No. 45694-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shawn Christopher,

Appellant.

Clark County Superior Court Cause No. 13-1-01577-3

The Honorable Judge Robert A. Lewis

Appellant's Opening Brief

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3. The 2011 bill reenacting and amending RCW 9A.36.021 violated the subject-in-title rule.

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   ISSUE 1: Washington's constitution requires that bills enacted into law embrace a single subject. The 2011 bill reenacting and amending RCW 9A.36.021 (second-degree assault) embraced more than one subject. Was Mr. Christopher convicted under a statute that was enacted in violation of Wash. Const. art. II, § 19?
   ISSUE 2: Art. II, § 19 requires that the subject of a bill be expressed in its title. The bill reenacting and amending RCW 9A.36.021 (second-degree child assault) was captioned "AN ACT Relating to crimes against persons involving suffocation or domestic violence," but addressed additional unrelated topics. Was the statute enacted as part of a bill that violated the subject-in-title rule because the title contained no reference to some of the subjects contained in the bill?

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7. The prosecutor violated the court's order *in limine* by eliciting testimony that Officer Bibens "met Shawn before on some previous calls at that same location."

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Shawn Christopher and Christina Gutierrez were in a romantic relationship and lived together. RP 106-108. One night in the summer of 2013, they argued. RP 109-131. During the argument, Gutierrez kicked at Mr. Christopher, knocked a drink out of his hands, and pushed him over. RP 117-118, 119, 123, 327329, 331. Gutierrez called police and claimed that Mr. Christopher had choked her. Mr. Christopher denied it. RP 133-147, 266.

Gutierrez also claimed that while Mr. Christopher was in custody for her allegations, he convinced his cell-mate to contact her and tell her to drop the charges. RP 155-168. Mr. Christopher said that if the cell-mate made the contact, it was his own doing. RP 341.

The state charged Mr. Christopher with assault two, tampering with a witness, and violation of a domestic violence court order. CP 1-2. The court found Mr. Christopher indigent and appointed an attorney to represent him. Clerk's Minutes 8/23/13, Supp. CP.

Before trial, Mr. Christopher's attorney moved for an order preventing the state from eliciting evidence that Mr. Christopher had been convicted of assault in the past. RP 25. The court granted the motion over the state's objection. RP 24-25. The defense also requested redaction of

references to prior incidents from the 911 call. The state assented and the call was redacted. RP 42, 133-139.

The prosecutor planned to admit Gutierrez's statement written the night of the incident. In it, she alleged that she was told that Mr. Christopher was facing a strike if convicted. RP 52. The court ruled this evidence was admissible as it related to the tampering charge, but did not limit its consideration to the jury. RP 53-56.

At trial, the state asked the responding officer about the call he received. The officer told the jury that he has had contact with Mr. Christopher on prior calls to that same apartment. RP 233-234. Mr. Christopher's attorney's objection was sustained, but the court denied his motion for a mistrial. RP 233-238.

Mr. Christopher was convicted as charged. At sentencing, the court ordered that Mr. Christopher pay attorney fees of $1000 and defense expert fees of $409.25. CP 94.

Mr. Christopher timely appealed. CP 115.

ARGUMENT

I. MR. CHRISTOPHER WAS CONVICTED UNDER A STATUTE ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.

A. Standard of Review

Appellate courts review constitutional violations *de novo*. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Courts presume that statutes are constitutional; the party challenging a statute's constitutionality "bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) *opinion corrected,* 27 P.3d 608 (2001). An appellant meets this standard when "argument and research show that there is no reasonable doubt that the statute violates the constitution." *Id.*

B. The statute criminalizing second-degree assault was enacted in violation of the single-subject rule.

Under Wash. Const. art. II, § 19, "No bill shall embrace more than one subject…" The framers included this provision to prevent "logrolling" (where a law is pushed through by attaching it to other

legislation). To resolve a challenge under art. II, §19, a court must first determine whether the title is general or restrictive. *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003). A general title is broad, comprehensive and generic.[1] *Id.* A restrictive title is specific and narrow. *Id.*

A restrictive title carves out a particular part or branch of a subject. *Amalgamated Transit Union,* 142 Wn.2d at 210. Such a title will not be regarded as liberally as a general title. *Id.* Violations of the single-subject rule are more readily found where a restrictive title is used. *Id.,* at 211.

The single subject rule gives legislators "the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits." *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). The relevant inquiry looks to whether "the body of the act contain[s] more than one general subject…" *Id,* at 523. Part of the analysis turns on whether each subject is necessary to implement the others. *Amalgamated Transit Union,* 142 Wn.2d at 217. A statute passed in violation of the single

[1] A statute enacted under a general title is invalid unless there is "rational unity between the general subject and the incidental subjects." *Id.* at 209. Examples of general titles include "An Act relating to violence prevention," "An Act relating to tort actions." *Id.* at 208 (providing examples).

subject rule is unconstitutional and void. *Id.* at 216; *Toll Bridge,* 49 Wn2d at 525.

