6/13/12 RP 241, 267-68. *But see* 6/13/12 RP 307 (K.M.A. denies a newfound party lifestyle).

E. ARGUMENT

1. Mr. Abitia was denied his constitutional right to the effective assistance of counsel when his attorney failed to object to propensity evidence.

a. The federal and state constitutions guaranteed Mr. Abitia effective assistance of counsel.

All criminal defendants have the constitutional right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); *State v. A.N.J.*, 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects defendants' fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "[T]he very

premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”

Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *A.N.J.*, 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize a two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under *Strickland*, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226.

In reviewing the first prong of the *Strickland* test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no legitimate tactical explanation for counsel’s performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A lawyer’s

strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. *Strickland*, 466 U.S. at 690. Appellate courts find prejudice under the second prong if the defendant demonstrates “counsel’s errors were so serious as to deprive the defendant of a fair trial.” *Id.* at 687.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698.

b. Evidence of crimes, wrongs or acts other than that to which the charges pertain is inadmissible to show conformity.

Under Evidence Rule 404(a), “[e]vidence 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 in limited circumstances not applicable here. This rule bars evidence of a defendant’s bad character to show that he was likely to have committed the present offense because he committed the prior bad act. 5 K. Tegland, Wash. Prac. *Evidence* § 404.4 (5th ed. 2012). Rule 404(b) prohibits the admission of prior bad acts, crimes, or wrongs “to demonstrate the person’s character or general propensities.” Tegland, Wash. Prac. § 404.9. While evidence of prior bad acts, crimes or wrongs, may be admissible for other narrower purposes, such as proof of motive, opportunity, or intent, it is not admissible to show

conformity on another, charged occasion. ER 404(b); Tegland, Wash. Prac. § 404.9.

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The State’s bears a “substantial” burden to demonstrate admissibility. *Id.* at 17. Before evidence of other bad acts may be admitted pursuant to ER 404(b), the acts must be (1) proved by a preponderance of the evidence, (2) admitted for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, (3) relevant to prove an element of the offense charged or to rebut a defense, and (4) more probative than prejudicial. *E.g., State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995); *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (ER 404(b) evidence must “be logically relevant to a material issue before the jury” and “its probative value must . . . outweigh its potential for prejudice.”). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

- c. The State's case focused largely on an alleged act of sexual misconduct, for which Mr. Abitia was not charged, without any motion to exclude or objection from the defense.

Mr. Abitia was charged with acts alleged to have been committed in Whatcom County. He was charged with one count of rape of K.M.A. in Whatcom County between March 24, 2009 and April 4, 2011 when she was between 12 and 14 years old. CP 38. He was also charged with delivering methamphetamine to her in Whatcom County. CP 39.

Yet most of the trial focused on an alleged incident in Mt. Vernon, Washington, which is in Skagit County. The State's first witness was Dawn White, who testified she opened her son's bedroom door to find Mr. Abitia breathing hard, sweating and shaking and K.M.A. on the edge of a mattress with one pant leg completely removed. 6/11/12 RP 36-83. In the State's case-in-chief, Ms. White described the layout of her home, the details of the party during which the event allegedly occurred, and the bedroom in which it allegedly occurred. 6/11/12 RP 36-39, 68, 70; Exhibits 2, 3, 4. She provided further detail when recalled as a rebuttal witness. 6/13/12 RP 298-300.

Other witnesses expanded on these details related to the uncharged incident. 6/11/12 RP 84-92. The evidence also focused on

Ms. White and the extended family's reaction to the event. 6/11/12 RP 44-50, 57-59, 84-92, 148-51.

