92344-6

Supreme Court No. (to be set)
Court of Appeals No. 33227-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Vincent Fowler
Appellant/Petitioner

Kitsap County Superior Court Cause No. 13-1-00466-4
The Honorable Judge Anna Laurie

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner/Appellant Vincent Fowler asks the court to review the decision of Division III, Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Vincent Fowler seeks review of the Court of Appeals opinion entered on August 18, 2015. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does the missing witness doctrine violate an accused person's Fourteenth Amendment right to due process if the fact presumed (unfavorable testimony) is not rationally related to the fact established (witness absence)?

ISSUE 2: Did the trial judge violate Mr. Fowler's Fourteenth Amendment right to due process, shift the burden of proof, and undermine the presumption of innocence by instructing jurors on the missing witness doctrine?

ISSUE 3: Did the trial court err by giving a missing witness instruction where Ms. Boyle was not particularly available to Mr. Fowler and where she could have corroborated only insignificant details of his testimony?

ISSUE 4: Did the trial court improperly comment on the evidence by instructing jurors in a manner suggesting that Mr. Fowler's testimony required corroboration while the alleged victims' testimony did not?

ISSUE 5: Did the trial court err by imposing discretionary LFOs without inquiring into Mr. Fowler's ability to pay?

IV. STATEMENT OF THE CASE

Vincent Fowler met the mother of eight-year-old A.C.G. and ten-year-old A.G. through a friend. RP[1] 188. The girls' family was homeless, so Mr. Fowler occasionally helped them with money, rides, childcare, and places to stay. RP 108, 191, 201-202. As a result, Mr. Fowler slept in the same home as the girls a few times. RP 192-197, 203-205, 210-211.

After one such occasion, A.G. accused Mr. Fowler of touching her inappropriately. RP 197-198. Mr. Fowler called A.G.'s mother to inform her of the accusation and suggested that they call the police. RP 199. No action was taken. RP 201. A.G. continued to turn to Mr. Fowler for rides to the store and to the roller-skating rink. RP 109-110. A.G. never claimed that Mr. Fowler touched her during any of their subsequent interactions. RP 113. Eventually, Mr. Fowler lost contact with the family. RP 211.

Over a year later, A.C.G. took part in a forensic interview related to charges that her older brother had raped her. RP (9/26/13) 40. During the interview, A.C.G. said for the first time that Mr. Fowler had also touched her inappropriately on two occasions. RP (9/26/13) 40-41. The state charged Mr. Fowler with two counts of child molestation in the first degree and one count of rape of a child in the first degree. CP 17-20.

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[1]Transcripts cited in this brief as RP are to the trial and sentencing hearings, starting on September 3, 2013, and are consecutively numbered. Other dates cited include the date.

At trial, Mr. Fowler recounted the events of the night when A.G. claimed he had molested her. RP 192-197. He testified that his roommate's dog had jumped on A.G. and awakened her while she slept on the couch. RP 195-196. After this, he asked his roommate, Monica Boyle, to keep the dog confined to an area away from the living room. RP 195.

After both sides had rested, the state asked for a "missing witness instruction" regarding Boyle. RP 226. Mr. Fowler objected.

Defense counsel argued that the missing witness doctrine did not apply because Boyle's testimony would not be material and she was not particularly available to him. RP 230-233, 240. He pointed out that the prosecution had known Boyle's name from the police investigation. RP 239-240. He also explained that she had moved from the home more than two years earlier, and he did not know how to contact her. RP 237-238.

Over Mr. Fowler's objection, the court instructed jurors on the missing witness doctrine. CP 46. The court also instructed jurors that no corroboration was required for conviction. CP 45. In closing, the prosecutor argued that the jury could infer that Mr. Fowler did not call his former roommate because she would have contradicted his version of events. RP 270-271.

The jury convicted Mr. Fowler of all three charges. RP 296. The court ordered him to pay $1135 in fees for his court-appointed attorney. CP 99. Mr. Fowler appealed. CP 109. The Court of Appeals affirmed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the missing witness doctrine violates due process when applied against a criminal defendant. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

Due process prohibits instruction on a factual inference if there is "no rational connection between the facts proved and the ultimate fact presumed." *Leary v. United States*, 395 U.S. 6, 33, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (*quoting Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943)).[2] Nor may a court instruct jurors on a factual inference if more than one reasonable conclusion could be drawn from the facts proved. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

The "missing witness" doctrine is a legal anachronism permitting courts to penalize a party for failure to call a witness, based on antiquated legal considerations. *See Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1046 (5th Cir. 1990). No Washington court has analyzed the doctrine's

[2] The *Tot* rule applies to permissive inferences as well as mandatory presumptions. *Jackson*, 112 Wn.2d at 876.

historical underpinnings in the context of the modern legal landscape.[3, 4] When applied against an accused person in a criminal case, the inference violates due process because it undermines the presumption of innocence and has no rational connection to the facts actually proved. *Leary*, 395 U.S. at 33.

The oft-cited source for the "missing witness" rule in the U.S. is dictum from the U.S. Supreme court. *Graves v. United States*, 150 U.S. 118. 14 S.Ct. 40, 37 L.Ed. 1021 (1893). But the rule created in eighteenth century England served two purposes. *Herbert,* 911 F.2d at 1046.

