No. 45115-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Jackson,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00156-8

The Honorable Judge Kevin D. Hull

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Jackson was charged with second degree assault. CP 1-2.[1] The alleged victim, Amber Lindsey, did not testify at Mr. Jackson's trial. *See generally* RP (trial). Instead, the state relied on testimony from an eyewitness, the arresting officer, and the doctor who had treated a small cut on Lindsey's head. RP (trial) 371-452.

The state also offered Lindsey's medical records. Ex. 12A. In addition to notes from the testifying doctor, the records also contained statements from a non-testifying triage nurse and social worker. Ex 12A, pp. 3-4, 9-10. Both of these non-testifying witnesses had interviewed Lindsey. Ex 12A, pp. 3-4, 9-10. Over Mr. Jackson's objection, the court admitted the records. The court reasoned that Lindsey's statements in the record were made for medical diagnosis or treatment. RP (trial) 26-27. The court also found that the records were an authenticated business record. RP (trial) 363-64.

The note from the triage nurse included Lindsey's version of events:

> Pt says 'my ex boyfriend (Michael) just beat me up on the side of the road. A nice couple helped me.'… she states she was pushed

[1] Mr. Jackson moved to dismiss the case pretrial based on a violation of his right to a speedy trial. CP 38-39. The facts regarding the speedy trial issue are set forth in the argument section below.

> into a wooden pole hitting the back of her head, he tried to strangle her, pulled her hair and 'pushed my head into stuff.' She is tearful…
> Ex. 12A, pp. 3-4.

The social worker described Lindsey as a "32 yr old female brought to ER after alleged assault by her boyfriend, bystanders stopped the assault and brought the pt to the ER." Ex 12A, p. 9. The social worker's notes restated Lindsey's story:

> Pt reports that her boyfriend got mad when she tried to leave today and she refused to tell him where she was going. Pt states that he hit her in the face/head and hit her against a street sign or pole. Bystanders stopped and helped her…
> Referred for domestic violence assessment and crime victims. Pt was assaulted this morning by her boyfriend, 'Michael Jackson.' … Pt is reluctant to provide further information.
> Ex. 12A, pp. 9-10.

The social worker's notes also stated that Lindsey was "referred for possible abuse/neglect/violence." Ex. 12A, p. 9.

At trial, Mr. Jackson offered a jury instruction on the lesser-included offense of fourth degree assault. RP (trial) 485; CP 55. He argued that the evidence established an injury that did not qualify as substantial bodily harm. RP (trial) 480-82. The doctor provided the only evidence of Lindsey's injury. He described it as a three centimeter laceration that required stitches. RP (trial) 376. The doctor did not see Lindsey after treating her, and did not know whether the cut had left a visible scar. RP (trial) 381-82.

The court declined to give the instruction. The judge found that Mr. Jackson had failed to present affirmative evidence that the injury did not qualify as substantial bodily harm. RP (trial) 482-85.

In closing, the prosecutor argued that the jury should convict Mr. Jackson in order to give domestic violence victims a voice:

> [V]ictims of domestic violence need a voice. They do. Even when they're not potentially strong enough to stand up on their own, they need someone to stand up for them. And that's why we're here today. You didn't hear from the victim, but you did hear her voice. RP (trial) 527.

The prosecutor also compared the state's burden of proof to knowing that the earth is round or that the prosecutor is an attorney:

> I used the example of giving someone $100,000 if they can prove beyond a reasonable doubt that the earth is a sphere, the earth is round. Okay. And we all agree that no one had ever been to space, no one had actually observed the earth being round. But we had a common sense appreciation of the fact. We all agreed that because of that, we were satisfied beyond a reasonable doubt that the earth is round. All right. That's how you need to think about the proof in this case, having a common sense appreciation of the facts. RP (trial) 515.
>
> ...In jury selection I talked a little bit about the lawyer example, and I proposed to you a scenario where I wasn't actually an attorney, where I had come in here and told the prosecutor to take the day off. And I proposed that scenario to you. Okay. And we all agreed that that couldn't have happened; because even though you hadn't seen my bar card, even though you hadn't seen me graduate from law school, even though you hadn't seen my diploma on the wall of my office, you had confidence in the fact that I'm an attorney based on the appearances and circumstances that you were presented with. Well, you can have confidence in the fact that the

> defendant committed this crime because of the appearances and circumstances that you are presented with.
> RP (trial) 567.

Defense counsel did not raise objections to these arguments.

After Mr. Jackson's closing argument, the prosecutor told jurors that defense counsel's argument shocked him:

> You know, I'm going to go off script here for a second … I do this for a living. Okay. I talk for a living. That's what I do. It's not often that I am at a loss for words. After the defense attorney's presentation, I found myself at a loss for words.
> DEFENSE COUNSEL: Your Honor, I'm going to object at this point.
> THE COURT: Overruled.
> PROSECUTOR: He sat here, he stood here and told you that the victim was reckless. He stood here and told you that the people that helped her were reckless, the people that potentially saved her life were reckless.
> DEFENSE COUNSEL: Your Honor, that's a mischaracterization of argument.
> THE COURT: Overruled.
> RP (trial) 563-64.
> …
> PROSECUTOR: I hope that leaves you at a loss for words as well.
> RP (trial) 565.

Mr. Jackson moved for a mistrial based on prosecutorial misconduct. RP (trial) 571. The court denied the motion. RP (trial) 571.

The jury found Mr. Jackson guilty of second-degree assault. RP (trial) 575-76. The jury did not fill in an answer on the special verdict form asking whether the offense had involved domestic violence. RP (trial) 575-76.

At sentencing, the court ordered Mr. Jackson to pay $1135 in fees for his court –appointed attorney, a $100 domestic violence assessment, a $100 contribution to the Kitsap County expert witness fund, and a $500 contribution to the Kitsap County special assault unit. CP 17.