For example, in *Toll Bridge,* the Supreme Court invalidated an act because it embraced two subjects: "(1) To provide legislation, permanent in character, empowering a state agency to establish and operate all toll roads, and (2) to provide for the construction of a specific toll road linking Tacoma, Seattle, and Everett." *Toll Bridge,* 49 Wn.2d at 523. Similarly, in *Amalgamated Transit Union,* the court found that I-695 embraced two different purposes: "to specifically set license tab fees at $30 and to provide a continuing method of approving all future tax increases." *Amalgamated Transit Union,* 142 Wn.2d at 217.

The statute criminalizing assault was reenacted in 2011. Laws, 2011, Ch. 166 §1. The legislation was titled "AN ACT Relating to crimes against persons involving suffocation or domestic violence…" Laws, 2011, Ch. 166. This title carves out "a particular part or branch of a subject." *Amalgamated Transit Union*, 142 Wn.2d at 210 (internal quotation marks and citation omitted). It is therefore restrictive.

The body of the Act addresses multiple subjects, none of which are "necessary to implement the other." *Id.,* at 217. First, the Act defines "suffocation," and adds suffocation as a means of committing second-degree assault. Laws, 2011, Ch. 166 §1, 2. Second, the Act makes several

technical corrections, changing the spelling of "wilful" to "willful" in the definition of "malice," correcting a statutory reference to failure to register in RCW 9.94A.525 ("Offender Score"), and moving a misplaced conjunction in that same statute. Laws, 2011, Ch. 166 §§2-3. Third, the Act adds language allowing prior convictions for a repetitive domestic violence offense to wash out of a person's offender score after a ten-year period. Laws, 2011, Ch. 166 §1, 2.

None of these three subjects has anything to do with the other two. The provisions creating and defining a new means of committing second-degree assault do not relate to the technical corrections or to the wash-out period for repetitive domestic violence offenses. Similarly, the technical corrections have nothing to do with the more substantive provisions. Finally, the provision creating a wash-out period for repetitive domestic violence offenses does not concern assault by suffocation or the technical corrections.

The Act violates the single-subject requirement of art. II, § 19, "because both its title and the body of the act include" more than one subject." *Amalgamated Transit Union* 142 Wn.2d at 217. Mr. Christopher's assault conviction must be reversed, and the charge dismissed with prejudice. *Id.*

C. The statute criminalizing second-degree assault was enacted in violation of the subject-in-title rule.

The purpose of the subject-in-title rule is "to notify members of the Legislature and the public of the subject matter of the measure." *Amalgamated Transit Union,* 142 Wn.2d at 207. The subject-in-title rule requires courts to consider only the substantive language in the title. A title's "mere reference to a section… does not state a subject." *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted).

The bill reenacting the statute criminalizing second-degree assault addressed subjects that were not encompassed by its title. The two subjects referenced in the title—domestic violence and assault by suffocation—do not cover the technical changes. Because of this, the Act violates the subject-in-title rule. *Amalgamated Transit Union,* 142 Wn.2d at 226.

The second-degree assault statute was reenacted as part of a bill that violates the subject-in-title rule. Accordingly, it is unconstitutional. *Amalgamated Transit Union,* 142 Wn.2d at 210. Because he was found guilty of violating an unconstitutional statute, Mr. Christopher's assault conviction must be vacated and the charge dismissed with prejudice.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. CHRISTOPHER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY EXPOSING THE JURY TO PROPENSITY EVIDENCE.

D. Standard of Review.

Constitutional issues are reviewed *de novo.*[2] *Lynch*, 178 Wn.2d at 491. A prosecutor's misconduct requires reversal whenever there is a substantial likelihood that it affected the jury's verdict. *State v. Lindsay*, 88437-4, 2014 WL 1848454 (Wash. May 8, 2014).

E. The prosecution violated the court's ruling *in limine* by introducing evidence Officer Bibens knew Mr. Christopher from prior police responses to the apartment.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. 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). The inquiry examines the misconduct and

[2] Ordinarily, an appellate court applies an abuse-of-discretion standard to a trial court's decision denying a mistrial or a motion for a new trial. *See, e.g., State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011); *Smith v. Orthopedics Int'l, Ltd., P.S.*, 170 Wn.2d 659, 664, 244 P.3d 939 (2010). However, these standards cannot apply where constitutional error is involved, because a trial court "necessarily abuses its discretion if it denies an accused his constitutional rights." *State v. Hart*, -- Wn.2d --, 320 P.3d 1109, 1112 (Wash. Ct. App. 2014) (citing *State v. Iniguez,* 167 Wn.2d 273, 280, 217 P.3d 768 (2009)).

its impact, not the evidence that was properly admitted. *Glasmann*, 175 Wn.2d at 711.

The use of propensity evidence to prove a crime may also violate due process under the Fourteenth Amendment.[3] U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).[4] A conviction based in part on propensity evidence is not the result of a fair trial.[5] *Garceau,* 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

> [S]uch evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover…jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. …[J]urors will credit propensity evidence with more weight than

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[3] The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

[4] Washington courts are not bound by decisions of the federal circuit courts. *In re Crace*, 157 Wn. App. 81, 98 n. 7, 236 P.3d 914 (2010) *reversed on other grounds,* 174 Wn.2d 835, 280 P.3d 1102 (2012). However, decisions of the federal courts of appeal can provide guidance to Washington courts as they interpret the Fourteenth Amendment's due process clause.

