 74030-0

NO. 74030-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD PARKER,

Appellant.

FILED
Jun 21, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 5

1. Shannon Parker's children did not like living with their step-father, Ronald Parker, to the point that one wrote up a five-pointp plan to get rid of him 5

2. At the end of the school year, Mr. Parker's step-daughters got rid of him and secured their attendance at their preferred school the following year 7

3. Based on one child's accusation, the State charged Mr. Parker with several crimes 8

4. The State's case received unfair advantages at trial, while Mr. Parker's defense was curtailed 9

E. ARGUMENT 11

1. The cumulative and prejudicial video of the complaining witness's interview with Snohomish County's 'child interviewer' should have been excluded 11

2. Mr. Parker was denied the constitutional rights to a fair trial by an impartial jury when two jurors broadcast their expert-like opinion the that Mr. Parker was guilty 14

a. An accused is denied his constitutional right to an impartial jury when a panel is tainted by a juror's expert-like experience 14

b. Two jurors told the panel that, based on their experience, Mr. Parker was guilty 16

c. Mr. Parker was denied a fair trial before an impartial jury in light of these jurors' experienced-based conclusions that girls like the complaining witness do not lie about sexual misconduct 18

3. The prosecutor bolstered the complainant by calling her 'cute as a button' and later lessened the burden of proof, thereby committing misconduct that denied Mr. Parker the right to a fair trial 19

4. It violated Mr. Parker's constitutional rights and was an abuse of discretion to exclude the complaining witness's older brother's testimony about occasions when the family watched television together and to exclude her older sister's journal in which she wrote about plans to get rid of Mr. Parker 22

a. The trial court erred as a matter of law and abused its discretion in excluding older brother's testimony about the family's television watching..... 23

b. The trial court also should have admitted older sister's journal discussing her plans to get rid of Mr. Parker 25

5. If not standing alone, the above cumulative errors violated Mr. Parker's due process right to a fair trial 26

6. The Court should strike the legal financial obligations because Mr. Parker lacks the ability to pay 29

a. The trial court found Mr. Parker unable to pay legal costs, yet imposed legal financial obligations without analyzing his ability to pay those obligations 29

b. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants, reading these provisions otherwise violates due process and the right to equal protection..... 30

c. This Court should reverse and remand with instructions to strike the legal financial obligations..... 41

F. CONCLUSION 42

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Det. of Coe, 175 Wn.2d 482, 286 P.3d 29 (2012).....25, 27

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 21

Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013) 35, 36, 37, 40

Roe v. Snyder, 100 Wash. 311, 170 P. 1027 (1918) 11

State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015) 20

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) 39

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....passim

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) 27

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015).....32, 35

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) 33

State v. Duncan, __ Wn.2d __, 2016 WL 1696698 (Apr. 28, 2016).....30, 31, 41

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2014.....21

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) 14

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).....22

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007).....18

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991) 19

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 22

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).....14, 15

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).....19

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 19

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) 14

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 19

Washington Court of Appeals Decisions

Gorman v. Pierce County, 176 Wn. App. 63, 307 P.3d 795 (2013) 23

In re Det. of Sease, 149 Wn. App. 66, 201 P.3d 1078 (2009) 19

Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013) 40

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 13

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1982) 21, 27

State v. Bedker, 74 Wn. App. 87, 871 P 2d 673 (1994) 13

State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993) 19

State v. Hines, 87 Wn. App. 98, 941 P.2d 9 (1997) 25

State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009) 17

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008) 19

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 31, 34

State v. Mathers, __ Wn. App. __, 2016 WL 2865576 (May 10, 2016) 41

State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012) 20

State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002) 25

United States Supreme Court Decisions

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) 19

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038,
35 L. Ed. 2d 297 (1973) 22

Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105,
39 L. Ed. 2d 347 (1974) 22

Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116,
40 L. Ed. 2d 642 (1974) 38

Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct 1727,
164 L. Ed. 2d 503 (2006) 22

James v. Strange, 407 U.S. 128, 92 S. Ct. 2027,
32 L. Ed. 2d 600 (1972) 37

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989,
94 L. Ed. 2d 40 (1987) 23

Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518,
143 L. Ed. 2d 689 (1999) 38

Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940,
71 L. Ed. 2d 78 (1982) 14

Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930,
56 L. Ed. 2d 468 (1978) 26

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920,
18 L. Ed. 2d 1019 (1967) 22