This timely appeal follows. CP 22.

ARGUMENT

I. THE COURT VIOLATED ER 802 AND MR. JACKSON'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT ADVERSE WITNESSES.

A. Standard of Review.

A denial of the Sixth Amendment right to confront adverse witnesses is reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Such an error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 117. Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).[2]

[2] Division I has held that a violation of the Confrontation Clause cannot be raised for the first time on appeal. *State v. O'Cain*, 169 Wn. App. 228, 232, 279 P.3d 926 (2012). Division III has held that a confrontation error can be raised for the first time on appeal, subject to harmless error analysis. *State v. James*, 138 Wn. App. 628, 641, 158 P.3d 102 (2007). Mr. Jackson objected to the admission of Lindsey's hospital records on confrontation grounds. RP 339-40. However, if Mr. Jackson's confrontation error is waived, his defense attorney's failure to preserve the issue constituted ineffective assistance of counsel, as argued elsewhere in this brief.

The interpretation of an evidentiary rule presents a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). If the trial court interpreted the rule correctly, the appellate court ordinarily reviews for an abuse of discretion.[3] *Id.* However, an evidentiary ruling alleged to infringe a constitutional right must be reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d 273, 280-281, 217 P.3d 768 (2009).

B. The court violated Mr. Jackson's right to confront adverse witnesses by admitting testimonial statements from a non-testifying social worker and triage nurse.

The state and federal constitutions guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. The Confrontation Clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the accused has had a prior opportunity for cross-examination. *Jasper*, 174 Wn.2d at 109 (*citing Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

[3] A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I).

The state bears the burden of establishing that a statement is non-testimonial and, therefore, admissible even absent an opportunity to cross-examine. *State v. Hurtado*, 173 Wn. App. 592, 600, 294 P.3d 838 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford,* 541 U.S. at 51. A statement is testimonial if it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Jasper*, 174 Wn.2d at 115 (*citing Crawford*, 541 U.S. at 52).

The Confrontation Clause analysis is separate from analysis under the rules of evidence. *Crawford*, 541 U.S. at 51.

At Mr. Jackson's trial, the court admitted records that included extensive notes from a non-testifying hospital social worker and triage nurse. Ex. 12A, pp. 3-4, 9-10. The court found that the statements were admissible. The court reasoned that Lindsey had spoken to the social worker and triage nurse for the purpose of medical diagnosis or treatment and that the notes were in an authenticated business record. RP (trial) 344, 363-64. The court did not respond when Mr. Jackson pointed out that the records also raised a confrontation issue. RP (trial) 339-40.

Statements made for the purpose of medical diagnosis or treatment are not testimonial for confrontation purposes. *See e.g. State v. Sandoval*, 137 Wn. App. 532, 538, 154 P.3d 271 (2007); *State v. Saunders*, 132 Wn. App. 592, 603, 132 P.3d 743 (2006); *State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005); *State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005). In such cases, a medical professional may relay the alleged victim's statement to the jury. *See, e.g., Sandoval*, 137 Wn. App. at 538.

In each of the cases cited above, the medical professional testified at trial. *Id.* The medical professional was subject to cross-examination regarding the alleged victim's statements. *Id.*

Here, on the other hand, the triage nurse and social worker did not testify. Mr. Jackson had no opportunity to cross examine the triage nurse or the social worker.[4]

The social worker and triage nurse's statements were testimonial under *Crawford*. *Jasper*, 174 Wn.2d at 115. When they formalized their statements in the medical records, the non-testifying witnesses would have been reasonably aware that they would be available for later use at trial. *Id.* This is especially true because Lindsey alleged that she'd been the

[4] Mr. Jackson does not contest the admissibility of Lindsey's statements to the medical professionals. Had the nurse and social worker testified, he could have cross-examined them about Lindsey's statements, and his confrontation right would have been satisfied.

victim of a crime. In fact, the social worker suggested a referral to law enforcement. Ex. 12A, p. 10.

The statements from the non-testifying triage nurse and social worker were the only evidence corroborating the details of the eyewitness's version of events and specifically naming Mr. Jackson as the assailant. Ex. 12A, pp. 3-4, 9-10. Mr. Jackson did not have the opportunity to cross-examine the nurse or the social worker. He was unable to ask how they reached their conclusions or whether there was additional information that they did not record. The fact that Lindsey herself did not testify exacerbates the prejudice because the jury is likely to have relied heavily the social worker and triage nurse's statements. The state cannot establish that the violation of Mr. Jackson's right to confront witnesses was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117.

The court violated Mr. Jackson's constitutional right to confront adverse witnesses by admitting testimonial statements from witnesses whom he was unable to cross-examine. *Id.* Mr. Jackson's conviction must be reversed. *Id.*

C. The court violated ER 802 by admitting hearsay that did not fall within an exception to the rule.

Under ER 805, "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule…" In this case, both the social worker and the triage nurse wrote summaries of Lindsey's statements. Ex. 12A. The records therefore presented hearsay within hearsay. *Paradiso v. Drake*, 135 Wn. App. 329, 339, 143 P.3d 859 (2006). The court failed to analyze whether each level of hearsay fell within an exception to the hearsay rule. *Id.* Assuming Lindsey's statements themselves qualified under the medical exception (ER 803(a)(4)), the records were still inadmissible because no exception supported the admission of the nurse's statements or the social worker's statements.

The trial court made reference to the business records exception. . RP (trial) 363-64. However, the business records exception applies only to records where "cross-examination would add nothing to the reliability of clerical entries…" *In re Welfare of J.M.*, 130 Wn. App. 912, 924, 125 P.3d 245 (2005). A narrative report such as that provided by each of the two absent witnesses in this case should not be admitted as part of a business record. *Id.*

Mr. Jackson should have had the opportunity to cross-examine the two absent witnesses regarding Lindsey's statements. He could not ask about Lindsey's demeanor. He could not seek to clarify the exact words she used in describing the conflict. He could not determine whether or not the witnesses omitted anything from their reports.