First, it acted as a counterbalance to the common law "voucher rule." which prohibited a party from impeaching its own witness. *Id.* The voucher rule discouraged parties from calling potentially hostile witnesses, because such witnesses could not be impeached if their testimony varied

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[3] Courts in other jurisdictions have noted the constitutional concerns raised by application of the "missing witness" rule against an accused person. *See e.g. State v. Tahair*, 172 Vt. 101, 109, 772 A.2d 1079 (2001); *State v. Malave*, 250 Conn. 722, 737, 737 A.2d 442 (1999); *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104 (1990); *State v. Brewer*, 505 A.2d 774, 777 (Me. 1985); *Russell v. Com.*, 216 Va. 833, 836, 223 S.E.2d 877 (1976) (instruction could "weaken, if not neutralize, the presumption of innocence"); *State v. Caron*, 300 Minn. 123, 126, 218 N.W.2d 197 (1974) *abrogated on other grounds by State v. Ramey*, 721 N.W.2d 294 (Minn. 2006).

[4] In 1991, the Supreme Court held that a prosecutor had not committed flagrant and ill-intentioned misconduct by arguing the "missing witness" inference in closing argument. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). The court relied in part on the fact that the court also instructed the jury that the attorneys' remarks are not evidence. *Id.* at 492 The *Blair* court failed to address the propriety of a court instructing the jurors regarding the "missing witness" inference. *Id.* It also did not address the due process issues Mr. Fowler raises. *Id.* Mr. Fowler does not argue that the prosecutor committed misconduct in this case. *Blair* does not control here.

from the expected script. Thus a party would never call a witness more closely associated with the opposing side. *Id.* Without the "missing witness" rule as a counterbalance, the voucher rule would have permitted a party to skew the evidence at trial by simply failing to call certain witnesses. *Id.* Each party would have known that the opposing party would not risk calling an unimpeachable yet hostile witness. *Id.* With the voucher rule in place, the missing witness doctrine rested on a logical inference. A party's failure to call and "vouch for" a witness suggested that the party feared that the witness's testimony would be unfavorable.[5] *Brewer,* 505 A.2d at 776.

Second, it discouraged the parties from concealing evidence. *Id.* The doctrine was created "to punish the party [who had concealed evidence] by depriving him of any benefit he might thus have gained." *Id.*

In short, the "missing witness" doctrine was created to penalize a party's attempts to conceal evidence and to overcome the incentives created by the voucher rule. It was not created as a reliable fact-finding tool. *Herbert,* 911 F.2d at 1046. It has no place in modern criminal proceedings.

The voucher rule no longer exists in Washington. ER 607. A party may call an adverse witness, control the testimony with leading questions,

[5] Additionally, before the advent of discovery procedures, the "missing witness" rule was used as a way to compel parties to identify potential witnesses. *Tahair*, 172 Vt. at 107.

and impeach the witness when necessary. ER 607; ER 611(b). Furthermore, attempts to conceal evidence are punishable by discovery sanctions and criminal prosecution. *See* CR 37; CrR 4.7(h); RCW 9A.72.150.

Defense counsel may have a number of strategic reasons not to call a witness, none of which are related to whether the witness's testimony would be favorable to the defense.[6] These strategic considerations further undermine the logic of the "missing witness" doctrine's inference that the only reason a party may fail to call a witness is because his/her testimony would be harmful. *Tahair*, 172 Vt. at 108; *Malave*, 250 Conn. at 734-35.

The "missing witness" doctrine is a vestigial remnant that no longer serves any evidentiary purpose. Given the doctrine's undermining effect on the presumption of innocence, its application against an accused person in a criminal trial violates due process. *Mullaney v. Wilbur,* 421 U.S. 684, 703, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

The "missing witness" doctrine also violates due process because the inference (that a witness's testimony would be damaging) has no ra-

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Modern discovery rules also undercut the "missing witness" doctrine's utility. *Tahair*, 172 Vt. at 107; *See also* ER 4.7.

[6] *See e.g. In re Elmore*, 162 Wn.2d 236, 266, 172 P.3d 335 (2007) (failure to call a witness is reasonable when it could have opened the door to damaging rebuttal evidence); *United States v. Lathrop*, 634 F.3d 931, 939 (7th Cir. 2011) (failure to call a witness is reasonable based on counsel's assessment of the witness's demeanor and fear that the witness would "fall apart" during cross examination); *Pina v. Maloney*, 565 F.3d 48, 56 (1st Cir. 2009) (it is reasonable not to call a witness who is clearly biased in favor of the defense); *State v. James*, 48 Wn. App. 353, 360, 739 P.2d 1161 (1987) (failure to call an impeachable witness is reasonable).

tional relationship to the facts adduced at trial (that a party did not call the witness to testify). *Leary*, 395 U.S. at 33. The party's failure to call a witness is just as likely to have been based on other strategic factors. Because a witness's absence has more than one reasonable explanation, the inference that it points to unfavorable testimony violates due process. *Jackson*, 112 Wn.2d at 876.

The Court of Appeals' decision reflects a fundamental misunderstanding of this analysis. The court misidentified the established fact from which the inference purportedly flows. Op., p. 10. The established fact is the witness's absence. It is not, in this case, Mr. Fowler's testimony about the witness's dog. Op., p. 10.

Numerous other jurisdictions have held missing witness instructions improper.[7] Such an instruction "creates evidence from nonevidence, [and] may add fictitious weight to one side of the case... by giving the missing witness undeserved significance." *Tahair*, 172 Vt. at 109 (internal citation omitted).