Williams v. Taylor, 529 U.S. 362, 120 S. Ct 1479,
146 L. Ed. 2d 435 (2000) 26

Other Federal Decisions

Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997) 15, 16, 18

United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979) 15

United States v. Molina, 934 F.2d 1440 (9th Cir. 1991) 20

Constitutional Provisions

Const. art. I, § 3 ..... 26, 37

Const. art. I, § 22 ..... 14, 22

U.S. Const. amend. VI 14

U.S. Const. amend. XIV 14, 26, 37

Statutes

RCW 7.68.035 31

RCW 9A.44.120 9

RCW 9.94A.010 ..... 31, 35, 40

RCW 9.94A.753 32

RCW 10.01.160 ..... passim

RCW 36.18.020 ..... 31, 36

RCW 43.43.7541 32

Rules

ER 401 ..... 11, 23

ER 402 23

ER 403 ..... 3, 11, 13

ER 801 ..... 25, 26

GR 34 ..... 35, 36

RAP 1.2 ..... 41, 42

RAP 15.2 42

RAP 2.5 ..... 41, 42

Other Authorities

Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) 39

A. SUMMARY OF ARGUMENT

Step-fathers accused of sexual abuse may often claim the accuser had ulterior motives, but the accused rarely has proof of such motives. Ronald. Parker's step-daughter wrote out at least five ways to get her mother to leave him. But the trial court did not allow the jury to see this journal. The trial court also excluded evidence from a defense witness relating key information about the context in which the alleged acts purportedly occurred. Meanwhile, the State bolstered the credibility of the complaining witness, reduced the burden of proof, and was allowed to present cumulative, unfairly prejudicial evidence. Further tipping the scales unfairly against Mr. Parker, two prospective jurors told the panel that based on their experience, Mr. Parker was guilty before any evidence was even presented.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting cumulative evidence that was prejudicial to Mr. Parker.

2. Mr. Parker was denied his constitutional rights to a fair trial and impartial jury when a Department of Social and Health Services employee shared his conclusion, based upon his professional experience, that Mr. Parker was guilty.

3. Mr. Parker was denied his constitutional rights to a fair trial and impartial jury when an elementary school employee shared her professionally-derived conclusion that girls like the complaining witness do not lie about sexual abuse.

4. The prosecutor committed misconduct when she called the complainant "cute as a button" in her opening statement.

5. The prosecutor committed misconduct when she lessened the burden of proof in closing argument.

6. The trial court violated Mr. Parker's right to present a defense and abused its discretion when it excluded relevant testimony.

7. The trial court violated Mr. Parker's right to present a defense and abused its discretion when it excluded Exhibit 5, older sister R.M.'s journal.

8. Mr. Parker was denied a constitutionally fair trial due to the cumulative effect of the above errors.

9. The trial court acted improperly when it imposed $800 in legal financial obligations and entered a boilerplate finding on Mr. Parker's ability to pay without receiving evidence related to his ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under ER 403, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence. Where several witnesses, including the complaining witness, testified about her disclosure of the alleged sexual abuse, did the trial court abuse its discretion by also allowing the State to show the jury the entire video of the Snohomish County "child interviewer" interviewing the complaining witness?

2. An accused is constitutionally entitled to a fair and impartial jury, due process, and a fair trial. A jury exposed to outside bias and influence may not be able to act impartially. Was Mr. Parker denied a fair trial by an impartial jury when two prospective jurors broadcast to the venire their expert-like opinions that children do not lie about sexual misconduct and Mr. Parker was guilty?

3. A prosecutor commits misconduct when she bolsters a witness or misstates the burden of proof. Is it substantially likely the prosecutor's argument, which bolstered the complaining witness and decreased the State's burden of proof, affected the jury's verdict in this closely contested case?

4. The federal and state constitutions guarantee an accused the right to present a defense and to a fair trial. Did the trial court abuse its discretion and violate these constitutional guarantees by excluding relevant testimony from A.M. (older brother) relating to family television gatherings?

5. Did the trial court abuse its discretion and violate the state and federal constitutional rights to present a defense and to a fair trial by excluding older sister R.M.'s journal when Mr. Parker did not seek to rely on it for the truth of the matters asserted but for non-hearsay purposes such as motive to fabricate?

6. Did the cumulative effect of trial errors deny Mr. Parker a constitutionally fair trial?

7. RCW 10.01.160 mandates the waiver of costs and fees for indigent defendants. "[A] trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). While the trial court recognized Mr. Parker was indigent, the court imposed legal financial obligations (LFOs) without mention of his inability to pay. Should this Court remand with instructions to strike LFOs?

D. STATEMENT OF THE CASE

1. Shannon Parker's children did not like living with their step-father, Ronald Parker, to the point that one wrote up a five-point plan to get rid of him.