The medical records contained hearsay within hearsay. Ex. 12A. Even if some portions of the records were admissible, the narrative summaries by the nurse and social worker were not. ER 802. The records should have been excluded. *Welfare of J.M.,* 130 Wn. App. at 924.

II. THE COURT VIOLATED MR. JACKSON'S RIGHT TO A SPEEDY TRIAL.

A. Standard of Review.

The application of the speedy trial rule to a specific set of facts is a question of law reviewed *de novo*. *State v. Chavez-Romero*, 170 Wn. App. 568, 577, 285 P.3d 195 (2012) *review denied,* 176 Wn.2d 1023, 299 P.3d 1171 (2013). Denial of a motion to dismiss for speedy trial purposes is reviewed for abuse of discretion. *Id.* A court necessarily abuses its discretion when it fails to apply the correct legal standard. *Hidalgo v. Barker*, 176 Wn. App. 527, 309 P.3d 687 (2013).

B. The court abused its discretion by continuing trial beyond the speedy trial period based on unavailability of state witnesses whom the state had not subpoenaed..

An accused person who is in custody must be brought to trial within sixty days of arraignment. CrR 3.3(b)(1). The court may continue the trial date if "required in the administration of justice." CrR 3.3(f)(2). The continuance period is excluded from the speedy trial clock. CrR 3.3(e)(3).

A court may grant a continuance based on witness unavailability if the party seeking the continuance has exercised due diligence in securing the witness's attendance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). The state has not exercised due diligence if it has not properly subpoenaed the witness prior to arguing that his/her unavailability requires a continuance. *Id.*; *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 577, 761 P.2d 621 (1988).

Mr. Jackson was arraigned on February 20, 2013 and stayed in custody until his trial. CP 39. The trial was originally set for April 15, 2013. CP 39. The initial speedy trial expiration date was April 22, 2013. CP 39. His trial was not commenced on that date.

1. The trial court erred by granting the state's first request for a continuance beyond the speedy trial expiration period.

On April 11th, the state moved to continue. RP (4/11/13) 2. The prosecutor said that an eyewitness to the alleged assault would be working in Montana for several weeks. RP (4/11/13) 2. The prosecutor did not indicate what efforts the state had made to secure the witness's presence at trial. RP (4/11/13). Nothing in the record shows that the state attempted to serve her with a subpoena. Mr. Jackson objected to the continuance. He pointed out that the alleged victim herself could testify regarding what had occurred. RP (4/11/13) 3. The court granted the state's motion to continue. RP (4/11/13) 3-5.

This was error. Because the state had not taken any steps to secure the attendance of the witness, the court should not have granted the prosecutor's motion. *Clewis*, 159 Wn. App. 847. The court abused its discretion by granting the state's motions to continue. *Adamski*, 111 Wn.2d at 577. The state was unable to demonstrate that it had exercised due diligence because it never filed a subpoena for the alleged eyewitness. *Id.* In fact, the court did not conduct any inquiry into whether the state had exercised due diligence in securing the attendance of the witness. The court's failure to apply the correct legal standard constitutes an abuse of discretion. *Barker*, 176 Wn. App. 527.

Mr. Jackson's conviction must be reversed and the case dismissed with prejudice. CrR 3.3(h);l *Adamski*, 111 Wn.2d at 583.

2. The trial court erred by granting the state's second request for a continuance beyond the speedy trial expiration period.

The state moved to continue again on May 6, 2013. RP (5/6/13) 3. The state claimed that the arresting officer was unavailable because of military training. RP (5/6/13) 3. Nothing in the record indicates that the state had subpoenaed the officer. Mr. Jackson objected to the continuance. RP (5/6/13) 5. He noted that the state had not established that the witnesses' absences were unavoidable. RP (5/6/13) 5. The court granted the state's motion to continue. RP (5/6/13) 6.

As with the first continuance, this second continuance was also error. The prosecutor did not show that it had made diligent efforts to secure the attendance of the witness. *Clewis*, 159 Wn. App. 847. The continuance was an abuse of discretion. *Adamski*, 111 Wn.2d at 577. The state failed to demonstrate due diligence. It never even filed a subpoena for the officer. *Id.* The court did not conduct any inquiry into the state's efforts. The court's failure to apply the correct legal standard constitutes an abuse of discretion. *Barker*, 176 Wn. App. 527.

Mr. Jackson's conviction must be reversed and the case dismissed with prejudice. CrR 3.3(h); *Adamski*, 111 Wn.2d at 583.

3. The trial court should have granted Mr. Jackson's pretrial motion for dismissal for violation of his right to speedy trial.

Before trial, Mr. Jackson moved to dismiss the charge for violation of his right to a speedy trial. CP 38-39; RP (trial) 50-53. The state did not present any evidence that it had made reasonable efforts to ensure that its witnesses would be present for trial. Despite this, the court denied the motion. RP (trial) 53.

Because each continuance violated Mr. Jackson's speedy trial right, the trial court should have granted his motion to dismiss. Mr. Jackson's conviction must be reversed with prejudice. CrR 3.3(h); *Adamski*, 111 Wn.2d at 583.

III. THE COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF FOURTH DEGREE ASSAULT.

A. Standard of Review.

The Supreme Court reviews constitutional errors *de novo*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A trial court's refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wn. App. 211, 214, 56 P.3d 618 (2002).[5] The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

[5] An abuse of discretion standard applies if the refusal was based on a factual dispute. *Belasco*, 114 Wn. App. at 214.

B. The court denied Mr. Jackson's unqualified right to have the jury consider the lesser offense of fourth degree assault.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

These statutes guarantee the "unqualified right" to have the jury decide on the inferior-degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900) (Young I)). The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *Fernandez-Medina,*141 Wn.2d 448. The right to an appropriate inferior-degree offense instruction is "absolute;" failure to give such an instruction requires reversal. *Parker,* 102 Wn.2d at at 164.

