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Division I  
State of Washington

NO. 74527-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOEY MCFARLAND,

Appellant.

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

The Honorable Bruce Weiss, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>State’s Case</u> .....	2
2. <u>Defense Case</u> .....	6
C. <u>ARGUMENT</u> .....	9
1. McFARLAND WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY A JURY WHEN A POLICE OFFICER REPEATEDLY EXPRESSED HIS OPINION ON GUILT AND WITNESS CREDIBILITY. ....	9
a. <u>Washington courts hold it is unconstitutional for a             witness to give his opinion on the defendant’s guilt or             the credibility of other witnesses.</u> ....	9
b. <u>Officer Carlile gave his personal opinion on             McFarland’s guilt and the credibility of witnesses.</u> ....	13
c. <u>Officer Carlile’s impermissible opinion testimony was             manifest constitutional error that prejudiced the outcome             of McFarland’s trial.</u> ....	17
2. McFARLAND’S COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO REPEATED INSTANCES OF IMPROPER, PREJUDICIAL POLICE TESTIMONY....	21
3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER McFARLAND’S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS. ....	27

**TABLE OF CONTENTS (CONT'D)**

	Page
4. McFARLAND'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.	33
5. APPELLATE COSTS SHOULD NOT BE IMPOSED. ....	34
D. <u>CONCLUSION</u> .....	36

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>City of Seattle v. Heatley</u> 70 Wn. App. 573, 854 P.2d 658 (1993).....	10
<u>In re Pers. Restraint of Stetson</u> 150 Wn.2d 207, 76 P.3d 241 (2003).....	24
<u>James v. Robeck</u> 79 Wn.2d 864, 490 P.2d 878 (1971).....	9
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	9
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	34
<u>State v. Adamy</u> 151 Wn. App. 583, 213 P.3d 627 (2009).....	26
<u>State v. Allen</u> 50 Wn. App. 412, 749 P.2d 702 (1988).....	15
<u>State v. Black</u> 109 Wn.2d 336, 754 P.2d 12 (1987).....	10, 21, 31
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	27, 28, 29, 32, 33, 34
<u>State v. C.D.W.</u> 76 Wn. App. 761, 887 P.2d 911 (1995).....	26
<u>State v. Carlin</u> 40 Wn. App. 698, 700 P.2d 323 (1985).....	19
<u>State v. Carlson</u> 80 Wn. App. 116, 906 P.2d 999 (1995).....	10

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	9, 10, 11, 17
<u>State v. Dolan</u> 118 Wn. App. 323, 73 P.3d 1011 (2003).....	18
<u>State v. Duncan</u> 185 Wn.2d 430, 74 P.3d 83 (2016).....	32, 35
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	26
<u>State v. Farr-Lenzini</u> 93 Wn. App. 453, 970 P.2d 313 (1999).....	14
<u>State v. Groth</u> 163 Wn. App. 548, 261 P.3d 183 (2011).....	24
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	25
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	13
<u>State v. Johnson</u> 152 Wn. App. 924, 219 P.3d 958 (2009).....	12, 13
<u>State v. Jones</u> 117 Wn. App. 89, 68 P.3d 1153 (2003).....	11, 17
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	18, 19
<u>State v. Klinge</u> 96 Wn. App. 619, 980 P.2d 282 (1999).....	25

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	26
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013).....	30, 32
<u>State v. Mahone</u> 98 Wn. App. 342, 989 P.2d 583 (1999).....	34
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	9, 10, 16, 25
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	22
<u>State v. Olmedo</u> 112 Wn. App. 525, 49 P.3d 960 (2002).....	19
<u>State v. Quaale</u> 182 Wn.2d 191, 340 P.3d 213 (2014).....	18
<u>State v. Reynolds</u> 80 Wn. App. 851, 912 P.2d 494 (1996).....	30
<u>State v. Sargent</u> 40 Wn. App. 340, 698 P.2d 598 (1985).....	14
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	22
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	34
<u>State v. Smissaert</u> 41 Wn. App. 813, 706 P.2d 647 (1985).....	24
<u>State v. Smits</u> 152 Wn. App. 514, 216 P.3d 1097 (2009).....	28