The state cannot prove that this constitutional error was harmless beyond a reasonable doubt. *State v. Lamar*, --- Wn.2d ---, 327 P.3d 46, 52 (June 12, 2014). The court's "missing witness" instruction and its "no cor-

[7] *See e.g Tahair*, 172 Vt. at 109; *Malave*, 250 Conn. at 738-40; *Henderson v. State*, 367 So.2d 1366, 1367 (Miss. 1979); *State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411 (1978); *Russell*, 216 Va. at 835-36.

roboration necessary" instruction worked in combination to inform jurors that Mr. Fowler's theory of the case required substantiation, but that the state's did not. Mr. Fowler was prejudiced by the court's improper instruction.

The court violated Mr. Fowler's right to due process by instructing the jury that it could infer that Boyle's testimony would have been damaging to the defense, based on the unrelated fact that Mr. Fowler did not call her to testify. *Jackson*, 112 Wn.2d at 876. The Supreme Court should accept review and reverse Mr. Fowler's convictions. *Id.* at 879. This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

B. The Supreme Court should accept review and hold that the trial court violated Mr. Fowler's right to due process by giving an unwarranted missing witness instruction under the facts of this case. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

Due process limits use of the 'missing witness' doctrine in criminal cases. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). A court risks shifting the burden of proof by instructing the jury that it may draw a negative inference from an accused person's failure to produce evidence. *State v. Dixon*, 150 Wn. App. 46, 56, 207 P.3d 459 (2009).

The missing witness doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the party against whom the instruction is offered, (3) the witness's absence is not satisfactorily explained, and (4) the argument does not shift the burden of proof. *Montgomery*, 163 Wn.2d at 598-599. These limitations are "particularly important" when the missing witness doctrine is applied against an accused person. *Id.* at 598.

The missing witness rule only applies when "it is clear the defendant was able to produce the witness." *Dixon*, 150 Wn. App. at 55. The testimony of the accused must also "unequivocally impl[y] the uncalled witness's ability to corroborate his theory of the case." *Id.*

An erroneous missing witness instruction is not harmless when the parties to a criminal case present the jury with two competing versions of events. *Montgomery*, 163 Wn.2d at 600. This is particularly true when the prosecutor argues about the missing witness in closing. *Id.*

The missing witness rule does not apply to Mr. Fowler's case. *Montgomery*, 163 Wn.2d at 598-599. The Court of Appeals' analysis reflects a misapplication of *Montgomery*. Op., p. 11-16.

First, the court erroneously suggested that Ms. Boyle could have corroborated Mr. Fowler's testimony that the dog woke A.G.[8] Op., p. 13. This is incorrect; Mr. Fowler testified that Ms. Boyle was not in the room when the dog woke A.G. RP 195-196. She could not have corroborated his testimony on that point. The missing witness rule does not apply to Mr. Fowler's case because Boyle's testimony would not have been material. *Id.* at 598.

Second, the Court of Appeals suggested that Boyle was particularly under Mr. Fowler's control. Op., pp. 13-14. This is incorrect. The police got Boyle's name from the manager of the apartment complex. RP 238. The apartment manager – who was a witness for the state – had a forwarding address for Boyle. RP 178-184, 256. Boyle was available to the prosecution.

Third, the Court of Appeals did not consider Mr. Fowler's explanation for Boyle's absence. She had moved from the home more than two years earlier, and he did not know how to contact her. RP 237-238.

Fourth, the Court of Appeals erroneously found no due process violation, based on circular reasoning. According to the court, no due process violation occurred because "the State was entitled to argue the rea-

[8] According to the Court of Appeals, this point was critical to the defense because it contradicted the alleged victim's statement that Mr. Fowler woke her by molesting her. Op., p. 13.

sonable inference from the evidence presented," including Boyle's absence. Op., p. 15. Such circular reasoning should not be used to eviscerate an accused person's right to due process.

Mr. Fowler had no burden to present evidence in his defense. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The instruction encouraged jurors to question his credibility because he failed to call a witness who could not corroborate anything important. The missing witness instruction violated the presumption of Mr. Fowler's innocence.

Mr. Fowler was prejudiced by the erroneous instruction. *Montgomery*, 163 Wn.2d at 600. The case was a credibility contest between Mr. Fowler and the alleged victims. The instruction informed jurors that Mr. Fowler's story was not credible unless corroborated. The court also instructed the jury that A.G. and A.C.G.'s testimony did not need corroboration.[9] CP 45. The combined effect of these instructions was to advise the jury that the alleged victims were more credible than Mr. Fowler as a matter of law.

The Supreme Court should accept review and reverse Mr. Fowler's convictions. The trial court erred by giving a prejudicial missing witness instruction that was not warranted by the facts of this case. *Montgomery*,

[9] As argued below, this instruction constituted an impermissible judicial comment on the evidence.

163 Wn.2d at 598-99. This significant question of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

C. The Supreme Court should accept review and hold that the trial court improperly commented on the evidence by suggesting that Mr. Fowler's testimony required corroboration while the alleged victims' testimony did not. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

A comment on the evidence "invades a fundamental right." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Wash. Const. art. IV, § 16. Courts presume prejudice when a judge comments on the evidence.[10] *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

The judicial comment need not expressly convey the court's feelings regarding the evidence; an implied comment is sufficient. *Levy*, 156 Wn.2d at 721; *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A court comments on the evidence by instructing the jury regarding the weight to give to certain evidence. *In re Det. of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (*citing Lane*, 125 Wn.2d at 838).