In Washington, courts apply the two-prong *Workman* test in determining whether to instruct the jury on a lesser-included offense. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (*citing State v. Workman,* 90 Wn.2d 443, 584 P.2d 382 (1978)). The first prong is met if each of the elements of the lesser offense is necessarily an element of the greater. *Id.* The second, factual prong requires evidence supporting the inference that the only the lesser crime occurred. *Id.*

A person is guilty of fourth degree assault if "under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041. Mr. Jackson was charged with second degree assault for "assault[ing] another… thereby recklessly inflict[ing] substantial bodily harm." CP 1. Under the legal prong of the *Workman* test, fourth degree assault is a lesser-included offense of second degree assault. *Nguyen*, 165 Wn.2d at 434.

The evidence of Mr. Jackson's case also meets the second, factual prong of the *Workman* test. *Id.* To convict Mr. Jackson of second degree assault, the jury had to find that he had caused "substantial bodily harm" to Lindsey. CP 1. The court defined "substantial bodily harm" to include "a temporary but substantial disfigurement." CP 90.

Lindsey did not testify at trial. The only evidence of her injuries came from the doctor who testified that Lindsey sustained a three

centimeter laceration, which required stitches. RP 376. The doctor testified that he never saw Lindsey after her initial hospital visit and did not know whether she had a visible scar. RP (trial) 381-82. A reasonably jury could have concluded that the laceration did not qualify as "substantial disfigurement."

When taken in a light most favorable to Mr. Jackson, the evidence showed that Lindsey did not suffer substantial bodily harm, and thus supported the inference that only a fourth degree assault had occurred. *Nguyen*, 165 Wn.2d at 434. The second prong of the *Workman* test was met in Mr. Jackson's case. *Id.*

The trial court refused to instruct the jury on the lesser-included of simple assault. The court reasoned that Mr. Jackson had not presented evidence affirmatively establishing some injury amounting to less than substantial bodily harm. RP 485. The *Workman* test, however, only requires that there be "the slightest" evidence supporting an inference that only the lesser offense was committed. *Parker,* 102 Wn.2d at 163-164; *Nguyen*, 165 Wn.2d at 434. The *Workman* test does not require additional evidence of a non-substantial injury. The state's evidence, taken in the light most favorable to the defense, affirmatively proves simple assault, not second-degree assault.

The court abused its discretion by failing to apply the proper legal standard to the facts of Mr. Jackson's case. *Barker*, 176 Wn. App. 527 (a court abuses its discretion when it applies the incorrect legal standard). The trial court violated Mr. Jackson's "unqualified right" to have the jury instructed on an applicable lesser-included offense. *Parker,* 102 Wn.2d at 163-164. His conviction must be reversed. *Id.* at 166.

C. The trial judge infringed Mr. Jackson's state and federal due process rights to instructions on a lesser-included offense.[6]

The government may not deprive a person of liberty without due process. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.[7] Washington courts balance three factors when evaluating due process claims involving state criminal procedures.[8] *Mathews v. Eldridge,* 424 U.S. 319, 333, 96

[6] This issue is currently on review before the Washington Supreme Court. *State v. Condon*, 178 Wn.2d 1010, 311 P.3d 26 (2013).

[7] In some contexts, art. I, § 3 provides greater protection than does the Fourteenth Amendment's due process clause. See, e.g., *State v. Bartholomew,* 101 Wn.2d 631, 639-640, 683 P.2d 1079 (1984).

[8] Federal courts do not apply this test to state criminal proceedings; instead, they apply the *Patterson* test. *Medina v. California*, 505 U.S. 437, 444-445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)) (citing *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). This is because federal courts are loathe to "construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson,* 432 U.S. at 201; *see also Medina,* 505 U.S. at 445 (quoting *Patterson*). A federal court will not invalidate a state criminal procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson.* 432 U.S. at 201-202. Washington courts are not constrained in this way. The *Medina* decision applies only to federal review of state court proceedings. *Patterson*, 432 U.S. at 201; *Medina*, 505 U.S. at 445. State courts need not adopt the *Patterson* standard when reviewing criminal procedures. State courts may apply a more protective test under the Fourteenth Amendment,

S.Ct. 893, 47 L.Ed.2d 18 (1976)). These factors include (1) the private interest, (2) the risk of error under current procedure and the probable value of additional procedures, and (3) the government's interest in maintaining the existing procedure. *Id.* This three-factor test applies when Washington courts apply the Fourteenth Amendment in criminal cases.[9] It also applies under Wash. Const. art. I, § 3.[10]

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despite the U.S. Supreme Court's adoption of the *Patterson* standard in federal court. Because *Medina* and *Patterson* deviate from *Mathews* only as a result of federalism, this court must apply *Mathews* balancing to Mr. Jackson's procedural due process claim.

[9] This Court has twice remarked on the appropriate test for evaluating due process claims in criminal cases. The court declined to apply *Mathews* in *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009). However, the court did not analyze art. I, § 3, and appellant did not provide a *Gunwall* analysis. Furthermore, the *Heddrick* court made no mention of the federalism concerns that prompted the appli-cation of a different standard in *Medina* and *Patterson. Id.* In a later case, the court declined to reach the issue, finding in favor of the state under either the *Mathews* standard or the standard set forth in *Medina. State v. Brousseau*, 172 Wn.2d 331, 346-49 n. 8, n. 9., 259 P.3d 209 (2011).

[10] Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive Gunwall criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Gunwall* may be unnecessary here, because Mr. Jackson asks the court to do no more than apply the traditional federal standard for evaluating procedural due process claims. Nonetheless, a brief *Gunwall* analysis follows:

The language of the state provision. The strong and direct language of art. I, § 3 establishes a concern for individual rights. The acknowledgment that the state may deprive a person of rights suggests the need to balance such rights against state interests. The *Mathews* test meets this need.