Further, the State admitted extensive testimony from K.M.A. regarding what occurred at the Mt. Vernon home of Ms. White. 6/11/12 RP 130-36, 139-50. She testified in glaringly prejudicial detail that Mr. Abitia touched her inside her vagina, under her clothes, then took her pants off, took her underwear down to her ankles, "pulled out his dick and he touched [her on the inside of her vagina] with his dick," quickly jumping up when he heard someone coming up the stairs and Ms. White opened the door. 6/11/12 RP 142-47. K.M.A.'s testimony encompassed another uncharged crime, wrong or act: that Mr. Abitia had provided her with methamphetamine shortly before Ms. White walked in on her and Mr. Abitia in the bedroom. 6/11/12 RP 134-36.

The Mt. Vernon event was an uncharged wrong, crime or act. *See* CP 38-39. It was inadmissible under ER 404 to show Mr. Abitia's propensity for intercourse or sexual contact with K.M.A. or delivering methamphetamine to her. It was inadmissible to show that because he had sexual contact with and delivered methamphetamine to K.M.A. in Mt. Vernon he also did so in Whatcom County on the charged occasions. Trial counsel, however, did not object to its admission, even

though the probable cause statement related this incident and the State's witness list made clear Ms. White would testify at trial. By failing to object, the State was not required to identify a purpose for the evidence other than demonstrating Mr. Abitia's propensity to commit the charged crimes. The trial court, in turn, did not evaluate its relevance, weigh its prejudicial value against its relevance, or provide a limiting instruction. By failing to object, the jury was entitled to consider the Mt. Vernon incident as evidence of Mr. Abitia's propensity to commit rape of K.M.A. and deliver methamphetamine to her, just as charged in the two counts at issue.

- d. Trial counsel acted objectively unreasonably by failing to object to the admission of this highly prejudicial propensity evidence.

Trial counsel's failure to object to evidence of the uncharged incidents was objectively unreasonable. The admission of ER 404(b) evidence is generally a matter within the trial court's discretion. *State v. Dawkins*, 71 Wn. App. 902, 910, 863 P.2d 124 (1993). Objecting to propensity evidence requires the State to articulate a limited purpose for which the evidence is admissible and requires the trial rule on the validity of that purpose, rule on the relevance of the evidence, and determine that the probative value is not substantially outweighed by

the danger of unfair prejudice or undue delay. *Id.* at 908-09. Even if the evidence is admissible for some other purpose under ER 404(b), the court must instruct the jury it cannot consider the evidence for any other reason.

There was no tactical basis not to hold the State and the trial court to its duties. The Mt. Vernon incident in no way advanced Mr. Abitia's defense, which was that K.M.A. was lying. By failing to exclude the Mt. Vernon evidence, the defense had to overcome testimony from a third-party witness to events substantially similar to those charged. Mr. Abitia's entire direct testimony was an attempt to rebut K.M.A. and other witnesses' testimony about the Mt. Vernon events. 6/13/12 RP 209-20. A substantial portion of cross-examination likewise was engulfed by the Mt. Vernon evidence. 6/13/12 RP 222-36. Ms. White's testimony also corroborated K.M.A.'s testimony as to the Mt. Vernon event, thereby bolstering her overall credibility. Without the Mt. Vernon incident, the case would have come down to a credibility contest between Mr. Abitia and K.M.A. Because the State was allowed to extensively prove the Mr. Vernon incident, the State's case was bolstered by third-party witnesses, corroborating evidence and intimate detail from K.M.A.

Admission of the evidence was not a surprise. The Mt. Vernon incident was discussed extensively in the probable cause statement. CP 6-7, 11-13. The State's witness list, filed months before trial, indicated it would call Ms. White of Mt. Vernon and a Mt. Vernon police detective. CP 97-98. But a failure to object to propensity evidence is objectively unreasonable, even where counsel had advance notice and an opportunity to consider whether to object. *Dawkins*, 71 Wn. App. at 906 (counsel's failure to move to exclude evidence that accused had molested child on prior, uncharged occasion ineffective despite counsel's research into lustful disposition exception and consultation with client).