[10] To overcome this presumption, the record must affirmatively show that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

Here, the court instructed the jury that it could infer that Boyle's testimony would have been unfavorable to Mr. Fowler. CP 46. At the same time, it told jurors that the alleged victims' testimony need not be corroborated.[11] CP 45.

These instructions impermissibly commented on the evidence. *Levy*, 156 Wn.2d at 721. The instructions suggested that Mr. Fowler's testimony was not believable because it lacked corroboration, but that the girls' testimony could provide the basis for conviction without corroboration.

The Court of Appeals erroneously determined that these two instructions did not create a judicial comment. Op., pp. 4-7. According to the Court of Appeals, any correct statement of law is permitted. Op., pp. 5-6, 7. This is not quite true. For example, an instruction accurately describing evidence sufficient to establish an aggravating factor can improperly resolve a factual issue for the jury. *State v. Brush*, -- Wn.2d--, ___, 353 P.3d 213, 217 (Wash. 2015). This is so despite the instruction's accuracy when considered as a statement of the sufficiency of the evidence. *Id.*

[11] Furthermore, this no-corroboration instruction did not include language reminding jurors to make an independent analysis of all of the evidence in the case. *Cf. State v. Clayton*, 32 Wn.2d 571, 572, 202 P.2d 922 (1949); *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009); *see also State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005).

The state cannot overcome the presumption of prejudice. *Levy*, 156 Wn.2d at 725. The combined effect of these instructions was to inform the jury that the state's case did not require substantiation, but that Mr. Fowler's did. CP 45, 46. Mr. Fowler was prejudiced by the court's improper comment on the evidence. *Id.*

The Supreme Court should accept review and reverse Mr. Fowler's convictions. The trial court commented on the evidence in violation of art. IV, § 16. This case raises significant constitutional issues that are of substantial public importance and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

D. The Supreme Court should accept review and hold that the trial court erred by imposing discretionary legal financial obligations without consideration of Mr. Fowler's ability to pay. The Court of Appeals' decision conflicts with *Blazina*, and this case raises significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(1), (3), and (4).

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court, and the record must reflect the court's inquiry. *Id.* The sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* The burden is on the prosecution to show

an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Only after the court imposes a term of incarceration can an offender can make a meaningful presentation on likely future ability to pay, since the length of incarceration will affect that ability. A defendant's silence or a pre-sentence statement expressing hopes for employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") Silence or pre-imposition statements cannot substitute for the required individualized inquiry. Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Vansycle*, No. 89766-2, 2015 WL 4660577 (Wash. Aug. 5, 2015).[12]

Here, the court imposed discretionary LFOs without an adequate inquiry. In addition, the imposition of defense costs without consideration of ability to pay violated Mr. Fowler's Sixth and Fourteenth Amendment right to counsel. U.S. Const. Amends. VI; XIV.

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[12] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

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.* In Washington, the *Fuller* rule has been implemented by statute. Under RCW 10.01.160, "[t]he court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3) (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)). This construction of RCW 10.01.160(3) violates the right to counsel.[13] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute, relying heavily on statutory language that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* 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). Several other juris-

[13] 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.

dictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel.[14]

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, neither party provided the court with information about Mr. Fowler's present or likely future ability to pay attorney's fees. RP (1/10/14). Although the Judgment and Sentence includes a boilerplate finding that "the Defendant has the ability or likely future ability to pay,"[15] this finding is not supported by anything in the record, and cannot satisfy the court's obligation. *Blazina*, 182 Wn.2d at 841.

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[14] *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").

[15] CP 99.

The court found Mr. Fowler indigent at beginning and at the end of the proceedings. CP 110-112. Mr. Fowler's felony convictions and lengthy incarceration will also negatively impact his prospects for employment.

The trial court ordered Mr. Fowler to pay $1135 in attorney fees without conducting any inquiry into his present or future ability to pay. 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 court must vacate the order requiring Mr. Fowler to pay $1135 in attorney fees. *Id.*

The Supreme Court should accept review, vacate the order imposing $1135 in defense costs, and remand the case for a hearing regarding Mr. Fowler's ability to pay. The Court of Appeals' decision conflicts with *Blazina* and with *Fuller.* Furthermore, this case raises significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

VI. CONCLUSION

The Supreme Court should accept review and either reverse Mr. Fowler's convictions or vacate the order imposing discretionary legal financial obligations. This case raises significant constitutional issues that are of substantial public interest and should be decided by the Supreme

Court. RAP 13.4(b)(3) and (4). Furthermore, the Court of Appeals' decision conflicts with *Blazina* and *Fuller*. RAP 13.4(b)(1).

Respectfully submitted September 8, 2015.

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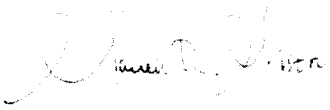

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Vincent Fowler, DOC #789354
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and I sent an electronic copy to

Kitsap County Prosecuting Attorney
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through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 September 8, 2015.