Differences between the state and federal provisions. Identity of language does not end the inquiry under this factor. Instead, the state constitution may depart from federal law where justified by policies underlying the constitutional guarantee. *State v. Davis*, 38 Wn. App. 600, 605 n. 4, 686 P.2d 1143 (1984). The federalism concerns discussed by the U.S. Supreme Court do not apply to art. I, § 3. *Medina*, 505 U.S. at 445.

State constitutional and common law history. While no legislative history suggests that art. I, § 3 differs from the federal provision; this does not mean they are coextensive. Nor does the common law preclude application of the balancing test outlined in *Mathews*. The Supreme Court has noted that *Mathews* sets the minimum standard in civil cases, so the state constitution "would not provide less due process protection" than that

Under *Mathews,* courts must instruct on applicable lesser-included offenses. The magnitude of the private interest at stake, the risk of error when jurors do not have the chance to consider a lesser-included offense, and the absence of any real countervailing government interest all weigh in favor of this result.

1. Every criminal case involves a compelling private interest: the accused person's fundamental right to freedom from restraint.

A proceeding that may result in confinement involves the "most elemental of liberty interests," one described as "almost uniquely compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *Mathews* balancing requires significant procedural safeguards when a person faces even brief confinement in a civil

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required under *Mathews*. *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *reconsideration denied* (May 9, 2012), *as corrected* (May 8, 2012).

Pre-existing state law. Washington has a long tradition of balancing competing interests in criminal cases. For example, the Supreme Court long ago balanced the competing interests attached to conflicting presumptions in rape cases. *State v. Jones*, 80 Wash. 588, 596, 142 P. 35 (1914) (Jones I). Pre-existing state law suggests that balancing tests are consistent with art. I, § 3.

Structural differences between the two constitutions. This factor always supports an independent constitutional analysis. *State v. Young,* 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (Young II).

Matters of local concern. State criminal procedure **is** a local concern. *Medina,* 505 U.S. at 445.

Conclusion: Five of the six *Gunwall* factors support an independent application of art. I, § 3. The remaining factor does not prohibit application of the *Mathews* balancing test.

proceeding. *Turner v. Rogers*, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011); *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Thus, the private interest here weighs heavily in favor of requiring instruction on a lesser-included offense as a matter of due process.

2. Failure to instruct on an applicable lesser-included offense creates a significant risk of error at a criminal trial.

In federal court, an accused person has the right to instructions on a lesser-included offense. *Stevenson v. United States*, 162 U.S. 313, 322-323, 16 S.Ct. 839, 40 L.Ed. 980 (1896).[11] Similarly, in all capital proceedings, due process requires instruction on applicable lesser-included offenses. U.S. Const. Amend. XIV; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).[12]

Accordingly, art. I, § 3 requires analysis of criminal procedures using the balancing test set forth in *Mathews*.

[11] The federal rule is "beyond dispute." *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). Any other rule would present "difficult constitutional questions." *Id.*, at 212-213.

[12] Although the *Beck* court explicitly reserved ruling noncapital cases (*Beck,* 447 U.S. at 638, n.14), subsequent decisions have eroded the distinction between capital cases and those resulting in life imprisonment without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The federal circuit courts have wrestled with the question, but only in the context of *habeas corpus* proceedings, where significant procedural bars foreclose a definitive answer. A plurality of federal circuit courts believe that refusal to instruct on a lesser-included offense may violate due process in cases not involving the death penalty. Of these, the third circuit has unequivocally extended *Beck* to noncapital cases. *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (1988). Four circuits will address the issue on *habeas* review if the refusal to instruct threatens a fundamental miscarriage of justice. Courts adopting this approach include the first, sixth, seventh, and eighth circuits. *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990); *Scott v. Elo,* 302 F.3d 598, 606 (6th Cir. 2002)); *Robertson v. Hanks,* 140 F.3d 707, 711 (7th Cir. 1998);

Failing to instruct on applicable lesser-included offenses increases the risk of error at trial. Such a failure "diminish[es] the reliability of the guilt determination," and "enhances the risk of an unwarranted conviction." *Beck,* 447 U.S. at 638.[13] Without instruction on a lesser-included offense, the accused person is

> exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction…

Keeble, 412 U.S. at 212-213.

In other words, failure to instruct on a lesser-included offense creates a risk of conviction even in the absence of proof beyond a reasonable doubt, "simply be-cause the jury wishes to avoid setting [the defendant] free." *Vujosevic,* 844 F.2d at 1027. The risk of error may increase when conviction does not carry the death penalty: in such cases

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DeBerry v. Wolff, 513 F.2d 1336, 1339 (8th Cir. 1975). The second circuit has refused to consider the issue on *habeas* review, citing a different procedural bar. *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir. 1996). The fourth circuit apparently takes this approach as well. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F.Supp.2d 785, 793 (D.S.C. 2010) (citing unpublished case); *see also Leary v. Garraghty*, 155 F.Supp.2d 568, 574 (E.D. Va. 2001). The D.C. circuit has not faced the issue. The remaining circuit courts—the fifth, ninth, tenth, and eleventh circuits—adhere to a general rule of "automatic nonreviewability" in *habeas* proceedings. *Trujillo v. Sullivan*, 815 F.2d 597, 603 (10th Cir. 1987); *see also Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987).

[13] Providing jurors with three options—guilty, not guilty, or guilty of a lesser charge— "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Beck,* 447 U.S. at 634.

jurors might find themselves *more* willing to convict despite the absence of proof on one element, since erroneous conviction will not result in execution of the innocent.

The second *Mathews* factor weighs in favor of requiring appropriate instruction on lesser-included offenses.