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Stoddard</u> 192 Wn. App. 222, 366 P.3d 474 (2016).....	30
<u>State v. Yarbrough</u> 151 Wn. App. 66, 210 P.3d 1029 (2009).....	22

**FEDERAL CASES**

<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	21, 27
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	21

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 701 .....	9, 24
ER 702 .....	24
RAP 14.....	34
RAP 15.2.....	35
RCW 7.68.035 .....	30
RCW 9.94A.760 .....	27, 28
RCW 10.01.160 .....	1, 27, 28, 33, 34
RCW 10.73.160 .....	34
RCW 36.18.020 .....	31
RCW 36.18.020 .....	30, 32
RCW 43.43.754 .....	31

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 43.43.7541 .....	31
U.S. CONST. amend. VI.....	9, 21
CONST. art I, § 21 .....	9, 21
CONST. art. I, § 22 .....	9, 21

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial by a jury when a police officer repeatedly gave his opinion on appellant's guilt and the credibility of witnesses.

2. Defense counsel was ineffective for failing to object to repeated instances of improper, prejudicial police testimony.

3. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant's current and future ability to pay.

4. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

1. Was appellant denied his constitutional right to a fair trial by a jury when a police officer repeatedly gave his opinion on appellant's guilt and the credibility of witnesses?

2. Was defense counsel ineffective for failing to object to repeated instances of improper, prejudicial police testimony?

3. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay?

4. Was defense counsel ineffective for failing to object to the imposition of discretionary LFOs?

B. STATEMENT OF THE CASE

The State charged Joey McFarland by amended information with one count of residential burglary with the aggravating circumstance that the victim was in the residence at the time. CP 57. The State alleged that on October 22, 2014, McFarland entered and remained unlawfully in the home of Kyli and Joshua Clark, with intent to commit the crime of theft therein. CP 57. The case proceeded to a jury trial in October 2015. 3RP-5RP.<sup>1</sup>

1. State's Case

Ms. Clark testified she woke up just before 7:00 a.m. on October 22 to her dogs barking. 3RP 140-41. She went downstairs and found the back sliding glass door unlocked, which she thought was unusual. 3RP 142. She noticed a t-shirt on the back porch and, when she picked it up, discovered it was dry even though it was raining outside. 3RP 143. Ms. Clark keeps a variety of purses on a table near the sliding door and found the one she used the previous day was missing. 3RP 144. The purse contained her house and car keys, wallet, phone, and other valuables. 3RP 145-46. She then noticed

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<sup>1</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP – 10/15/15; 2RP – 10/19/15; 3RP – 10/20/15; 4RP – 10/21/15; 5RP – 10/22/15; 6RP – 12/16/15; 7RP – 12/28/15.

“very distinct muddy shoe prints” on the kitchen floor. 3RP 145. She called the police and waited for them to arrive. 3RP 144, 156.

The police arrived quickly, with Officer Ray Riches first on the scene and Officer Derek Carlile arriving shortly thereafter. 4RP 262-63. They found no sign of forced entry. 3RP 164; 4RP 238, 289. Riches examined the footprints and together with Ms. Clark discovered the back gate was open. 4RP 269. Ms. Clark explained they use a curtain rod to prop up the fence, which is quite heavy, and the rod must be moved in order to open the back gate. 3RP 153-55, 165-67. Because the burglary appeared to have happened very recently, Riches sent Carlile to canvass the neighborhood. 3RP 200-01; 4RP 266.

Carlile drove north in his patrol car. 3RP 202. Four to five houses away, Carlile saw a man, woman, and a dog in front of a house with a long driveway. 3RP 202. The man and woman “kind of bent down” upon seeing Carlile and “then went inside the house real quick.” 3RP 202. Carlile thought this was suspicious, so went up to the house to speak with them. 3RP 202-04. Carlile told the man, McFarland, he was investigating a burglary and asked McFarland to come outside. 3RP 203-04. McFarland initially refused, but then came outside and told Carlile he saw a couple people walking by about 30 minutes earlier. 3RP 204.