Shannon Parker is the mother of five children: from youngest to oldest, daughter A.R.M. (referred to herein as the complaining witness), son J.M., daughter, R.M. (referred to herein as older sister), son A.M. (referred to herein as older brother), and adult-daughter M.M. RP (8/11/15) 63-64, 143-45; RP (8/12/15) 41.[1, 2] After she started dating Ronald Parker, Ms. Parker, her three youngest children, and older brother's friend R.S. moved from Sedro-Woolley into Mr. Parker's home in Rockport. RP (8/11/15) 71; RP (8/12/15) 43-46. The couple later married. RP (8/11/15) 67-68; RP (8/12/15) 46-47. They regularly went to bars in Concrete, "quite often" renting a motel room overnight, while the older children and friend R.S. watched the younger children. RP (8/11/15) 71-72; RP (8/12/15) 59-60, 77, 99; RP (8/13/15) 188-89, 206-07, 210; RP (8/14/15) 38-39. Over a year after

[1] The verbatim report of proceedings is set forth in separately-paginated volumes referred to by the date of the first hearing transcribed.

[2] At the time of trial, Shannon used the last name Dearinger. Both Dearinger and Parker are used to refer to Shannon throughout the proceedings. For consistency, this brief uses the last name Shannon had when the alleged events occurred, Parker.

she had moved in, Ms. Parker left with the children for a couple weeks, but returned with her children to live with Mr. Parker after the couple "decided to work things out." RP (4/1/15) 24; RP (8/11/15) 183, 201; RP (8/12/15) 47-48.

The children's relationship with Mr. Parker was volatile. *E.g.*, RP (8/12/15) 49-50, 61-62. The complaining witness initially did not mind Mr. Parker, but that changed when he started yelling at them if they did not do their chores. RP (8/11/15) 68-70. Older sister also did not like Mr. Parker. RP (8/12/15) 75; RP (8/13/15) 125-29; RP (8/13/15) 195-97; *see* RP (8/13/15) 211-12 (Shannon told Ron that older sister did not like him and Shannon was thinking of moving out). Older sister disliked that Mr. Parker disciplined her and she disliked living in Rockport with Mr. Parker because all her friends were in Sedro-Woolley. RP (8/11/15) 103, 148-49, 164-65, 182-83. The complaining witness also preferred her school in Sedro-Woolley. RP (8/11/15) 120, 122. The children told their mother they did not like her husband. RP (8/11/15) 99-100. Older sister also wrote in her journal a five-point plan mapping ways she could rid the family of Mr. Parker, including telling lies in order to make the parents break up. RP

(8/11/15) 131-32, 162-69 ("I do not like Ron, I hate him, he's so stupid, mom has made the biggest mistake"); Exhibit 5.

2. At the end of the school year, Mr. Parker's step-daughters got rid of him and secured their attendance at their preferred school the following year.

On the night before the last day of school in June 2013, older sister contends that while playing "the secrets game," her seven-year-old sister—the complaining witness—told her their step-dad touched her during family movie nights. RP (8/11/15) 157-59; *see* RP (8/11/15) 96-97, 101-02 (the complaining witness's testimony). On older sister's urging, the complaining witness told her mother and brother, J.M., the following day. RP (8/11/15) 96-97; RP (8/12/15) 64-65. J.M. later testified that, when the complaining witness told him about her allegations, she made a face like when she exaggerates. RP (8/11/15) 203-04. Older sister testified that the complaining witness always did what older sister said. RP (8/11/15) 149-50; *accord* RP (8/13/15) 110-11 (testimony of older brother that older sister bossed around the complaining witness who always listened to older sister).

Older sister received her wish; Ms. Parker immediately moved the family back to Sedro-Woolley from Rockport. RP (8/11/15) 66, 97-98, 160; RP (8/12/15) 65-66.

After Ms. Parker called the police a couple days later, the Snohomish County Prosecuting Attorney's Office arranged for its "child interviewer," Deborah Ridgeway, to conduct investigative interviews of the complaining witness, her older sister, and her brother J.M. about the allegations. RP (4/1/15) 26-27, 28, 31-32, 44, 47; RP (8/12/15) 67, 122, 130-32, 134, 139-40, 143-44; Exhibits 6 & 7. Ms. Ridgeway repeatedly referred to "Dan" instead of "Ron," and the complaining witness did not ask for clarification until after she responded to several of the questions about Dan. Exhibit 6 (file 2) at 9:09:15, 9:15:13, 9:30, 9:39:40; RP (8/13/15) 66. The complaining witness indicated her mother had talked to her about the accusations. Exhibit 6 at 8:55, 8:59:30, 9:16, 9:38:10. Older brother later testified that his mother encouraged him to lie to the police about Mr. Parker during this investigation. RP (8/13/15) 117-20, 141-42, 145-46.