Moreover, even if trial counsel had reasonably concluded the evidence would be admitted for another purpose under ER 404(b), such as lustful disposition, it was objectively unreasonable for trial counsel to fail to seek a limiting instruction. Absent trial counsel's objection, the jury was entitled to consider the Mt. Vernon incident for any basis, including to establish Mr. Abitia conformed to this conduct on prior occasions in Whatcom County and to bolster K.M.A.'s credibility. The failure to object for purposes of obtaining a limiting instruction cannot be a legitimate trial strategy.

In short, trial counsel acted objectively unreasonably by failing to object to evidence of other crimes, wrongs or acts.

- e. Mr. Abitia was prejudiced by trial counsel's deficient performance, requiring reversal of the convictions.

The second prong of the *Strickland* test requires Mr. Abitia to demonstrate prejudice by a reasonable probability. *Strickland*, 466 U.S. at 693. To establish prejudice, Mr. Abitia “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* Rather, he need only show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

First, if trial counsel had challenged the admission of evidence pertaining to the Mt. Vernon incident, the trial court either would have excluded it or provided the jury with a limiting instruction. Clearly, if trial counsel had objected and the State could offer no basis for the evidence other than Mr. Abitia’s propensity to commit rape of a child and delivery of methamphetamine to a minor, the evidence would have been excluded. ER 404(b). As discussed above, if the State had proffered a non-propensity purpose in response to an objection, the trial

court would have been required to consider whether the evidence was relevant to prove an element of the offenses charged or to rebut a defense, and was more probative than prejudicial. *E.g., Lough*, 125 Wn.2d at 852; *Coe*, 101 Wn.2d at 777.

In summation, the State essentially told the jury the Mt. Vernon incident evidence was *res gestae*, or an inseparable part of the same transaction. 6/13/12 RP 317-18. But if that had been the State's argument in the face of a defense objection, the trial court properly would have excluded the evidence. *Res gestae* applies to evidence so connected in time or place that proof of the other misconduct is necessary for a complete description of the crime charged. *State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004); *State v. Fish*, 99 Wn. App. 86, 94 & n.18, 992 P.2d 505 (1999). The Mt. Vernon incident occurred in a different place and time than the charged Whatcom County acts. Although the Mt. Vernon incident precipitated the family learning about the charged acts, the State still could have presented evidence from Dawn White and Kerry Abitia about K.M.A.'s revelation of the charged incidents to them without discussing the alleged misconduct that occurred in Mt. Vernon. *Res gestae* would not have been a proper purpose for admitting the other acts evidence.

In the face of a timely objection, the State might have argued the evidence was admissible to show lustful disposition. Though evidence of a defendant's lustful disposition towards a particular victim "borders on evidence of general propensity," courts have typically admitted the evidence where it makes it more likely that the defendant committed the crime charged. 5 Wash. Prac. § 404.26. Notably, here this purpose would relate only to the evidence of Mr. Abitia's sexual misconduct in Mt. Vernon and would not include delivery of methamphetamine.

Even if the State satisfied a non-propensity purpose for admitting the evidence, the court still should have excluded it because the prejudicial effect outweighed its probative value. *Dawkins*, 71 Wn. App. at 908-09; 5 Wash. Prac. § 404.32. In *Dawkins*, the State admitted evidence of the defendant's pre-charged offense sexual contacts with the same victim. This Court agreed that "[e]stablishing that Dawkins had sexual contact with R.B. in the past tends to make the fact that he had such sexual contact with her on this occasion more probable." 71 Wn. App. at 909. Despite its relevance, in a post-trial motion, the trial court ruled it would have excluded the evidence as substantially more prejudicial than probative if defense counsel had objected. *Id.* The court found the probative value was "questionable or

slight” because identity was not at issue. *Id.* On the other hand, this Court and the trial court agreed the prejudicial value was “very great.” *Id.* Like in the case at bar, the key question at trial was not who improperly touched the victim but whether any improper touching ever took place. *Id.* “Because there were no eyewitnesses to the [charged] touching, nor any physical evidence, the question of guilt thus necessarily turned on the relative credibility of the accused and the accuser.” *Id.* The other acts evidence thus cast the accused as “a person of abnormal bent, driven by biological inclination.” *Id.* at 410. Even more prejudicially, here the other acts evidence brought in a third-party witness (Dawn White) that otherwise at best could only have testified to K.M.A.’s revelations and not to what Ms. White saw with her own eyes.