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APPENDIX:

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Port Orchard, WA 98366-4614

CASE # 332276
State of Washington, Respondent v. Vincent L. Fowler, Appellant
KITSAP COUNTY SUPERIOR COURT No. 131004664

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.
c: **E-mail** – Hon. Anna M. Laurie
c: Vincent Fowler
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FILED
August 18, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. VINCENT L. FOWLER, Appellant.	)	No. 33227-6-III UNPUBLISHED OPINION

BROWN, A.C.J. — Vincent Fowler appeals his conviction for two counts of first degree child molestation and one count of first degree rape of a child. He contends the trial court erred by (1) commenting on the evidence when it gave missing witness and non-corroboration jury instructions, (2) improperly giving an unconstitutional missing witness instruction, and (3) imposing $1,135 in legal financial obligations (LFOs) for court-appointed counsel without making the requisite findings on his ability to pay. We disagree with Mr. Fowler's contentions and affirm his conviction.

FACTS

Mr. Fowler met A.G. and A.C.G.'s homeless mother through a friend. A.G. was either nine or ten when she met Mr. Fowler, and A.C.G. was eight or nine. Mr. Fowler occasionally watched over the girls and gave them food, rides, and a place to stay.

One night, A.G. stayed at Mr. Fowler's apartment. According to A.G., Mr. Fowler's roommate, Monica Boyle,[1] was not present the entire night. A.G. said she played with the dog before falling asleep on the couch in the living room. Mr. Fowler slept on the floor. She woke up when she felt something unzip her pants; she was wearing a shirt and jeans and had shorts and underwear underneath her jeans. Over her clothes, A.G. felt Mr. Fowler touch her vagina. A.G. turned over, got up, and went to the bathroom. She noticed her zipper was undone. When she returned, Mr. Fowler was pretending to sleep on the floor. A.G. sat awake for the rest of the night. A.G. told her friend the next day. She told her brother, her sister, and her mom; her mom did not believe her. A.G. said Mr. Fowler apologized to her, said he was drunk, and he told her if he had done it, he would not do it again. A.G. continued to spend time with Mr. Fowler after this incident, but she felt safe because they were not alone.

A.C.G. experienced two similar incidents with Mr. Fowler. The first occurred while A.C.G. and her family were at a friend's house. A.C.G. fell asleep on one couch in the living room while Mr. Fowler fell asleep on the other couch. She woke up when he touched her. Mr. Fowler had pulled her pants and underwear down to her knees and was touching the inside of her vagina with his hands. He stopped touching her when her mom, who was sleeping in the bedroom, got up to use the bathroom. When her mom came out of the bathroom, A.C.G. told her mom she wanted to sleep with her.

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[1] While Mr. Fowler testified his roommate's name was Monica Boyd, all references to her after his testimony are to Monica Boyle.

The second incident occurred in the same house, two days after the couch incident. A.C.G. was asleep on the bed in the bedroom; A.G. and their older brother were also sleeping on the bed. A.C.G. wore a skirt and underwear. Mr. Fowler came into the bedroom and touched A.C.G.'s vagina under her skirt but on top of her underwear. He stopped touching her when her brother moved.

Both A.G. and A.C.G. talked with a child interviewer at the prosecutor's office. Detective Kenny Davis reviewed the girls' statements and spoke with Natalie McMahon, the apartment manager, and the girls' mom. He interviewed Mr. Fowler, who denied the allegations but admitted he knew the girls, had spent time with them, and was around them during the relevant time frame.

At trial, Mr. Fowler again denied the allegations. Regarding the incident with A.G., Mr. Fowler testified Ms. Boyle and her dog were at the apartment. He fell asleep on the floor while Ms. Boyle and A.G. sat on the couch watching a movie. In the middle of the night, the dog woke him up by licking his face. He pushed the dog off him, but the dog jumped onto A.G. and licked her, which caused her to awaken. He took the dog off A.G. and called to Ms. Boyle, who came out of the kitchen to get the dog. He talked with Ms. Boyle for five minutes before going back to sleep on the floor. A.G. was already asleep on the couch and was still asleep when he left the next morning. While Mr. Fowler mentioned he lived with Ms. Boyle during his interview with Detective Davis, he never mentioned a dog or that she was present that night.

Because of Mr. Fowler's testimony, the State requested a missing witness jury instruction. The court gave the instruction over Mr. Fowler's objection. Mr. Fowler was convicted of two counts of first degree child molestation and one count of rape of a child in the first degree. Without objection, the court imposed $1,135 in LFOs for court-appointed attorney fees. Mr. Fowler appealed.

ANALYSIS

A. Judicial Comment Claims

The issue is whether the non-corroboration instruction (No. 8) and the missing witness instruction (No. 9) constituted judicial comments on the evidence.

Preliminarily, Mr. Fowler objected to the missing witness instruction at trial, but he did not object to the non-corroboration instruction. Because the claimed errors allege constitutional errors, we consider the issue. *See State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). We review constitutional challenges to jury instructions de novo, looking at them within the context of the instructions as a whole. *Id.* at 721.

"Article IV, section 16 of the Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been established as a matter of law." *State v. Steen*, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010). The purpose behind this provision is to prevent the jury from being influenced by the court's opinion. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). Because the jury is the sole judge of the weight of testimony, "[t]he touchstone of error in a trial court's comment on the

evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *see also In re Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (a court makes an impermissible comment on the evidence when it instructs the jury as to the weight it should give certain evidence). A court's comment on the evidence is presumed prejudicial, and the State must show no resulting prejudice. *Lane*, 125 Wn.2d at 838-39.