3. Based on one child's accusation, the State charged Mr. Parker with several crimes.

The State charged Mr. Parker with four counts of rape of a child in the first degree and four counts of child molestation in the first degree. Each count was alleged to have occurred "on or about and between August 17, 2012 and June 16, 2014." CP 7-11 (amended

information (citing RCW 9A.44.073; RCW 9A. 44.083); *see* CP 77-78 (information alleging single count of rape of a child).

4. The State's case received unfair advantages at trial, while Mr. Parker's defense was curtailed.

On the State's motion, a hearing was held to determine whether the complaining witness's out-of-court statements to her mother and the child interviewer were admissible under RCW 9A.44.120, the child hearsay statute. CP 80-98; RP (4/1/15) 3-71. Judge Rickert found the testimony admissible under the child hearsay statute. CP 75-76; RP (4/1/15) 66-71.[3]

Judge Needy presided over the trial, which began with the prosecutor describing the complaining witness as "cute as a button." RP (8/11/15) 46. The complaining witness then testified Mr. Parker touched her on her "boobies" and "crotch" while they were lying together on a living room couch on various occasions while her family and others were present watching television together. RP (8/11/15) 72-74, 77-79, 89-91, 105-06, 118-20, 180; *see* RP (8/12/15) 55-59, 77-78 (Ms. Parker's testimony regarding group television watching); *see* RP (8/13/15) 101-02, 106, 140 (testimony of older brother regarding

[3] Outside the presence of the jury, but during trial, Judge Needy (who presided over the trial) also found the complaining witness's out-of-court statements to her older sister admissible.

television watching and that he never saw the complaining witness under a blanket with Mr. Parker); RP (8/13/15) 175-77, 185, 190 (testimony of friend R.S. regarding television watching and that he never saw the complaining witness under a blanket with Mr. Parker). The complaining witness testified he sometimes tried to have her touch his "wee-wee." RP (8/11/15) 86-89. She did not unequivocally state that she actually did so. RP (8/11/15) 114. No one attested to witnessing any of the alleged acts of sexual misconduct. *E.g.*, RP (8/12/15) 86 (Ms. Parker never saw or became aware of "anything"). Mr. Parker testified in his own defense that he "did not inappropriately touch [the complaining witness]. I didn't touch her vagina or her boobs at all." RP (8/14/15) 26, 45-46 (allegations are fabrication to get back at him).

The jury was instructed on attempted child molestation as a lesser-included offense for count eight, the count referring to the allegation that Mr. Parker attempted to have or actually had the complaining witness touch his penis. CP 34, 79; RP (8/14/15) 120-22, 196-97.

Mr. Parker was convicted of counts one through seven and the lesser-included attempted child molestation for count eight. CP 101-

08. He was sentenced to an indeterminate minimum term of 260 months on counts one through four, with a minimum indeterminate term of 148.5 months on count eight running concurrently. CP 59-74 (counts five, six and seven merged with counts one through four). The court imposed $800 in legal financial obligations and conditions of community custody that apply for any portion of the lifetime statutory maximum term that Mr. Parker spends in the community. CP 62, 65-66, 73.

E. ARGUMENT

1. The cumulative and prejudicial video of the complaining witness's interview with Snohomish County's 'child interviewer' should have been excluded.

Evidence is relevant if it has any tendency to make the existence of a fact more or less probable. ER 401. But relevant evidence may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Cumulative evidence is simply "additional evidence of the same kind to the same point." *Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918).

Mr. Parker objected to the admission of the entire video-taped interview of the complaining witness by Deborah Ridgeway, the Snohomish County prosecutor's office's "resource interview specialist," or "child interviewer." RP (8/12/15) 91-94, 135-42; Exhibit 6; RP (4/1/15) 26-27. The State presented extensive testimony from many witnesses about the complaining witness's disclosures and allegations: Ms. Ridgeway, the complaining witness, the complaining witness's mother, older sister, and older brother. RP (8/11/15) 63-123 (testimony of the complaining witness); RP (8/11/15) 143-90 (testimony of older sister); RP (8/11/15) 192-204 & RP (8/12/15) 19-40 (testimony of brother J.M.); RP (8/12/15) 40-107 (testimony of mother); RP (8/12/15) 122-61 (testimony of child interviewer, Ridgeway). The admission of the hour-long interview where the complaining witness was in a more relaxed, "child friendly" setting than the courtroom and Mr. Parker was not present was not only cumulative but unfairly prejudicial. *See* RP (4/1/15) 26-27, 28, 31-32, 44, 47 (describing interview room, interviewer's allegiance to prosecutor's office, and purpose of interview as investigative). Admission of the entire video bolstered the State's witness. For these

reasons, the evidence should have been excluded under ER 403. *State v. Bedker*, 74 Wn. App. 87, 93, 871 P 2d 673 (1994).