The *Dawkins* court affirmed the finding of ineffective assistance of counsel because trial counsel “failed to consider the axiomatic, fundamental principle that evidentiary rulings are assigned to the discretion of the trial court.” 71 Wn. App. at 910. “Without raising the objection, counsel was in no position to hypothesize that the court would not have excluded the evidence.” *Id.* Accordingly, if trial counsel had objected, the evidence should have been excluded. *See*

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) (first part of prejudice established where court finds evidence, if it had been challenged, should have been excluded under ER 403); *State v. Saunders*, 91 Wn. App. 575, 578-80, 958 P.2d 364 (1998) (first part of prejudice established where court finds evidence, if it had been challenged, should have been excluded under ER 404(b)).

Even if the trial court had not excluded the evidence, upon request it would have been required to provide a limiting instruction informing the jury of the narrow purpose for which the uncharged misconduct could be considered. *E.g.*, *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012); *Dawkins*, 71 Wn. App. at 909. Explaining the limited purpose of the evidence is “particularly important in sex cases . . . where the potential for prejudice is at its highest.” *Dawkins*, 71 Wn. App. at 909 (quoting *Coe*, 101 Wn.2d at 780; *State v. Bacotgarcia*, 59 Wn. App. 815, 819, 801 P.2d 993 (1990)) (internal citation omitted). Thus, Mr. Abitia would have received a benefit if trial counsel had acted reasonably by objecting to the admission of the highly prejudicial other acts evidence.

Second, there is a reasonable probability that had the evidence been excluded from the jury’s deliberations or a limiting instruction

provided the outcome would have been different. First, had the evidence been excluded, the case would have been a mere credibility contest between K.M.A. and Mr. Abitia. The jury would not have heard from any third-party witnesses to the misconduct. Moreover, K.M.A.'s testimony about the alleged Whatcom misconduct was less specific and countered by other witnesses, who testified there was no spare bedroom in the home she alleged Mr. Abitia first had intercourse with her. 6/11/12 RP 154-59, 240, 286. Further, the defense asserted K.M.A. was motivated to fabricate the allegations so she could live largely unsupervised under her mother's care. 6/11/12 RP 168-70, 179-81; 6/13/12 RP 241, 267-68.

Even if the court allowed the evidence but provided a limiting instruction, there is a reasonable probability the result would have been different. A jury is presumed to follow the court's instructions. *E.g.*, *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008); *Lough*, 125 Wn.2d at 864. With a limiting instruction, the jury would have been precluded from considering the Mt. Vernon incident for anything other than the non-propensity purpose for which it was admitted. It would not have been permitted to find that Mr. Abitia had

committed the charged Whatcom County acts beyond a reasonable doubt because it found he was guilty of the same acts in Skagit County.

In sum, it is reasonably probable that the admission of the Mt. Vernon incident, and the State's heavy reliance on it, tipped the scales towards conviction on the charged counts. Trial counsel's deficient performance prejudiced the trial. The convictions should be reversed and the case remanded for a new trial. *See Saunders*, 91 Wn. App. at 581 (reversing conviction and remanding for new trial where counsel's failure to object to evidence constituted ineffective assistance of counsel).