First, Mr. Fowler contends jury instruction 8 contained a judicial comment on the evidence. Instruction 8 states: "In order to convict a person of Child Molestation in the First Degree and/or Rape of a Child in the First Degree it is not necessary that the testimony of the alleged victim be corroborated." Clerk's Papers (CP) at 45. Instructions accurately stating the applicable law are not comments on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 180-81, 121 P.3d 1216 (2005). RCW 9A.44.020(1) provides "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." *See also* RCW 9A.44.073 (defining rape of a child in the first degree); RCW 9A.44.083 (defining child molestation in the first degree).

Similar non-corroboration instructions have been upheld. In *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978), the court found a substantially similar instruction was not a comment on the evidence nor was it erroneously given because it was a correct statement of Washington law, was pertinent to the issues presented, its

phrasing did not convey the court's opinion on the alleged victim's credibility, and the court had a duty to instruct the jury on pertinent legal issues. *See also Zimmerman*, 130 Wn. App. at 181-83 (noting even though the Washington Supreme Court Committee on Jury Instructions recommends against such an instruction, the court was bound to hold giving such an instruction was proper based on *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949)). Here, the trial court's instruction was based on RCW 9A.44.020(1). The instruction was a neutral and accurate statement of the law; it did not contain facts nor did it convey the court's belief in any testimony.

Mr. Fowler incorrectly argues additional *Clayton* language is needed in instruction 8 telling the jury they decide credibility and including the standard of proof. *See Clayton*, 32 Wn.2d at 572, 577.[2] This issue was addressed in *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009). The *Johnson* court, seeing "no clear pronouncement from [the Washington] Supreme Court on whether the additional language is necessary to prevent an impermissible comment on the evidence under article [IV], section 16," held the one-sentence instruction was "not an erroneous

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[2] *Clayton* instructed:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572.

statement of the law." *Id.* at 936. However, the court cautioned trial courts should consider giving the additional language and omission of that language may be an impermissible comment on the alleged victim's credibility. *Id.* at 936-37. Here, the trial court did separately instruct them on credibility and the standard of proof. Looking at the instructions as a whole, we conclude giving the non-corroboration instruction was not error.

Second, Mr. Fowler next contends jury instruction 9 contained a judicial comment on the evidence. Instruction 9 states:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
>
> (1) The witness is within the control of, or peculiarly available to, that party;
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
> (5) The inference is reasonable in light of all the circumstances.
> The parties in this case are the State of Washington and Vincent L. Fowler.

CP at 46. Again, an instruction stating the applicable law pertaining to an issue in the case is not a comment on the evidence. *R.W.*, 98 Wn. App. at 145. This instruction is an accurate statement of the law. The instruction did not instruct the jury on the weight to give certain evidence but does allow the jury to draw inferences; it does not convey the court's feelings on the evidence. Instruction 9 does not comment on the evidence.

B. Missing Witness Instruction

Mr. Fowler first contends the missing witness instruction generally violates due process by shifting the burden of proof onto him and encouraging the jury to make an unreliable, irrational inference of his guilt. Second, Mr. Fowler contends instructing the jury on the missing witness doctrine was improper under these facts.

The missing witness doctrine permits the State to "point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable." *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). Because the doctrine subjects the defendant's theory of the case to the same scrutiny as the State's theory, the State is allowed to argue and the jury can infer the missing witness' testimony would have been unfavorable to the defendant. *Id.* Over Mr. Fowler's objection, the trial court allowed the State to argue to the jury that Ms. Boyle's testimony would have been unfavorable to Mr. Fowler; the court also gave a jury instruction to that effect.

Initially, we address Mr. Fowler's due process arguments. Constitutional challenges may be raised for the first time on appeal. RAP 2.5(a). "Due process requires the State bear the 'burden of persuasion beyond a reasonable doubt of every essential element of a crime.'" *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct., 1965, 85 L. Ed. 2d

344 (1985)). In meeting its burden of proof, the State may use evidentiary devices including inferences and presumptions. *Id.*

In order to determine whether an inference instruction, such as the missing witness instruction, violates a defendant's right to due process, appellate courts "must determine whether the instruction was only part of the State's proof supporting an element of the crime or whether the State relied solely on the inference." *State v. Reid*, 74 Wn. App. 281, 285, 872 P.2d 1135 (1994). If the inference was the sole basis for finding guilt, the inference must satisfy the reasonable doubt standard. *Id.* at 285-86; *see also Hanna*, 123 Wn.2d at 710-11 (discussing such an inference as a mandatory presumption). However, "[i]f the inference was only part of the proof, due process requires the presumed fact to flow more likely than not from proof of the basic fact." *Reid*, 74 Wn. App. at 285 (quoting *Hanna*, 123 Wn.2d at 710) (internal quotation marks omitted); *see also Hanna*, 123 Wn.2d at 710 (discussing such an inference as a permissive inference or presumption).

Both parties agree the missing witness instruction is a permissive inference. A permissive inference "do[es] not relieve the State of its burden of persuasion because the State must still convince the jury the suggested conclusion should be inferred from the basic facts proved." *Hanna*, 123 Wn.2d at 710. As such, permissive inferences are allowed "when there is a rational connection between the proven fact and the inferred fact, and the inferred fact flows more likely than not from the proven fact." *State v. Ratliff*, 46 Wn. App. 325, 331, 730 P.2d 716 (1986) (internal quotation marks omitted).

Whether an inference is allowed is determined on a case-by-case basis. *Hanna*, 123 Wn.2d at 712 (stating the State is entitled to an inference if it introduces facts supporting the inference to the degree required by due process and the jury is free to reject the inference if it gives more weight to the defendant's version of facts).