The trial court through Judge Needy, however, ruled that Judge Rickert had found the evidence admissible at a child hearsay hearing and therefore it would be admitted in its entirety. RP (8/12/15) 91-94, 135-42. The court abused its discretion when it failed to consider the separate bases for excluding the evidence, even if it was admissible child hearsay. *Bedker*, 74 Wn. App. at 93 (admissibility inquiry is not limited to child hearsay statute); *see State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (abuse of discretion when decision is manifestly unreasonable or based on untenable grounds).

Additionally, because this additional evidence was of the same kind and to the same point, it was cumulative. As discussed, it was also unfairly prejudicial because it bolstered the complaining witness's testimony on the stand with video of an interview in a more casual setting.

The trial court abused its discretion in admitting this evidence. Mr. Parker's convictions should be reversed and the case remanded for a new trial without the presentation of cumulative evidence.

2. Mr. Parker was denied the constitutional rights to a fair trial by an impartial jury when two jurors broadcast their expert-like opinion that Mr. Parker was guilty.

a. An accused is denied his constitutional right to an impartial jury when a panel is tainted by a juror's expert-like experience.

The state and federal constitutions guarantee those accused of crimes the right to a fair and impartial jury. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000). "The 'impartial jury' aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). "Indeed, an essential element of a fair trial is an impartial trier of fact—a jury capable of deciding the case based on the evidence before it." *Id*. "Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 945-46, 71 L. Ed. 2d 78 (1982); *accord* U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right to a fair trial includes the right to a presumption of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

"Voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *Momah*, 167 Wn.2d at 152. In *Mach v. Stewart*, the Ninth Circuit held the defendant was entitled to a new venire. 137 F.3d 630 (9th Cir. 1997). The defendant was charged with sexual conduct with a minor and during voir dire, a prospective juror with a psychology background and employed as a social worker stated that, in her three years as a state-employed social worker, every allegation a child made about sexual abuse was true, which she repeated upon further questioning. *Id*. at 632-33. The trial court struck the juror but denied a motion for a new panel. *Id*. Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly connected to guilt, and that "the court should have[, at a minimum,] conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements.'" *Id*. at 633.

"Even if 'only one juror is unduly biased or prejudiced,' [by the prospective juror's comments] the defendant is denied his constitutional right to an impartial jury." *Mach*, 137 F.3d at 633 (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)).

"Given the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, [the Ninth Circuit] presume[d] that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused." *Id*. at 634. Such a "bias violated [the defendant's] right to an impartial jury." *Id.* at 633. The remedy was to begin anew with a fresh jury pool.

b. Two jurors told the panel that, based on their experience, Mr. Parker was guilty.

Two panelists broadcast to the other jurors that their experience caused them to be biased against Mr. Parker. First, juror 22 reported that his wife was molested, his brother-in-law is in jail for being a molester, and he works for the Children's Administration arm of the Department of Social and Health Services. RP (8/10/15) 55. This experience caused him to be biased against Mr. Parker. RP (8/10/15) 53-55. He told the jury, "I see it all, every day" so he did not think he could be fair. RP (8/10/15) 55.

Juror 27 then added to this experience-laden presumption of guilt. She told the venire that her work in an elementary school and as a mandatory reporter "for years," has led her to the "feeling kids don't

lie in that situation." RP (8/10/15) 55. She elaborated that while a child might lie to their parent about whether they ate a cookie, they do not lie about something as "big" as sexual abuse:

> I still have that feeling that -- that kids might lie if they -- if mom says do you have a -- did you have a cookie, and they say no, but when it's something that big, that just weighs that heavy on a child, I don't know that I could separate them.

RP (8/10/15) 56. She further emphasized that her professional experience leads her to this bias. RP (8/10/15) 57. And she repeated to the venire,

> I think that my previous experience would, dealing with kids, that I just have a feeling kids don't lie in that situation. It's too extreme. And it's not that I assume the defendant is guilty; it's that I assume the child is telling the truth.

RP (8/10/15) 55.

These jurors' statements contravened the principle that no witness may opine on guilt, directly or inferentially, because such opining "invade[s] the fact finder's exclusive province." *State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009). Because the statements came during voir dire, moreover, Mr. Parker had no opportunity for cross-examination.

c. Mr. Parker was denied a fair trial before an impartial jury in light of these jurors' experienced-based conclusions that girls like the complaining witness do not lie about sexual misconduct.

Like in *Mach*, juror 22 and 27 shared their purported expertise on the main issue in the case—whether the complaining witness's accusations were truthful. Both the source and the content of the broadcasted information were highly prejudicial. *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) ("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.").