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

"Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Our constitution "requires respect for the jury's deliberations. *Id.* at 928 (citing Const. art. I, § 21); accord U.S. Const. amend. VI. Thus, a witness may not testify as to the defendant's veracity because it invades the exclusive province of

the jury, unfairly prejudicing the defendant. *Id.* at 927. This evidence is prohibited whether it is direct or by inference. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 011 (2003). A defendant also has a fundamental constitutional right to testify in his own behalf. Const. art. I, § 22; U.S. Const. amends. V, VI, XIV; *State v. Thomas*, 128 Wn.2d 553, 556-57, 562, 910 P.2d 475 (1996). Likewise, the credibility of witness may not be attacked by opinion evidence. ER 608(a); *see City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

In determining whether an expert's testimony contains impermissible opinion testimony, the court should consider the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the jury. *Kirkman*, 159 Wn.2d at 928 (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Mr. Abitia objected to the State's expert witness's testimony. 6/11/12 RP 106-09, 121. This Court reviews a trial court's decision to admit expert testimony for an abuse of discretion. *Kirkman*, 159 Wn.2d at 927.

Here, Joan Gaasland-Smith told the jury Mr. Abitia is a liar. She testified that sexual perpetrators “oftentimes . . . don’t tell the truth.” 6/11/12 RP 111. The State questioned her on the disclosure patterns of child victims of sexual abuse. 6/11/12 RP 105-17. She explained that most of the time kids do not disclose “everything all at once.” 6/11/12 RP 110. When questioned how she knew that, Ms. Gaasland-Smith told the jury that she reads sexual deviancy evaluations. 6/11/12 RP 110-11. Those 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 111. Verbatim, she told the jury, “then there is a lie detector test given because, um, oftentimes people who do this kind of thing [sexual assault] don’t tell the truth.” 6/11/12 RP 11. She concluded, “It’s most common to find out that a lot more happened than the child ever told.” 6/11/12 RP 111.

The specific nature of the testimony demonstrates it was impermissible opinion testimony. The court admitted testimony that sexual perpetrators like Mr. Abitia are “oftentimes” liars whose stories need to be vetted through a polygraph examination. The jury also

heard that, in all probability, Mr. Abitia had raped K.M.A. “a lot more” than she has revealed.

Unlike in *Demery*, where the statements on tape were admitted to provide context to the defendant’s taped responses and not to impeach the defendant’s credibility, here the State used Ms. Gaasland-Smith to bolster K.M.A.’s testimony and her pattern of disclosure. 144 Wn.2d at 761. In particular, her statements about perpetrators being liars were not in response to statements by Mr. Abitia or otherwise necessary to fill gaps in the evidence. The opinion testimony was a direct affront to Mr. Abitia’s credibility.

Moreover, this witness was an employee of the State prosecutor’s office. Thus she carried with her the prestige of the government. *United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir. 2004); *see Demery*, 144 Wn.2d at 762-63 (“An officer’s live testimony offered during trial, like a prosecutor’s statements made during trial, may often carr[y] an aura of special reliability and trustworthiness. (internal quotations omitted)); *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (“Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the

opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.”).

The nature of the charges, defense, and evidence also demonstrate the impropriety of the testimony. In sex cases, the risk of prejudice is particularly high. *Dawkins*, 71 Wn. App. at 909. Moreover, because there was no physical evidence, the jury’s assessment of Mr. Abitia’s credibility was critical. This improper opinion testimony should have been excluded.

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.*, *Demery*, 144 Wn.2d at 762; *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). Ms. Gaasland-Smith’s testimony invaded these exclusive provinces of the jury and prejudiced Mr. Abitia’s right to testify in his own defense.

The error was not harmless. *See State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Mr. Abitia’s defense argued he was more credible than K.M.A. He denied her version of the Mt. Vernon incident, testifying K.M.A. came into the room to change her clothes while he was there watching a movie. Ms. Gaasland-Smith, a

purported expert from the government, told the jury Mr. Abitia was probably lying. The admission of that testimony affected the verdict.

3. The court's instruction equating the reasonable doubt standard with an abiding belief diluted the State's burden of proof in violation of Mr. Abitia's due process right to a fair trial.

“The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 120-21, 286 P.3d 402, 411 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). “[A] jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. *Emery*,

174 Wn.2d at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 44 (instruction # 2); 6/13/12 RP 302-03. Mr. Abitia objected to the abiding belief language, but the court did not remove it from the instruction. 6/13/12 RP 302-03. The prosecutor seized on the instruction, arguing the beyond a reasonable doubt standard means the jury simply has to have an “abiding belief that these things happened.” 6/13/12 RP 342-43.