The missing witness instruction given in Mr. Fowler's case satisfies due process. A rational connection exists between the inferred fact (Ms. Boyle's testimony would have been unfavorable) and the proven fact (Mr. Fowler's testimony that Ms. Boyle was present and could have corroborated his story about the dog). The inferred fact flows more likely than not from the proven fact: if Mr. Fowler's version of events was true and the case was essentially a credibility contest, he would have called someone, such as Ms. Boyle, to corroborate his testimony. We are satisfied such an instruction does not impermissibly shift the burden of proof. *Montgomery*, 163 Wn.2d at 599.

Mr. Fowler cites to numerous out-of-state cases to support his contention the instruction is unconstitutional. But we need not resort to persuasive authorities when our precedent sufficiently guides us. Moreover, the majority of these cases have not found the instruction violates due process. *See, e.g.*, *State v. Tahair*, 172 Vt. 101, 109, 111 n.3, 772 A.2d 1079 (2001); *State v. Malave*, 250 Conn. 722, 737-38, 737 A.2d 442 (1999); *Russell v. Com.*, 216 Va. 833, 835-36, 223 S.E.2d 877 (1976). Mr. Fowler argues the historical reasons for the missing witness doctrine are no longer relevant; while this limits the prevalence of the doctrine in modern times, it does not mean the doctrine is unconstitutional. As for Mr. Fowler's concerns about strategic reasons not to

call witnesses, the instruction itself states there must be no satisfactory explanation for the witness' absence. The court ruled on this outside the presence of the jury, and Mr. Fowler was able to raise his arguments, including strategic arguments.

Next, we address whether the trial court properly gave the instruction. Mr. Fowler argues the instruction was improper because (1) Ms. Boyle's testimony was not material, (2) Ms. Boyle was not particularly available to Mr. Fowler, and (3) the instruction shifted the burden of proof. We do not disturb a trial court's decision about whether to give a missing witness instruction absent a clear showing of an abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). We review de novo whether legal error in jury instructions could have misled the jury. *Montgomery*, 163 Wn.2d at 597.

The missing witness doctrine applies equally to the State and the defense. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). Because a criminal defendant does not have to present evidence, the State cannot suggest a defendant has this burden. *Montgomery*, 163 Wn.2d at 597. However, the missing witness doctrine allows the State to argue a missing witness' testimony would have been unfavorable to the defendant. *Id.* at 598. In light of these two competing considerations, the limitations on the application of the missing witness doctrine "are particularly important when, as here, the doctrine is applied against a criminal defendant." *Id.* The missing witness doctrine applies only if four elements are met: (1) the missing witness' testimony must be material and not cumulative; (2) the missing witness must be "particularly under the

control of the defendant rather than being equally available to both parties"; (3) the witness' absence must not be satisfactorily explained;[3] and (4) application of the doctrine must not shift the burden of proof. *Id.* at 598-99.

Blair illustrates when the missing witness inference is permissible. The defendant was arrested for unlawful delivery of a controlled substance; after searching the defendant's home, officers found slips of papers with handwritten names and notations that appeared to represent his drug transactions. *Blair*, 117 Wn.2d at 481-83. The defendant testified most of the entries represented personal loans or money won playing cards, but he called only one witness listed on the slips of paper to corroborate this claim. *Id.* at 482-83. In finding the State properly argued the missing witness doctrine during closing, the Washington Supreme Court held the comments did not infringe on the defendant's constitutional rights or shift the burden of proof because the witnesses were all personal and business acquaintances known only to the defendant, listed solely by first name, and were peculiarly available to him. *Id.* at 490-92.

By contrast, *Montgomery* illustrates a situation where the trial court erred in giving a missing witness instruction. *Montgomery*, 163 Wn.2d at 599. Despite being arrested for possession of pseudoephedrine with intent to manufacture methamphetamine, the defendant testified he purchased the ingredients for innocent reasons. *Id.* at 584-85, 587. The defendant said his grandson and his landlord could corroborate his explanation; neither testified. *Id.* at 596-97. On cross-examination, the

[3] Although the State provides an argument concerning this element, Mr. Fowler does not. Thus, for purposes of this appeal, it is assumed this element is met.

State elicited the information the grandson could not testify because he was in school. *Id.* at 597. This was an adequate explanation for the grandson's absence. *Id.* at 599. As to the landlord, the court found the landlord was not peculiarly within the defendant's control. *Id.*

As it relates to the first element, Ms. Boyle's testimony would have been material and not cumulative. Mr. Fowler testified on direct Ms. Boyle was present in the apartment the night of the incident. In refuting A.G.'s testimony that it was Mr. Fowler's act of unzipping her pants that awoke her, he testified Ms. Boyle's dog woke up A.G. After taking the dog off of A.G., he called for Ms. Boyle, who came out of the kitchen. Ms. Boyle and Mr. Fowler then talked about this for five minutes before she put the dog away. Thus, according to Mr. Fowler, the sole thing that happened to A.G. that night was the dog jumped on her. Ms. Boyle was allegedly in the apartment and retrieved the dog. Contrary to Mr. Fowler's assertions, her testimony would not have been limited to whether or not a dog was in the apartment that night; rather, she could have corroborated Mr. Fowler's version of events that the dog jumping on A.G. woke her up rather than Mr. Fowler unzipping her pants.