At least one juror, if not the entire jury, was likely biased by juror 22 and juror 27's statements. *See Mach*, 137 F.3d at 633 (constitutional violation if even one juror is biased or prejudiced by irregularity). A new trial is required because this Court cannot be confident that the jury's verdict is free from outside taint.

3. The prosecutor bolstered the complainant by calling her 'cute as a button' and later lessened the burden of proof, thereby committing misconduct that denied Mr. Parker the right to a fair trial.

Prosecutors must ensure justice is done and the accused receive 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). 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).

Prosecutorial misconduct violates a defendant's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Sease*, 149 Wn. App. at 81.

It is generally improper for a prosecutor to bolster a witness's good character, even if the evidence supports it. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). Nonetheless, at the outset of

her opening statement, the prosecutor told the jury that the accusations against Mr. Parker were made by the complaining witness who was "cute as a button" RP (8/11/15) 46; *see United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991) (recognizing vouching is especially problematic in cases where the credibility of the witness is crucial). In this way, the prosecutor inserted her personal opinion and bolstered the complaining witness by insinuating a child this cute would not lie. The argument further bolsters the credibility of the complaining witness by implying that Mr. Parker was attracted to the complaining witness's "cute as a button" appearance. The statement the complaining witness is "cute as a button" is also improper because it depends on facts not in evidence. *See State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor used a sympathetic description, cuteness, to curry favor for the State's case but was not based in fact.

The prosecutor then misstated the law when she told the jury "if you have a doubt [as to Mr. Parker's guilt], it needs to be based on evidence or lack of evidence per element that I need to prove." RP (8/14/15) 112-13. She further argued that facts that are not relevant to an element cannot create a reasonable doubt. *Id*.; *see State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015) (prosecutor commits

misconduct by misstating the law). The prosecutor explained, "So, for example, whether or not Shannon Parker wanted to get out of the marriage might be a fact that you have a reasonable doubt on, but it doesn't matter in terms of evaluating the elements that I need to prove." RP (8/14/15) 112. This argument lessened the State's burden of proof because it withdrew from the jury acceptable bases upon which to formulate a reasonable doubt. *See In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 713, 286 P.3d 673 (2012). The jury rightfully could have believed the complaining witness's mother was motivated to fabricate, and did fabricate, the allegations thereby providing reasonable doubt as to the State's case against Mr. Parker.

Telling the jury the State's key witness is "cute as a button" and misstating the burden of proof were flagrant and ill-intentioned acts of misconduct because they were not curable by an instruction. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2014); *State v. Alexander*, 64 Wn. App. 147, 155-56, 822 P.2d 1250 (1982). "Cute as a button" is an image that cannot be undone. And the jury already had an instruction explaining the reasonable doubt standard, but the prosecutor's argument incorrectly described the State's burden and

lessened it. Therefore, even though Mr. Parker did not object, these instances of misconduct require reversal of the convictions.

4. It violated Mr. Parker's constitutional rights and was an abuse of discretion to exclude the complaining witness's older brother's testimony about occasions when the family watched television together and to exclude her older sister's journal in which she wrote about plans to get rid of Mr. Parker.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). These provisions require that an accused receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might

influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added); *accord Washington*, 388 U.S. at 19.

The exclusion of older brother's testimony relating to television watching and of older sister's journal violated these constitutional protections and was an abuse of the trial court's discretion.

a. <u>The trial court erred as a matter of law and abused its discretion in excluding older brother's testimony about the family's television watching.</u>

Although only relevant evidence is admissible, the threshold is low. ER 402. "Relevant evidence has any tendency to make a fact of consequence more likely or less likely; this definition sets a low threshold." *Gorman v. Pierce County*, 176 Wn. App. 63, 84, 307 P.3d 795 (2013) (citing ER 401).

On the prosecutor's relevance objection, the trial court excluded testimony from defense witness older brother, the complaining witness's older brother, about times when the family gathered to watch television and had friends over. RP (8/13/15) 113-15. This evidence was relevant because it related to Mr. Parker's opportunity to commit the alleged acts, the context around the family's television watching (when the acts were alleged to have occurred), and the presence of

others during these times. Because it was relevant, Mr. Parker was entitled to present it.

The trial court excluded this evidence because it did not think it perfectly aligned with the complaining witness's description of the alleged events. *E.g.*, RP (8/13/15) 113 ("This is Sunday afternoon, and TV nights have been testified to that they've been in the evenings on Saturday or Friday. But if you want to ask him if there were such TV nights, but Sunday afternoon doesn't necessary relate to TV nights."). The trial court abused its discretion when it allowed the State to narrowly define when the acts were alleged to occur. A defendant's evidence cannot fairly be limited to that which aligns perfectly with the State's evidence. Mr. Parker was entitled to admit this evidence to rebut the State's evidence.