By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be “problematic” because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court directed trial courts to use Washington

Pattern Instruction—Criminal 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the “belief in the truth” language only as a potential option by including it in brackets.

The pattern instruction reads:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed “belief in the truth” language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*,

the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury’s role. *Id.* at 764. However, the error was harmless because the “belief in the truth” theme was not part of the court’s instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the “belief in the truth” language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase “abiding belief” differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not consider the issue raised here: whether the “belief in the truth” phrase minimizes the State’s burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt. Without addressing this issue, the court found the “[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error.” *Id.* at 658.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

4. The prosecutor committed misconduct by diluting the burden of proof when he told the jury it need only have an abiding belief in the charge and to find the charge true.

As discussed above, a jury's job is to determine whether the State has proved the elements of the alleged offenses beyond a reasonable doubt and not to determine the truth. *Emery*, 174 Wn.2d at 760.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord *State v. Echevarria*, 71 Wn.

App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22. "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88.

A prosecutor commits misconduct when he or she mischaracterizes the role of the jury. "[W]hile [a prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones." *Id.* "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

In *Anderson*, the prosecutor stated, "by your verdict in this case, you will declare the truth about what happened." 153 Wn. App. at 424. He later argued, "Folks, the truth of what happened is the only thing that really matters in this case." *Id.* at 425. This Court held, "The

prosecutor's repeated requests that the jury 'declare the truth' . . . were improper" because the "jury's job is not to 'solve' a case," but "to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." *Id.* at 429.

A defendant who does not object to an improper remark may assert prosecutorial misconduct where the prosecutor's argument was so "flagrant and ill intentioned' that it causes enduring and resulting prejudice that a curative instruction could not have remedied." *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); accord *State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

It is not the jury's job to ascertain the truth. *State v. Walker*, 164 Wn. App. 724, 732-33, 265 P.3d 191 (2011). Finding the truth is not synonymous with determining whether the State proved its allegations beyond a reasonable doubt. *Emery*, 174 Wn.2d at 760; *Anderson*, 153 Wn. App. at 429. Nonetheless, Deputy Prosecuting Attorney Eric Richey told the jury that it need only have an abiding belief that the charged offenses occurred. 6/13/12 RP 342-43. His near-final words to the jury in rebuttal were:

I'm going to leave you with one thought, oh yeah,
beyond a reasonable doubt, there is an instruction here.

You know, it's pretty simple if you folks end up having an abiding belief that these things happened, that the defendant sexually abused [K.M.A.], if you have an abiding belief, abiding, continuing belief, you believe it and it continues on, this is what happened you have an abiding belief that the defendant gave [K.M.A.] methamphetamine, that you are satisfied beyond a reasonable doubt, that's that.

6/13/12 RP 342-43.

The prosecutor's truth-seeking argument was not only improper; it was flagrant and ill-intentioned requiring a new trial. Misconduct is flagrant and ill-intentioned where it contravenes rules enunciated in published decisions. *Fleming*, 83 Wn. App. at 214. The trial below occurred in June 2012. At that time, *Emery* had been argued before the Supreme Court and three published Court of Appeals decisions held such argument was error. *Anderson*, 153 Wn. App. at 429; *State v. Emery*, 161 Wn. App. 172, 193-94, 253 P.3d 413 (2011), *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011) (argued Feb. 28, 2012);¹ *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011). *State v. Curtiss* was the only case holding a declare-the-truth argument to be acceptable. *State v. Curtiss*, 161 Wn. App. 673, 701-02, 250 P.3d 496 (2011). This Court should presume that prosecutors are aware of case

¹ The Washington Supreme Court issued its decision in *Emery* on the day the jury returned its verdict. *Compare* 174 Wn.2d 741 *with* 6/13/12 RP 344.

law interpreting their duties. *See Fleming*, 83 Wn. App. at 214; *cf. State v. Laramie*, 141 Wn. App. 332, 340, n.2, 169 P.3d 859 (2007) (prosecutors presumed to be aware of case law affecting charging requirements).