Carlile noticed McFarland's shoes were similar to shoeprints inside the Clarks' home, so he radioed to Riches. 3RP 204-05. About that time McFarland's girlfriend, Leanna Fuller, came outside. 3RP 204-05. Fuller rented the apartment attached to the main house. 3RP 185, 202. When Riches arrived, he examined the shoes and took them into evidence. 4RP 271-72. Fuller went inside the apartment to get McFarland's slippers, which McFarland said he had been wearing earlier that morning to find Fuller's dog. 3RP 208-11. Carlile noted the slippers were dry, even though it had been raining that morning. 3RP 210-11.

Riches and Carlile returned to the Clarks' home to compare the shoeprints with the seized shoes. 3RP 211-12; 4RP 277. The shoes were the same size and had the same tread as the prints. 4RP 278-79. Believing they had probable cause to arrest McFarland for burglary, the officers went back outside to arrest him. 4RP 279.

Outside, Fuller was standing in the Clarks' driveway on the phone. 3RP 212. Ms. Clark's purse was sitting on the trunk of Carlile's patrol car. 3RP 213-14; 4RP 280. When Carlile asked Fuller why McFarland did not return the purse immediately, Fuller said McFarland found the purse while he was walking around that morning. 3RP 214. Carlile told Fuller to get McFarland, but she said McFarland had already gone to work. 3RP 213.

Carlile said, however, he saw McFarland watching them and then quickly go back inside Fuller's apartment. 3RP 214.

Officers surrounded Fuller's apartment with their guns drawn, demanding that McFarland come outside. 4RP 310. They asked Sergeant Adam Vermeulen, who was en route, to call McFarland and ask him to come out. 4RP 306-08. McFarland told Vermeulen over the phone he did not do anything wrong—he simply found the purse on the sidewalk and asked his girlfriend to return it. 4RP 309. During the standoff, Fuller was very agitated and ran back inside the apartment contrary to the officers' orders. 4RP 223-24.

When McFarland came out several minutes later, he arrested and transported to jail. 4RP 225-26, 283-84. At the scene, McFarland explained he found the purse and did not return it immediately because he did not want the police to think he stole it. 4RP 227. At the jail, Detective Jon Elton interviewed McFarland with Carlile present. 4RP 228-29, 315. McFarland told Elton he found the purse in the street and picked it up hoping to find something good inside. 4RP 316. McFarland expressed concerned that Fuller was pregnant and he was ruining her life. 4RP 252-53.

Police searched Fuller's apartment and found Ms. Clark's car key in another purse hidden underneath some insulation in the attic above Fuller's bedroom. 4RP 230-31, 288. Ms. Clark's house key was not found. 3RP

157-58. An adult tricycle was also missing from the Clarks' yard and was discovered in the front yard at Fuller's apartment. 3RP 159-60; 4RP 285.

2. Defense Case

In August 2015, Fuller came forward admitting she committed the burglary, not McFarland. 2RP 8-9, 61. She testified for the defense at trial. 4RP 343. On the morning of October 22, 2104, Fuller slipped on McFarland's shoes and stepped outside her apartment to smoke a cigarette and let her dog out. 4RP 347-48. Fuller explained she put on McFarland's shoes because they were right by the door and she intended to smoke only one cigarette before going back inside. 4RP 348. This was not the first time she had done so. 4RP 349-50. Fuller further explained she had not slept for the four days due to her methamphetamine and heroin use, so "there's a lot of parts of during that time that are not very clear." 4RP 345-46.

When Fuller finished her cigarette, she did not see her dog. 4RP 350. Fuller's landlord confirmed that one of Fuller's dogs would roam the neighborhood. 3RP 189-90; 4RP 386. Fuller got on her bike to see if she could find her dog, riding up and down the street, still wearing McFarland's shoes. 4RP 350-52. Fuller explained there were two backyards her dog would often explore, so she checked one of them. 4RP 350-52. In the backyard, she noticed purses through a sliding glass door, so she went inside

and grabbed them.<sup>2</sup> 4RP 352-55. Fuller then got on what she thought was her bike and rode back to her apartment. 4RP 354-55.