The trial court's exclusion of this evidence was also in error because the complaining witness herself had broadly defined when the alleged acts occurred. She testified it happened different days of the week and "any time of day." RP (8/11/15) 91. On both these grounds, the trial court violated the right to present a defense and abused its discretion when it excluded older brother's testimony.

b. The trial court also should have admitted older sister's journal discussing her plans to get rid of Mr. Parker.

The trial court also abused its discretion when it excluded older sister's journal as an exhibit. RP (8/11/15) 166-67; RP (8/14/15) 67-71; Exhibit 5. Mr. Parker explained the exhibit was not hearsay because it was not being offered for the truth. ER 801(c); RP (8/11/15) 166-67. It was being offered to show the complaining witness and her older sister's state of mind. RP (8/14/15) 67-68. The court likened the document itself to a police report and excluded it, although the contents were permissible subjects for direct and cross-examination. RP (8/11/15) 166-67; RP (8/14/15) 67-71.

The trial court abused its discretion because older sister's journal lacks similarity to a police report. Police reports are generally excluded at trial because they contain out-of-court statements by third parties and because they contain investigative summaries. *State v. Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997); ER 801; *see, e.g.*, *In re Det. of Coe*, 175 Wn.2d 482, 504-05, 286 P.3d 29 (2012); *State v. Roche*, 114 Wn. App. 424, 444, 59 P.3d 682 (2002). Older sister's journal contained no third-party statements; it contained her own thoughts. *See* Exhibit 5. Because Mr. Parker would not have relied on the thoughts for their truth but to show older sister and the complaining

witness's motive to fabricate and intense dislike for Mr. Parker, the journal did not contain hearsay at all. ER 801(c). Consequently, the trial court violated Mr. Parker's right to present a defense and abused its discretion in excluding older sister's journal from the evidence at trial.

5. If not standing alone, the above cumulative errors violated Mr. Parker's due process right to a fair trial.

Each of the errors discussed in the sections above require reversal. But if this Court disagrees, then it should hold that the aggregate effect of these trial court errors denied Mr. Parker 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 errors combined to deny 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, 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*, 175 Wn.2d at 515 (applying same to civil commitment trial). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *Alexander*, 64 Wn. App. at 150-51.

These errors combined to prejudice Mr. Parker's right to a fair trial because the State's allegations turned on the jury's credibility determinations. No one witnessed Mr. Parker touch the complaining witness in any sexualized manner, even though many people would have been in the living room when the alleged acts occurred. The jury heard about problems between Shannon and Mr. Parker, including Shannon's departure from Mr. Parker's home for several weeks in 2013 and 2014. The jury also knew older sister had plotted to disparage Mr. Parker so that her mother would move them back to Sedro-Woolley. Older sister's influence over the complaining witness and consistent bossing around of her younger sister was also of record. Older sister "hated" Mr. Parker and the complaining witness testified she also wanted to leave her school in Concrete. In short, affirmative evidence cast doubt on the State's case.

These shortcomings were overshadowed by the admission of improper evidence, opinion, and argument, and were prejudiced by the exclusion of evidence that supported Mr. Parker's defense. Mr. Parker should have been able to rely on the physical journal older sister kept in order to provide the jury with a visual example of older sister's motive to lie and dislike for Mr. Parker. The jury also should have heard additional testimony about the context of movie nights from Mr. Parker's witness. Instead, the court admitted cumulative and prejudicial testimony favoring the complaining witness and the State. The State also bolstered the credibility of its complaining witness and eliminated bases upon which the jury could acquit. The accumulation of these errors swayed the jury to ignore its doubt and to find Mr. Parker guilty.

Cumulatively, these errors denied Mr. Parker the fair trial to which he was entitled. His convictions should be reversed and remanded for a new trial on this independent ground.

6. The Court should strike the legal financial obligations because Mr. Parker lacks the ability to pay.

a. The trial court found Mr. Parker unable to pay legal costs, yet imposed legal financial obligations without analyzing his ability to pay those obligations.

At sentencing, the court imposed a $500 victim assessment; a $100 DNA collection fee; and a $200 criminal filing fee. CP 65. These fees bear interest at the 12 percent statutory interest rate. CP 66. The court waived all other costs, presuming these imposed costs were "the mandatory ones." 8/14/15 RP 210.

A short time later, Mr. Parker was appointed counsel on appeal due to his indigency. CP 109-13. Mr. Parker attested he was unable to pay the filing fee on appeal and had no assets, equity or income. CP 109-10. He was no longer employed. *Id*.