3. The government benefits from proper instruction on applicable lesser-included offenses.

The third *Mathews* factor requires examination of the public interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews,* 424 U.S. at 335. Appropriate instructions on lesser-included offenses benefit the state. The public interest therefore weighs in favor of a rule requiring such instruction.

First, prosecutors have a duty to act in the interest of justice. *State v. Warren,* 165 Wn.2d 17, 27, 195 P.3d 940 (2008). No prosecutor should seek what the *Beck* court described as an "unwarranted conviction." *Beck,* 447 U.S. at 638. Second, proper instruction on an included offense allows jurors to convict of a lesser charge when they might otherwise acquit the defendant of the charged crime.[14] Juries will convict defendants of the

[14] As the *Beck* court noted, this rationale underlies the common law origin of the practice. *Beck,* 447 U.S. at 633.

appropriate offense when the state cannot prove the charged offense. Third, unwarranted conviction on a greater charge wastes resources by incarcerating people for longer periods than necessary or appropriate. Instruction on applicable lesser-included offense reduces the possibility that offenders will receive longer sentences than they deserve.

The public interest weighs in favor of requiring appropriate instruction on lesser-included offenses.

4. Due process requires trial courts to instruct jurors on applicable lesser-included offenses.

All three *Mathews* factors weigh in favor of a rule requiring courts to instruct jurors on applicable lesser-included offenses when warranted by the evidence and requested by the defendant. *Mathews,* 424 U.S. at 333. The significant private interest, the likely benefits of additional procedural protections, and the benefit flowing to the state all favor such instruction. *Mathews,* 424 U.S. at 333.

The Supreme Court should adopt the *Beck* court's reasoning, and hold that failure to instruct on a lesser-included offense violates due process when the evidence supports such an instruction and the accused person requests it. Here, the court's instructions forced jurors to either acquit or convict Mr. Jackson. They did not have "the 'third option' of convicting on a lesser included offense…" *Beck,* 447 U.S. at 634.

The trial court's refusal to instruct the jury on fourth degree assault violated Mr. Jackson's due process right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Vujosevic.* The court must reverse his conviction and remand the case to the superior court. *Id.* Upon retrial, the court must instruct jurors on any applicable lesser-included offenses.

D. The court's failure to instruct on fourth degree assault prejudiced Mr. Jackson because the evidence supported the proposed instruction.

1. A reviewing court may not find harmless any violation of the statutory right if the evidence supports instruction on the lesser-included offense.

The statutory right to an appropriate inferior-degree offense instruction is "absolute." *Parker,* 102 Wn.2d at 164. When warranted by the evidence and requested by the defendant, failure to give such an instruction requires reversal. *Id.* Washington courts adopted this rule more than a century ago.[15] Because the court deprived Mr. Jackson of his statutory right to instruction on second-degree murder, this court must reverse his conviction. *Parker,* 102 Wn.2d at 164.

[15] *See, e.g., Young*, 22 Wash. 273 (Young I). Courts have recognized only two exceptions to this rule. First, a reviewing court need not reverse when the jury rejects an intermediate included offense. Thus, for example, failure to instruct on manslaughter does not require reversal harmless when the jury convicts on first-degree murder and rejects the inferior degree offense of second-degree murder. *State v. Guilliot*, 106 Wn. App. 355, 369, 22 P.3d 1266 (2001). Second, a court need not reverse convictions for companion charges unrelated to the included offense. *State v. Southerland*, 109 Wn.2d 389, 391, 745 P.2d 33 (1987) (reversal of assault charges not required where trial court erroneously failed to

2. A reviewing court may not find harmless any violation of the due process right if the evidence supports instruction on the lesser-included offense.

Courts presume prejudice from a showing of constitutional error. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Violation of a constitutional right requires reversal unless the state proves harmlessness beyond a reasonable doubt. *Id.* The prosecution must establish that the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *Id.*

A due process violation stems from refusal to instruct when the evidence supports the requested instructions. Under such circumstances, the state cannot show harmless error: if the evidence supports instructions on a lesser-included offense, refusal to give the instructions will never be trivial, will always prejudice the defendant's substantial rights, and will always have a potential impact on the outcome. *Id.*

Here, the evidence supported Mr. Jackson's request for an instruction on fourth degree assault, as outlined above. This evidentiary support for the requested instructions establishes prejudice. The trial court's failure to give the requested instructions deprived Mr. Jackson of

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instruct on trespass as a lesser-included offense of burglary; error found harmless "as to the assault convictions."). Neither exception applies here.

his state and federal due process right to have the jury pass on the lesser-included offense. *Vujosevic,* 844 F.2d at 1027. His conviction must be reversed. *Lorang,* 140 Wn.2d at 32.

IV. PROSECUTORIAL MISCONDUCT DENIED MR. JACKSON A FAIR TRIAL

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If not objected to, prosecutorial misconduct requires reversal if it is flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones II).

B. The prosecutor committed misconduct by appealing to the passion and prejudice of the jury, disparaging defense counsel, and misstating the state's burden of proof.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash.

Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed flagrant and ill-intentioned misconduct by appealing to the passion and prejudice of the jury.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.*

A prosecutor also commits misconduct by encouraging the jury to consider sympathy for the alleged victim when deciding guilt or

innocence. *Moore v. Morton*, 255 F.3d 95, 117 (3d Cir. 2001). Such an argument invites the jury to rely on passion and prejudice, rather than the evidence in the case. *Id.*

At Mr. Jackson's trial, the prosecutor invited the jury to rely on passion, prejudice, and sympathy for the alleged victim:

> [V]ictims of domestic violence need a voice. They do. Even when they're not potentially strong enough to stand up on their own, they need someone to stand up for them. And that's why we're here today. You didn't hear from the victim, but you did hear her voice. RP (trial) 527-28.

The prosecutor's argument encouraged the jury to convict based on sympathy for victims of domestic violence, in general, rather than on the facts of the case.