Fuller felt very scared, so when she got home, she woke up McFarland and “told him somewhere along the lines of what happened.” 4RP 353-56. Fuller explained McFarland “didn’t want any part of it” and told her to take the purses back. 4RP 357.

Fuller recalled the police coming to her house, asking about the burglary, and seizing McFarland’s shoes. 4RP 359-61. Fuller explained she did not take responsibility at that point because she had been dating McFarland for only a month and “didn’t really know him very, very well.” 4RP 361. She further explained, “I was using drugs. I was scared to go to jail, and get in big trouble. My addicted part of my personality was scared not to be able to use drugs, and that’s very selfish, but, I mean, that’s reality.” 4RP 362.

When the police left, McFarland told Fuller to take the purses back, so she “walked them down to the house, and set them on the . . . police car.” 4RP 364. She acknowledged when she returned the purse it did not have everything in it. 4RP 366. Fuller explained when she initially returned home with the purse, she was “paranoid about everything, and hid some of

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<sup>2</sup> Fuller’s reference to “purses” rather than a single purse was consistent with Ms. Clark’s testimony that she found another purse “shoved into” the purse that was returned. 3RP 145.

the contents of the purse inside my place. And then when I brought it back, I was just in a hurry to get it back, so I gathered what I could find, and then took it back.” 4RP 366.

Fuller said she finally came forward in August 2015 because “I got sober, and really thought out my priorities.” 4RP 368. She “was doing this because -- because of my own reasoning of clearing out my life, and doing -- taking accountability for my actions.” 4RP 370. She explained:

I don’t really know what I was thinking at the time, honestly. I know I was under the influence of a lot of drugs, and I wasn’t thinking clearly. I had just quit my job, due to my drug use, so we didn’t have money. I don’t even know what I had planned on doing with the contents of the purse because I don’t even really know anything about, like, that kind of stuff.

So, I mean, honestly, I just think it was a stupid moment that I had. I saw an opportunity, and I just made a mistake in my life.

4RP 371. Fuller agreed she would be facing less time in prison than McFarland if convicted. 4RP 388.

The jury found McFarland guilty of residential burglary and returned a special verdict form finding the victim was present in the dwelling during the burglary. CP 33-34. The trial court sentenced McFarland to 84 months confinement—the high end of the standard range. CP 7-8. McFarland filed a timely notice of appeal. CP 4.

C. ARGUMENT

1. McFARLAND WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY A JURY WHEN A POLICE OFFICER REPEATEDLY EXPRESSED HIS OPINION ON GUILT AND WITNESS CREDIBILITY.

The role of the jury is “inviolable” under the Washington Constitution. CONST. art I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). “To the jury is consigned under the constitution ‘the ultimate power to weigh the evidence and determine the facts.’” State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Washington courts likewise recognize it is exclusively “the function of the jury to assess the credibility of a witness and the reasonableness of the witness’s responses.” State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

- a. Washington courts hold it is unconstitutional for a witness to give his opinion on the defendant’s guilt or the credibility of other witnesses.

ER 701 permits opinion testimony by a lay witness only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. Therefore, no witness “may testify to his opinion as to the guilt of a defendant, whether by

direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Nor may a witness “give an opinion on another witness’[s] credibility” or the “veracity of the defendant.” State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (citing numerous cases). “Testimony regarding the credibility of a key witness” is improper “[b]ecause issues of credibility are reserved strictly for the trier of fact.” City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

Before opinion testimony is offered, the trial court must determine its admissibility. Montgomery, 163 Wn.2d at 591. Courts consider the circumstances of the case, including: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Id. Opinion testimony is “clearly inappropriate” in a criminal trial when it contains “expressions of personal belief[]s to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” Id.