Regarding the second element, Mr. Fowler asserts Ms. Boyle was not under his control. He points to the following as support: (1) the State knew about Ms. Boyle after A.G. mentioned Mr. Fowler's roommate during her pre-trial interview, (2) the State got Ms. Boyle's name from the apartment manager, and (3) the apartment manager had a forwarding address for Ms. Boyle. Mr. Fowler reads this element too narrowly.

Whether a witness is peculiarly available to one party does not mean the witness is in court or is subject to the subpoena power. *Blair*, 117 Wn.2d at 490. Rather, a witness is peculiarly available to one party if there is

> such a community of interest between the party and the witness, or the party [has] so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that [her] testimony would have been damaging.

State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012). "The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be." *Blair*, 117 Wn.2d at 490. Thus, availability turns on the relationship between the party and the witness. *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003).

While the State knew about Ms. Boyle, they had no reason to suspect she was present at the apartment during the incident until Mr. Fowler testified at trial. Mr. Fowler never mentioned her or the dog to the police or the State until this time. The State had no motivation to call Ms. Boyle as a witness, despite the fact the State certainly could have subpoenaed her. Rather, there was a community of interest between Mr. Fowler and Ms. Boyle. While Mr. Fowler testified he did not know where she was, he did have

a superior opportunity for knowledge of her as a witness. Ms. Boyle was particularly available to Mr. Fowler.

Lastly, Mr. Fowler argues the missing witness instruction shifted the burden of proof. But nothing in the State's comments said Mr. Fowler had to present any proof on the question of his innocence, and the State was entitled to argue the reasonable inference from the evidence presented. Mr. Fowler testified specifically about Ms. Boyle's presence and her dog. He had a personal relationship with Ms. Boyle. During closing, Mr. Fowler reminded the jury of the State's burden of proof. Moreover, the jury was instructed counsel's comments are not evidence, the State had the burden of proving each element of each crime beyond a reasonable doubt, and Mr. Fowler was presumed innocent. We conclude the missing witness instruction was warranted.

Even if the missing witness jury instruction was not warranted, it was harmless beyond a reasonable doubt. Improper jury instructions can be harmless error if the jury was properly instructed on the State's burden. *Montgomery*, 163 Wn.2d at 600. "'An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002) (finding error where jury was presented with two competing interpretations of undisputed events and what those events meant about defendant's intent and the State repeatedly referenced the missing witnesses).

Both A.G. and A.C.G. testified about what happened to them. The child interviewer from the prosecutor's office independently testified and verified the girls' version of events remained consistent throughout the entire trial period. There was no dispute the girls had been alone with Mr. Fowler. There was no dispute the girls spent the night with Mr. Fowler. During closing, the State did not focus on the missing witness inference; rather the State referenced Mr. Fowler's failure to call Ms. Boyle when discussing Mr. Fowler's credibility and then briefly argued the inference in its rebuttal. Moreover, the jury was told not to apply the inference unless certain conditions were met; if the evidence was not all that critical, the jury would not apply the inference. And contrary to Mr. Fowler's contention, as discussed above, the instruction did not constitute a judicial comment on any witnesses' credibility.

C. LFOs

The issue is whether the trial court erred by imposing $1,135 in LFOs for the costs of court-appointed counsel without inquiring into Mr. Fowler's financial circumstances. Despite not objecting at trial, Mr. Fowler contends we should review his claim because he mounts a constitutional and statutory challenge: the trial court's action impermissibly chills the exercise of his Sixth Amendment right to counsel. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, No. 89028-5, slip op. at 4 (Wash. Mar. 12, 2015). We exercise our discretion and decline review because no

extraordinary facts are shown. *See State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014).

RCW 10.01.160(1) provides a trial court may require a defendant pay costs, including costs of court-appointed counsel. *See State v. Wimbs*, 74 Wn. App. 511, 516, 874 P.2d 193 (1994). Statutes are presumed constitutional, and the party challenging a statute's constitutionality, here Mr. Fowler, must show the statute's unconstitutionality beyond a reasonable doubt. *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997).

In *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992), the Washington Supreme Court held formal findings of fact on ability to pay are not required for recoupment of costs under RCW 10.01.160. The court stated a sentencing court has discretion to impose repayment obligations, and a defendant is protected from abuse of that discretion by RCW 10.01.160's directive that ability to pay be considered and provision for modification of imposed LFOs if a defendant cannot pay. *Id.* Similarly in *Blank*, the Washington Supreme Court reconsidered "whether, *prior* to including a repayment obligation in defendant's judgment and sentence, it is constitutionally necessary that there be an inquiry into the defendant's ability to pay, his or her financial resources, and whetner there is no likelihood that defendant's indigency will end." *Blank*, 131 Wn.2d at 239 (reconsidering in light of RCW 10.73.160 which provides for recoupment of appellate costs from a convicted defendant). In holding the Constitution does not require an inquiry into ability to pay at the time of sentencing, the *Blank* court

relied on (1) the holding in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and (2) case law holding mandatory monetary assessments may be imposed against indigent defendants at sentencing without any per se constitutional violations. *Blank*, 131 Wn.2d at 239-42. Neither *Blank* nor *Curry* have been overruled, and Mr. Fowler does not provide any persuasive argument to the contrary.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, A.C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.

BACKLUND & MISTRY

September 08, 2015 - 12:58 PM

Transmittal Letter

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Case Name: State v. Vincent Fowler

Court of Appeals Case Number: 33227-6

Party Respresented: Appellant

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Comments:

No Comments were entered.

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