The prosecutor's improper argument prejudiced Mr. Jackson. *Glasmann*, 175 Wn.2d at 704. The alleged victim did not testify at trial, which created a weakness in the state's case. Rather than attempting to cure the weakness with admitted evidence, the prosecutor argued that the alleged victim's absence was a reason to convict in order to lend her a "voice." RP (trial) 527. There is a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging the jury to convict based on passion and

prejudice and sympathy for victims of domestic violence. *Id.* Mr. Jackson's conviction must be reversed. *Id.*

2. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). Such an argument improperly attempts to "draw a cloak of righteousness" around the state's case. *Id.*

At Mr. Jackson's trial, the prosecutor argued that defense counsel's theory of the case left him "at a loss for words." RP (trial) 563-64. He accused defense counsel of treating the case as if it were insignificant. RP (trial) 564. He told the jury that he hoped the defense argument left them "at a loss for words" as well. RP (trial) 565. The court overruled Mr. Jackson's objections to these improper arguments. RP (trial) 563-64.

The prosecutor's argument sought to "draw a cloak of righteousness" around the state's case by mischaracterizing and denigrating the defense theory. *Gonzales*, 111 Wn. App. at 282. Rather than focusing on the evidence, the prosecutor encouraged the jury to convict based on his assessment of defense counsel's performance.

The prosecutor's misconduct prejudiced Mr. Jackson's defense. *Glasmann*, 175 Wn.2d at 704. The argument discouraged the jury from

considering the evidence and the logic of the defense arguments. Instead, the prosecutor urged jurors to focus on an emotional response. There is a substantial likelihood that the improper argument affected the verdict. *Id.*

The prosecutor committed prejudicial misconduct by disparaging defense counsel in closing argument. *Gonzales*, 111 Wn. App. at 282. Mr. Jackson's conviction must be reversed. *Id.* at 284.

3. The prosecutor committed misconduct by mischaracterizing the state's burden of proof and undermining Mr. Jackson's presumption of innocence.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Glasmann*, 175 Wn.2d at 713 (*citing In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). The presumption of innocence makes up the "bedrock principle upon which our criminal justice system stands." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.*

A prosecutor commits misconduct by mischaracterizing the beyond a reasonable doubt standard by comparing it to everyday decisions. *Johnson*, 158 Wn. App. at 684.

At Mr. Jackson's trial, the prosecutor compared finding guilt beyond a reasonable doubt to believing that the earth is round or that the prosecutor is an attorney. RP (trial) 515, 567. He pointed out that the jury did not have direct evidence of either of those contentions, but nonetheless believed them to be true based on "a common sense appreciation of the facts." RP (trial) 515, 567.

The prosecutor's argument mischaracterized the state's burden of proof. *Johnson*, 158 Wn. App. at 684. Finding guilt beyond a reasonable doubt is not like knowing that the earth is round. The average person is told that the earth is round starting at a young age and simply believes it absent either circumstantial or direct evidence. A child knows that the earth is round because his/her teacher or parent says so. The prosecutor's contention that the accused is guilty, however, does not establish proof beyond a reasonable doubt. Rather, the jury must examine the evidence at trial and determine whether the state has overcome the presumption of innocence.

Additionally, a belief based on "a common sense appreciation of the facts" is not the same as proof beyond a reasonable doubt. A person can believe something based on common sense, but still harbor a reasonable doubt.

Similarly, the prosecutor's analogy to "having confidence" that he was an attorney misstated the state's burden. *Id.*; RP (trial) 567. The jury could "have confidence" in something without being convinced beyond a reasonable doubt.

Mr. Jackson was prejudiced by the prosecutor's improper arguments. *Glasmann*, 175 Wn.2d at 704. Mr. Jackson exercised his right not to testify at trial. His defense relied on the jury holding the state to its burden of proof. There is a substantial likelihood that the prosecutor's mischaracterization of that burden of proof affected the outcome of the case. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing the state's burden of proof. *Johnson*, 158 Wn. App. at 685-86. Mr. Jackson's conviction must be reversed. *Id.*

C. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Santiago's conviction.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Here, the prosecutor committed misconduct by encouraging the jury to rely on passion, prejudice, and sympathy for domestic violence

victims rather than the evidence of the case; disparaging defense counsel; and minimizing the state's burden of proof.

Whether considered individually or in the aggregate, the prosecutor's improper arguments require reversal of Mr. Jackson's conviction. *Walker*, 164 Wn. App. at 737.

V. MR. JACKSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel provided deficient performance that prejudiced Mr. Jackson's defense.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amend. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at

862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

1. If Mr. Jackson's trial counsel did not adequately raise his right to confront adverse witnesses, that failure constituted ineffective assistance of counsel.

Failure to exert the right to confront adverse witnesses may waive the issue for appeal. *O'Cain*, 169 Wn. App. at 232.

During extensive argument on the admissibility of the hospital records, defense counsel mentioned *Crawford*, but did not expand on the argument or renew the objection later. RP (trial) 339-40. Neither the state nor the court ever responded to that issue. RP (trial) 339-44, 361-69.

The admission of testimonial statements from the non-testifying social worker and triage nurse violated Mr. Jackson's rights under the Confrontation Clause. *Jasper*, 174 Wn.2d at 109. Counsel had no valid tactical reason for failing to argue on behalf of his client's constitutional right. The medical records did not contain any information helpful to the defense. Ex. 12A. Defense counsel argued at length for the exclusion of the records on hearsay grounds. Counsel's failure to continue to object fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at

862. If defense counsel's single objection was not sufficient to preserve the issue for appeal, failure to further press the issue of Mr. Jackson's confrontation right constituted deficient performance. *Hendrickson*, 138 Wn. App. at 833.