In Demery, the trial court admitted a videotaped interview in which the police accused Demery of lying and said they did not believe his story. 144 Wn.2d at 756 n.2. Four justices held the taped statements were not opinion testimony, reasoning they were different from trial testimony, which bore an added “aura of special reliability and trustworthiness.” Id. at 763 (plurality opinion) (quoting United States v. Espinosa, 827 F.2d 604, 613

(9th Cir. 1987)). However, four justices concluded the taped statements were essentially the same as live testimony by an officer and were therefore inadmissible opinion testimony. Id. at 773 (Sanders, J., dissenting). The final justice found the videotaped statements to be impermissible opinion evidence but believed the error was harmless. Id. at 765-66 (Alexander, J., concurring). Thus, a majority concluded the officers' taped statements that Demery was lying were inadmissible opinions on Demery's credibility.

In State v. Jones, Jones was convicted of unlawfully possessing a firearm. 117 Wn. App. 89, 90, 68 P.3d 1153 (2003). A police officer saw Jones making furtive movements and discovered the gun under the passenger seat of the car where Jones was sitting. Id. During an interview, the officer kept insisting Jones must have known about the gun. Id. at 91. At trial, the officer explained he “addressed the issue that, you know, I just didn't believe him. There was no way that someone was sitting in that car, and everything that had transpired from my eyes.” Id. (quoting report of proceedings). On appeal, Jones argued the prosecutor committed flagrant and ill-intentioned misconduct by eliciting this testimony. Id. at 90-91.

After analyzing Demery, the Jones court found “no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him.” Id. at 92. Either

way, “the jury learns the police officer’s opinion about the defendant’s credibility.” Id. The court held the officer’s testimony that he believed Jones was lying during the interrogation constituted inadmissible opinion evidence. Id. The error was prejudicial and required reversal because the case hinged on Jones’s credibility. Id.

State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), is also instructive. There, the court reversed Johnson’s conviction for child molestation because of improper opinion testimony. Id. at 934. The case involved out-of-court statements by Johnson’s wife indicating she believed the victim’s allegations. Id. at 931. The victim (T.W.), her mother, and her stepfather all related an incident where Johnson’s wife confronted T.W. about the accusations and demanded T.W. prove it was true. Id. at 931-32. When T.W. recounted details of Johnson’s intimate anatomy and sexual habits, his wife burst into tears, acknowledged it must be true, and hours later attempted suicide. Id. at 932-33.

The Johnson court held it was manifest constitutional error to admit Johnson’s wife’s opinion and reversed despite the lack of objection below. Id. at 934. The court reasoned the testimony shed “little or no light on any witness’s credibility or on evidence properly before the jury and really only tells us what [Johnson’s wife] believed.” Id. at 933. The court further noted “the jury should not have heard collateral testimony that Johnson’s wife

believed T.W.’s allegations.” Id. at 934. The testimony “served no purpose except to prejudice the jury,” thereby denying Johnson a fair trial. Id.

b. Officer Carlile gave his personal opinion on McFarland’s guilt and the credibility of witnesses.

At trial, Officer Carlile repeatedly testified to his personal opinion on McFarland’s guilt, as well as McFarland’s and Fuller’s credibility. The first instance came when Carlile explained he walked with Fuller as she went to retrieve McFarland’s slippers from her apartment. 3RP 209-10. Carlile testified he told Fuller, “look, I know Joey broke into the neighbor’s house and stole the purse, all the neighbor wants is her purse back.” 3RP 210.

Carlile then opined:

Leanna looked at me, like, in fear, like, as if I knew some deep, dark secret or something that she didn’t want me to know, like she had been caught, like they had been caught red-handed, as if I know that Joey had done the burglary. And she was very scared for him.

3RP 210. This was impermissible opinion testimony for several reasons.

First, Carlile testified he “knew” McFarland stole the purse—a direct comment on McFarland’s guilt. Second, he indicted Fuller also knew McFarland stole the purse. Johnson demonstrates Fuller’s belief that McFarland committed the burglary was not admissible and served no purpose except to prejudice McFarland. See also State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) (“A mother’s opinion as to her

children's veracity could not easily be disregarded even if the jury had been instructed to do so.").