Moreover, as a representative of the State and a quasi-judicial officer, the prosecutor can surely be held to know that the jury's role is to ensure the State has proved its case beyond a reasonable doubt, and not to declare the truth. Washington courts have long held that a prosecutor commits misconduct by misstating the burden of proof. *E.g., State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) (arguments that shift the burden of proof to the defense constitute misconduct); *Fleming*, 83 Wn. App. at 213-14.

A limiting instruction could not have cured the prosecutor's ill-intentioned and erroneous argument that the jury's role was to determine the truth and then stop deliberating. This is particularly true because the court's own instructions already informed the jury that "abiding belief" is synonymous with beyond a reasonable doubt. CP 44.

In sum, the improper diluting of the State's burden of proof and ascribing the incorrect role to the jury denied Mr. Abitia a fair trial.

The convictions should be reversed and remanded for a new trial.

5. Cumulative trial errors denied Mr. Abitia his constitutional right to a fair trial.

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Abitia a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *Coe*, 101 Wn.2d at 789; *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of

nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. In light of the cumulative effect of the trial errors, Mr. Abitia's convictions should be reversed.

6. The trial court abused its discretion by imposing a lifetime no-contact order purporting to protect Mr. Abitia's older daughter, who was not the victim of the charged crimes.

The Sentencing Reform Act of 1981, RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions" as a condition of sentence. *State v. Warren*, 165 Wn.2d at 32. On appeal, the imposition of crime-related prohibitions is reviewed for an abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010). A no-contact order with the victim is a crime-related prohibition. *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007) (defining "crime-related" to include no contact with the victim of a no-contact order violation who merely witnessed an assault). A no-contact order protecting a person other than the victim may also be crime-related under certain circumstances likely present here. *Warren*,

165 Wn.2d at 33-34. For example, in *Warren* the Court held a no-contact order reasonably crime-related as to the mother of the two child victims of sexual abuse for which defendant was convicted because the defendant attempted to induce her not to cooperate in the prosecution of the crime, she testified against defendant, the defendant's criminal history included convictions for murder and for physically abusing her, and nothing in the record suggested she objected to the no-contact order. *Id.*

However, a crime-related prohibition must also comport with constitutionally-protected freedoms. Crime-related prohibitions affecting fundamental rights must be narrowly drawn, requiring there be no other way to achieve the state's interests. *Warren*, 165 Wn.2d at 33-34. Here, the trial court affected Mr. Abitia's fundamental right to parent by prohibiting all contact between him and his adult daughter Kerry for life. CP 75. The right "to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny." *Warren*, 165 Wn.2d at 33 (citing, *inter alia*, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

In assessing the propriety of the no-contact order, this Court should regard the scope as well as the duration. “The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life.” *Rainey*, 168 Wn.2d at 381. The restriction’s length must be reasonably necessary. *Id.* “[W]hat is reasonably necessary to protect the State’s interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State’s interests.” *Id.*

The lifetime prohibition from all contact with Kerry was not narrowly tailored to achieve a compelling state interest. Mr. Abitia’s convictions were for crimes perpetrated against a minor. *See* CP 38-39. Kerry is an adult. CP 75. To the extent any allegations arose about misconduct towards Kerry, the alleged misconduct occurred more than 15 years ago. CP 4; Presentence Report at 1.² Kerry is Mr. Abitia’s daughter. Yet the court provided no reason for the duration or scope of

² The Presentence Report was filed under seal, and a supplemental designation of clerk’s papers has been filed in the trial court requesting designation of this report.

the no-contact order. *See* 6/13/12 RP 353-56 (failing to discuss protection order at sentencing). Likewise, the State did not attempt to justify the need for a lifetime prohibition against all contact between father and daughter. Although DOC recommended Mr. Abitia could contact Kerry if “approved by the Department of Corrections and treatment provider with an approved sponsor,” the no-contact order does not contain any exceptions or opportunities for revision. *Compare* Presentence Report at 15 (suggested community custody conditions) *with* CP 75. The record contains no appeal from Kerry for any protection from contact with her father. *See* Presentence Report at 2, 12 (Kerry did not respond to DOC investigation); 6/13/12 RP 35-57 (Kerry apparently not present at sentencing).