[5] A violation of due process that has practical and identifiable consequences is a manifest error affecting the accused person's constitutional right. RAP 2.5(a)(3). It may therefore be raised for the first time on review.

> such evidence deserves…[S]uch evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause,* 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence. Under ER 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[6] *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

In this case, the trial court ruled *in limine* that the state would not be permitted to introduce any prior convictions, or evidence of prior bad acts. RP 25-26, 27, 30, 56; CP 18-38. Despite this, the prosecutor asked Officer Bibens if he knew Mr. Christopher, eliciting the response "I've met Shawn before on some previous calls at that same location." RP 234.

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[6] ER 403 provides that relevant evidence "may 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."

This was misconduct. The officer's testimony left jurors with the impression that Mr. Christopher had previously committed acts of domestic violence against Ms. Gutierrez. The problem was exacerbated by Officer Bibens's constant use of the parties' first names.[7] This suggested that Bibens was on a first-name basis as a result of frequent calls to the apartment.

It is unlikely that the court's instruction to disregard the remark solved the problem. Although jurors may have consciously ignored the words used by the officer, each juror's subconscious would have been infected by the idea that Mr. Christopher is a repeat offender. In light of this, they were likely to use his presumed propensity toward domestic violence as evidence of his guilt. Despite the court's effort to mitigate the prejudice, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004).

Furthermore, there is a substantial likelihood the misconduct affected the verdict. *Lindsay*, --- Wn.2d at ___. The case boiled down to a credibility contest between Mr. Christopher and Gutierrez. Knowing that Officer Bibens had "met Shawn before on some previous calls at that same

[7] Officer Bibens repeatedly referred to Ms. Gutierrez as "Christina." RP 233, 234, 243, 244, 262, 264, 265, 266. He also referred to Mr. Christopher as "Shawn." RP 234, 247, 248.

location," jurors were likely to presume his guilt and disregard his testimony. RP 234.

In light of the potential for prejudice, the trial court should have granted Mr. Christopher's mistrial motion. RP 235-238. Failing that, the court should have granted Mr. Christopher's post-trial Motion for Arrest of Judgment and New Trial. CP 76-79.

The prosecutor committed prejudicial misconduct. There is a substantial likelihood the misconduct affected the verdict. *Lindsay*, --- Wn.2d at ___. In addition, jurors used propensity evidence to convict Mr. Christopher. This violated his right to due process. *Garceau,* 275 F.3d at 776, 777-778. His convictions must be reversed and the case remanded for a new trial.

III. THE COURT ERRED BY ORDERING MR. CHRISTOPHER TO PAY ATTORNEY FEES.

A. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013); *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

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).[8] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[9]

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[8] *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).

[9] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* The cases do not govern Mr. Christopher's claim that the court lacked constitutional and statutory authority.[10]

C. The court violated Mr. Christopher's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that 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). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

"established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

[10] The issue will likely be resolved when the Supreme Court issues its opinion in *Blazina*.

In Washington, the *Fuller* 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.

RCW 10.01.160(3) (emphasis added).

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.[11] *Fuller*, 417 U.S. at 45.

In *Fuller*, 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

[11] 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.

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 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*, 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*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *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 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 the reimbursement amount ordered within the sixty days provided by statute").

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*, 417 U.S. at 53.

Here, none of the parties provided the court with information about Mr. Christopher's present or likely future ability to pay. RP 434-451. Although the court made a finding that Mr. Christopher "has the ability or likely future ability to pay," this finding is not supported by anything in the record. Indeed, the court found Mr. Christopher indigent at beginning and at the end of the proceedings. Mr. Christopher's felony conviction and incarceration will also negatively impact his prospects for employment.

The trial court ordered Mr. Christopher to pay $1409.25 in attorney fees and defense costs.[12] CP 94. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Christopher to pay attorney fees and other defense costs must be vacated. *Id*

CONCLUSION

Mr. Christopher's assault conviction must be vacated and the charge dismissed. The statute criminalizing second-degree assault was enacted in a manner that violated Wash. Const. art. II, § 19.

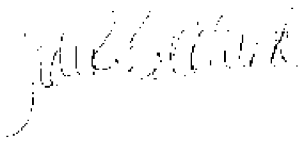
[12] Costs associated with investigative or expert services are likely grounded, at least in part, in the Sixth and Fourteenth Amendment right to counsel. *See State v. Cuthbert*, 154 Wn. App. 318, 330 n. 8, 225 P.3d 407 (2010).

His convictions must also be reversed because the prosecutor committed prejudicial misconduct. The case must be remanded for a new trial.

In the alternative, if the convictions are not reversed, the order imposing attorney fees and defense costs must be vacated. Imposition of these fees and costs infringed his right to counsel.

Respectfully submitted on June 12, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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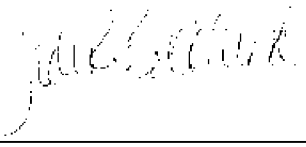
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 June 12, 2014.



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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

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