And, third, Carlile could only speculate as to Fuller's state of mind. In State v. Sargent, a detective testified that when Sargent denied knowing of his wife's death, the detective had the "impression" Sargent's statement was "contrived." 40 Wn. App. 340, 350, 698 P.2d 598 (1985). This Court held the detective's testimony was an improper opinion on Sargent's guilt because the detective neither knew Sargent personally nor based his opinion on observable facts. Id.; see also State v. Farr-Lenzini, 93 Wn. App. 453, 458, 460, 970 P.2d 313 (1999) (holding officer improperly speculated about the defendant's state of mind where he testified her driving exhibited she "was attempting to get away from me and knew I was back there and [was] refusing to stop").

Sargent controls. There is no indication in the record Carlile knew Fuller before speaking with her on October 22. He had no basis to opine as to her internal thought processes. Moreover, "the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." Farr-Lenzini, 93 Wn. App. at 460. Carlile offered no supporting facts for his opinion that Fuller knew a "deep, dark secret" and looked "like they had been caught red-handed." 3RP 210. For instance, he did not say Fuller's eyes widened or that she turned red or refused to meet

his gaze. See State v. Allen, 50 Wn. App. 412, 418-19, 749 P.2d 702 (1988) (holding officer could give his opinion that defendant's crying was insincere where it was prefaced with a proper foundation, i.e., objective observations of the defendant's conduct such as her facial expression, lack of actual tears, and lack of redness in her face). Instead Carlile jumped to the ultimate conclusion that Fuller knew McFarland was guilty, without any foundation or objective observations of her conduct.

Carlile's opinions on guilt and credibility did not end there. After the police arrested McFarland, Carlile testified he asked McFarland "why he wasn't honest with [the police] earlier." 3RP 228. Likewise, McFarland told Carlile that earlier that morning he had been wearing the slippers Fuller got from inside the house. 4RP 255-56. Carlile noted the slippers were dry, even though it had been raining that morning. 4RP 255. Carlile then went on to opine, regarding McFarland's statement, "I was, like, okay, that's not true. You know, I felt like it was a complete lie because the shoes would have been wet . . . ." 4RP 256.

Similarly, Carlile gave his opinion on Fuller's version of events, explaining he was "very shocked" by it. 4RP 256. He continued, testifying he believed Fuller's story "was absolutely asinine, that she would have done that burglary. I couldn't grasp that whatsoever." 4RP 256-57. When the prosecutor asked why Carlile thought that, Carlile explained all the evidence

“added up, showing me that [McFarland] wasn’t being fully truthful, he wasn’t being honest, and he was trying to create some story of how his tracks could be covered.” 4RP 257.

Finally, defense counsel asked Carlile about McFarland expressing concern for Fuller’s wellbeing during the jail interview. 4RP 247. Carlile responded, “I don’t necessarily believe that. I believe he’s more so minimizing that he went inside the house, and stole the purse in a burglary, rather than finding it on the side of the road. That’s my personal belief.” 4RP 247-48. It is hard to imagine a more explicit statement on guilt. In Montgomery, the court noted “it is very troubling that the testimony in this case was quite direct and used explicit expressions of personal belief such as ‘I felt very strongly that . . .’ and ‘we believe.’”<sup>3</sup> 163 Wn.2d at 594. This is precisely how Carlile couched his testimony: his “personal belief” was that McFarland “stole the purse in a burglary.”<sup>4</sup> 4RP 247-48.

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<sup>3</sup> For instance, in Montgomery’s trial for possession of pseudoephedrine with intent to manufacture methamphetamine, a detective testified, “‘I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I’d seen those actions several times before.’” Montgomery, 163 Wn.2d at 587-88. Another detective testified the chemicals Montgomery purchased “are for what we believe to be methamphetamine production.” Id. at 588.

<sup>4</sup> The Montgomery court further noted “[i]t is the duty of every trial advocate to prepare witnesses for trial,” which includes explaining “the rules against speculation or expression of personal beliefs or opinions unless specifically requested.” 163 Wn.2d at 592.