The record does not support a lifetime interference with Mr. Abitia’s fundamental right to contact with his daughter, Kerry. *See State v. Ancira*, 107 Wn. App. 650, 654-55, 27 P.3d 1246 (2001) (holding State did not show that complete ban on contact with the defendant’s nonvictim children was necessary to protect their safety or that accommodations such as supervised visits and indirect contact, such as through the mail, were not appropriate). The no-contact order

should be stricken and remanded to the trial court to comport with Mr. Abitia's constitutional rights. *See Rainey*, 168 Wn.2d at 382.

7. 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.

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.

A sentencing court can only impose discretionary costs and fees if the evidence clearly supports a finding that the defendant has the ability to pay or likely will have the future ability to pay. Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Curry*, 118 Wn.2d at 915-16. This requirement is both constitutional and statutory. *Id.* Though fees and costs may not be collected immediately, the court must have substantial evidence at the time it enters the finding. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Findings as to a defendant's ability to pay are reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Abitia without specifically finding he had the ability to pay. The sentencing court imposed discretionary fees totaling \$2,850. CP 68-69 (imposing \$450 for court costs and \$2,400 for court appointed attorney); RCW 9.94A.760; RCW 10.01.160; RCW 43.43.690.³

The State presented no evidence at sentencing that Mr. Abitia had the present or likely future ability to pay these discretionary financial obligations. Further, the court made no finding that Mr. Abitia had the ability to pay. 6/13/12 RP 353-56. On the contrary, the court actually found Mr. Abitia indigent. 6/13/12 RP 355-56. Yet the judgment and sentence contains boilerplate language stating:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial

³ The remaining fees were mandatory and are not disputed here. CP 68-69 (listing fees and costs imposed); *see, e.g., Curry*, 118 Wn.2d at 917 (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

resources and the likelihood that the defendant's status will change. The court finds the defendant has the ability or likely future ability to pay the legal financial obligations imposed here.

CP 66.

It was improper for the court (1) to find Mr. Abitia had an ability to pay where there was no support in the record and (2) to impose \$2,850 in discretionary costs and fees where Mr. Abitia lacks the present and future ability to pay. Substantial evidence does not support the court's boilerplate finding. The court did not take Mr. Abitia's financial status into account; instead, the court imposed the costs and fees, without any specific findings that he had the present or future ability to pay.

This Court has affirmed the imposition of discretionary costs only where the record contains specific evidence of the defendant's ability to pay. For example, in *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." 63 Wn. App. at 311.

Unlike the defendant in *Richardson*, the record does not indicate Mr. Abitia was employed. Further, unlike in *Baldwin*, the State did not submit evidence establishing a factual basis for Mr. Abitia's future ability to pay. To the contrary, the totality of the evidence showed he was indigent at the time of sentencing and likely to remain so for the foreseeable future. Thus, the court's finding that Mr. Abitia had the ability to pay was clearly erroneous. This Court should strike the discretionary costs imposed. In the alternative, the Court should strike the ability to pay finding.

F. CONCLUSION

Mr. Abitia was denied his constitutional right to the effective assistance of trial counsel. Trial counsel had an obvious basis to object to the admission of the State's key evidence, yet failed to do so. The admission of Mr. Abitia's uncharged sexual misconduct towards the same alleged victim was clearly prejudicial. His convictions should be reversed on this or one of the other bases raised above.

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

DATED this 14th day of May, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Marla L. Zink', written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING 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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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MAY, 2013.

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STATE OF WASHINGTON

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