Although it was not discussed at sentencing and despite the evidence of indigency and the 260-month minimum sentence imposed, the findings reflect a boilerplate statement "That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 62.

b. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection.

Our legislature mandates that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized this means "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord State v. Duncan*, __ Wn.2d __, 2016 WL 1696698, *2-3 (Apr. 28, 2016) (remanding to trial court for resentencing with "proper consideration" of defendant's ability to pay).

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. LFOs accrue interest at a rate of 12 percent, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id.* at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on

finances." *Id.* at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837; *Duncan*, 2016 WL 1696698 (recognizing the "ample and increasing evidence that unpayable LFOs 'imposed against indigent defendants' imposed significant burdens on offenders and our community" (quoting *Blazina*, 182 Wn.2d at 835-37)).

Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a $200 fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and

refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[4]

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a

[4] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *id.* at 839 ("We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue,

the court cited one of the same LFOs Mr. Parker challenges here, the criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). *See id.* If the Court were limiting its holding to only certain of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

In fact, it does not appear that the Supreme Court has ever held that the DNA fee and "criminal filing fee" are exempt from the ability-to-pay inquiry. Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 *with Blazina*, 182 Wn.2d at 830-39.

It would be particularly problematic to require Mr. Parker to pay the "criminal filing fee," because many counties – including Washington's largest – do not impose it on indigent defendants. *Cf. Blazina*, 182 Wn.2d at 857 (noting significant disparities in administration of LFOs across counties). This means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees

for indigent defendants. *See Conover*, 183 Wn.2d at 712 ("we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant's favor"). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because "the error, if permitted to stand, would create inconsistent sentences for the same crime"); *see also id.* at 837 (discussing the "[s]ignificant disparities" in the administration of LFOs among different counties); RCW 9.94A.010(3) (stating that a sentence should "[b]e commensurate with the punishment imposed on others committing similar offenses").

General Rule 34, which was adopted at the end of 2010, also supports Mr. Parker's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees,

but ordered Jafar to pay $50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

Our Supreme Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.* at 529. Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal

cases. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of the "criminal filing fee" across counties. *See Jafar*, 177 Wn.2d at 528-29; *Blazina*, 182 Wn.2d at 857.

The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that "principles of due process or

equal protection" guided the court's analysis and recognizing that failure to require waiver of fees for indigent litigants "could lead to inconsistent results and disparate treatment of similarly situated individuals"). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more

specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits *imprisoning* people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id.* at 241. This assumption was not borne out. As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).[5] The risk of unconstitutional imprisonment for poverty is very real – certainly as

[5] Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). The government certainly has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the

various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.[6]

c. This Court should reverse and remand with instructions to strike the legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835. The Court re-emphasized this holding in *Duncan*, 2016 WL 1696698, at *2-3.

This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. *Accord Duncan*, 2016 WL 1696698, at *2-

[6] Division Two recently held that despite the equal hardships imposed by "mandatory" and "discretionary" LFOs, it could not agree with the above statutory interpretation or constitutional grounds to reverse the imposition of a $500 victim penalty assessment and $100 DNA fee. *State v. Mathers*, __ Wn. App. __, 2016 WL 2865576 (May 10, 2016). For the reasons set forth above, this Court should not follow *Mathers*.

3. Because the record demonstrates Mr. Parker's indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Parker has the ability to pay.

Finally, in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. The presumption of indigence continues on appeal pursuant to RAP 15.2(f). *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The law and facts call for an exercise of this Court's discretion not to impose appellate costs against Mr. Parker. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id*. at 841 (Fairhurst, J. concurring).

F. <u>CONCLUSION</u>

Quite simply, Ronald Parker was denied a fair trial. The State's case depended solely upon the story of his step-daughter, as repeated to others. Despite others being present when the alleged acts occurred, no one witnessed the improper conduct alleged. The State also had no physical evidence to prove its case.

The errors presented during this case are particularly salient against this backdrop of thin evidence. At the outset, prospective jurors provided their experience-laden opinions that the accused was guilty. The State then bolstered the alleged victim and reduced the burden of proof. Trial court rulings allowed in extensive favorable, out-of-court video of the victim that duplicated in-court testimony, while restricting Mr. Parker's evidence on key issues. Standing alone or cumulatively, these errors require reversal.

DATED this 21st day of June, 2016.

Respectfully submitted,

s/ Marla L. Zink _____
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. RONALD PARKER, Appellant.	)))))))))	NO. 74030-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JUNE, 2016, 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:

[X]	ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	RONALD PARKER 384956 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JUNE, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711