Carlile's testimony was remarkably similar to the improper opinion testimony in Demery and Jones. Like the interrogation in Demery where the police accused Demery of lying and said they did not believe his story, Carlile testified he asked McFarland at the scene why he had not been honest with the police. 3RP 228. Like the officer's trial testimony in Jones that he did not believe Jones's story, Carlile repeatedly testified he did not believe McFarland or Fuller. Carlile used almost exactly the same language as the officer in Jones: testifying it was his "personal belief" that McFarland "went inside the house, and stole the purse in the burglary." 4RP 247-48; Jones, 117 Wn. App. at 91 (officer testifying he "just didn't believe" Jones). And, like in both cases, Carlile used the words "not true," "complete lie," "wasn't being fully truthful," "wasn't being honest" to describe McFarland, and "absolutely asinine" to describe Fuller's story. 4RP 247-48, 256-57. This testimony clearly conveyed to the jury Carlile's opinion on McFarland's and Fuller's credibility, violating McFarland's right to a jury trial.

- c. Officer Carlile's impermissible opinion testimony was manifest constitutional error that prejudiced the outcome of McFarland's trial.

McFarland's counsel did not object once during Carlile's testimony. 3RP 193-214; 4RP 220-59. However, impermissible opinion testimony may be reversible error because such evidence violates the accused's constitutional right to a jury trial, which includes the independent

determination of the facts by the jury. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). Such testimony constitutes manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3), when there is an “an explicit or almost explicit witness statement on an ultimate issue of fact.” State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

Carlile made numerous explicit statements on McFarland’s guilt, as well as McFarland’s and Fuller’s credibility. Regarding McFarland’s guilt, Carlile testified his “personal belief” was McFarland “went inside the house, and stole the purse in a burglary.” 4RP 247-48. He likewise testified he “kn[e]w” McFarland “stole the purse” and Fuller looked “like they had been caught red-handed” when he told her that. 3RP 210. Regarding McFarland’s credibility, Carlile testified McFarland was not “honest” or “fully truthful” with the police. 3RP 228; 4RP 257. Carlile opined McFarland “was trying to create some story of how his tracks could be covered,” which Carlile believed was “not true” and was “a complete lie.” 4RP 256-257. Regarding Fuller’s credibility, Carlile believed her version of events was “absolutely asinine.” 4RP 256-57. Such blatant statements on ultimate issues of fact rise to the level of manifest constitutional error. State v. Dolan, 118 Wn. App. 323, 328-30, 73 P.3d 1011 (2003) (finding manifest constitutional error where police officer and case worker opined the mother did not bruise the child’s neck, which suggested the defendant did).

Manifest constitutional error is subject to harmless error analysis. Kirkman, 159 Wn.2d at 927. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id.

First and foremost, “[t]estimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer’s testimony often carries a special aura of reliability.” Kirkman, 159 Wn.2d at 928; see also State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985). (“Particularly where [an opinion on guilt] is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.”). Carlile was one of only two officers who had the opportunity to speak with and observe both McFarland and Fuller immediately after the burglary. His opinions on guilt and credibility were likely quite persuasive to the jury, who had no such opportunity.

The case also hinged on McFarland’s and Fuller’s credibility. Fuller took responsibility for the burglary, explaining she slipped on McFarland’s shoes when she stepped outside to smoke a cigarette. 4RP 347-48. While looking for her dog, Fuller was enticed by purses she saw through the

Clarks' sliding glass door and snatched them. 4RP 352-55. Carlile's opinion that this story was "absolutely asinine" significantly undercut the defense, as did his "personal belief" that McFarland, not Fuller, committed the burglary. 4RP 247-48, 256-57.

Fuller's testimony was further undermined by Carlile's testimony that when he told Fuller he believed McFarland stole the purse, she looked like she "kn[e]w that Joey had done the burglary." 3RP 210. But Fuller's facial expression could also be explained by her realization that McFarland was about to be arrested for her burglary. Carlile's testimony essentially foreclosed this reasonable alternative.

The evidence supported both Fuller's and the State's version of events. For instance, before the police arrived, Fuller told McFarland she stole the purses. 4RP 353-56. The ensuing events were consistent with McFarland telling Fuller to return the purses, as Fuller testified he did. 4RP 357, 364. McFarland's story that he found the purse while walking around was also consistent with an attempt to cover for Fuller, given his concern for her wellbeing. Of course, however, Carlile testified he did not "necessarily believe that," and instead thought McFarland was lying "to create some story of how his tracks could be covered." 4RP 247, 257.