Counsel's deficient performance prejudiced Mr. Jackson. *Kyllo*, 166 Wn.2d at 862. The statements from the social worker and triage nurse were the only evidence corroborating Seifert's story and naming Mr. Jackson as the one who had committed the assault. Ex. 12A, pp. 3-4, 9-10. There is a reasonable probability that defense counsel's failure to object affected the outcome of the trial. *Id.*

Mr. Jackson's defense attorney provided ineffective assistance of counsel by failing to protect his client's right to confront adverse witnesses. *Id.* Mr. Jackson's conviction must be reversed. *Id.*

VI. THE COURT ERRED BY ORDERING MR. JACKSON TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY, THE DOMESTIC VIOLENCE ASSESSMENT, AND THE CONTRIBUTION TO THE SPECIAL ASSAULT UNIT AND EXPERT WITNESS FUND.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones III); *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Illegally imposed costs and fees can be

challenged for the first time on review. *State v. Calvin*, 67627-0-I, 2013 WL 6332944, --- P.3d ---, n. 2 (Wash. Ct. App. May 28, 2013)

B. The court lacked the authority to order Mr. Jackson to pay the cost of court-appointed counsel.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[16] The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). The court may not order an offender to pay "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2).[17]

The trial court exceeded its authority by requiring Mr. Jackson to pay $1135 for court appointed attorney fees. CP 17. First, nothing in the statute specifically authorizes imposition of costs for counsel. Second, the costs of counsel were not "specially incurred by the state in prosecuting" Mr. Jackson. RCW 10.01.160(2). Third, the cost of counsel inhered in

[16] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

[17] Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160. Here, the record does not

the expense required to provide a constitutionally guaranteed jury trial. RCW 10.01.160(2).

For these reasons, the attorney fee assessment must be vacated, and the case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

C. The court violated Mr. Lawson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (*Fuller II*). Under *Fuller II,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller II* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

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indicate whether or not defense counsel belonged to a public defense agency funded in a manner unrelated to specific violations of law.

RCW 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[18] *Fuller II*, 417 U.S. at 45.

In *Fuller II*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those

[18] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller II*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller II,* 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.[19]

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[19] *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller II*, 417 U.S. at 53.

D. The court lacked authority to order payment of the domestic violence assessment, the expert witness fund contribution, and the special assault unit contribution.

The court ordered Mr. Jackson to pay a domestic violence assessment of $100. CP 17. This fee may not be imposed except in cases involving domestic violence. *Moreno*, 173 Wn. App. at 499. In this case, the jury did not find that the offense had involved domestic violence. RP 575-76. The court should not have imposed the fee. *Hathaway*, 161 Wn. App. 651-653.

The court also ordered Mr. Jackson to pay $100 toward the "Kitsap County Expert Witness Fund." CP 17. No statute authorizes such a payment. Furthermore, Mr. Jackson was not afforded a defense expert. The fee should not have been assessed. *Hathaway*, 161 Wn. App. 651-653.

Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay

Finally, the court ordered Mr. Jackson to pay a $500 contribution to the "Kitsap County Special Assault Unit." CP 17. This fee is not authorized by any statute. The court exceeded its authority by imposing this fee. *Hathaway*, 161 Wn. App. 651-653.

E. The record does not support the sentencing court's finding that Mr. Jackson has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). This is an error that may be raised at any time, including for the first time on appeal. *Calvin*, 67627-0-I, 2013 WL 6332944, --- P.3d ---, n. 2.

In this case, the sentencing court entered such a finding without any support in the record. CP 17. Indeed, the record suggests that Mr. Jackson lacks the ability to pay the amount ordered. The court found Mr. Lawson indigent at the end of the proceedings. CP 34-36. Accordingly, Finding No. 4.1of the Judgment and Sentence must be vacated. *Bertrand*, 165 Wn. App. at 404.

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the reimbursement amount ordered within the sixty days provided by statute").

The lower court ordered Mr. Jackson to pay $1135 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. CP 17; RP (6/14/13) 5-19. The court violated Mr. Jackson's right to counsel. Under *Fuller,,* it lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller II*, 417 U.S. at 53. The order requiring Mr. Jackson to pay $1135 in attorney fees must be vacated. *Id.*

In addition, the court ordered payment of various other costs and fees. The court should not have assessed these costs and fees without entering a finding, supported by evidence in the record, that Mr. Jackson had the ability to pay.

CONCLUSION

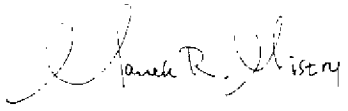
The court violated Mr. Jackson's right to confront adverse witnesses by admitting testimonial statements from witnesses who did not testify at trial. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging the jury to convict based on passion, prejudice, and sympathy for domestic violence victims; disparaging the role of defense counsel; and minimizing the state's burden of proof. The court violated Mr. Jackson's right to a speedy trial by granting the state's motions to continue based on the unavailability of

witnesses who had not been subpoenaed. Mr. Jackson's defense attorney provided ineffective assistance of counsel by not properly raising his client's confrontation right. Mr. Jackson's conviction must be reversed, and the case either dismissed with prejudice or remanded for a new trial.

The court ordered Mr. Jackson to pay the cost of his court-appointed attorney in violation of statute and the right to counsel. The court also erred by ordering Mr. Jackson to pay a domestic violence assessment, a contribution to an expert witness fund, and a special assault unit contribution. If the conviction is not reversed, the Court of Appeals must vacate the lower court's order that Mr. Jackson pay the cost of his court-appointed attorney, the domestic violence assessment, the contribution into an expert witness fund, and the crime lab fee.

Respectfully submitted on December 18, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Michael Jackson
6139 NE Center Street
Suquamish, WA 98392

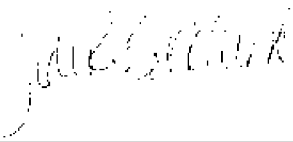
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 18, 2013.



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