Carlile's repeated, explicit opinions on guilt and credibility undercut every aspect of the defense, resulting in significant prejudice to McFarland.

This manifest constitutional error violated McFarland's right to a fair trial by a jury. Because the error was not harmless, this Court should reverse and remand for a new trial. Black, 109 Wn.2d at 349-50.

2. McFARLAND'S COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO REPEATED INSTANCES OF IMPROPER, PREJUDICIAL POLICE TESTIMONY.

If this Court concludes the issue of Carlile's impermissible opinion testimony was not preserved because defense counsel did not object, then that failing deprived McFarland of his right to effective assistance of counsel. Exacerbating the prejudice, defense counsel also failed to object to several other instances of impermissible and prejudicial police testimony.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029

(2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

No sound trial strategy can explain defense counsel's complete failure to object even once during Carlile's impermissible, borderline offensive, opinion testimony. Carlile's opined on every ultimate issue in the case: McFarland's credibility, Fuller's credibility, and McFarland's guilt. The trial court would surely have sustained objections to such explicit opinion testimony—or created an excellent issue for the appeal—given the clear case law prohibiting such testimony. Defense counsel attempted to cross-examine Carlile on these topics, but ended up just reemphasizing Carlile's belief that McFarland was lying and was guilty. 4RP 247-49. Defense counsel's performance was particularly deficient given that jurors could easily be swayed Carlile's aura of reliability as a police officer.

Defense counsel's failure to object to inadmissible testimony did not end there, either. On direct, the prosecutor asked Detective Elton if Fuller's confession made him question "whether or not Mr. McFarland was the right person to refer to the Prosecutor's office?" 4RP 322. Elton responded, "No, I still believed that -- after studying officers' reports and my report, I still believed Officer -- Mr. McFarland's the one that committed the residential burglary." 4RP 322. Like Carlile, Elton expressed his personal belief that McFarland was guilty of the burglary. Whether Fuller was telling the truth that she committed the burglary was solely for the jury to determine.

Elton went on to testify, given Fuller's small stature, "there's no way" she could have left the footprints or opened the Clark's fence gate. 4RP 322-23. Elton explained he was "not an expert, by any means" in examining or tracking footprints. 4RP 323. Nevertheless, Elton went on to opine, "[f]or, like, a smaller person, to weigh that, the amount of weight to push down, I don't think it would have left that good tread on the floor of the Clarks' residence. It would have [had] to be somebody bigger in size, obviously, to do that." 4RP 323. On the prosecutor's prompting, Elton continued, "as you saw in the pictures from Officer Riches, it was like a -- you could see the he[e]l and the toe mark of the tread, you know, like when you -- somebody's smaller, I don't think they would leave that even marking." 4RP 323-24.

Lay witnesses may offer opinions only if they are not based on scientific or specialized knowledge.<sup>5</sup> ER 701. Otherwise, expert testimony is required. ER 702. Elton averred he was “not an expert” in shoeprint identification. While basic matching of shoeprints based on shoe tread and size may be within the knowledge of an average lay person, Elton’s testimony went far beyond that. Instead he speculated that a small person like Fuller could not have left such an even footprint, and the heel-to-toe markings suggested a heavier person than Fuller must have left them. This required significantly more complicated analysis than simple shoeprint matching. Expert testimony is required in such circumstances. Compare State v. Groth, 163 Wn. App. 548, 563-64, 261 P.3d 183 (2011) (holding expert tracker could properly analyze two sets of footprints in photographs because his testimony “concerned matters beyond the layperson’s knowledge”); and In re Pers. Restraint of Stetson, 150 Wn.2d 207, 211-12, 76 P.3d 241 (2003) (complex conclusion drawn from details of blood patterns requires expert testimony), with State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985) (lay witness may testify to a person’s intoxication if based on personal observation). Elton’s lay opinion therefore exceeded the proper scope of ER 701.

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<sup>5</sup> See Smissaert, 41 Wn. App. at 815 (“If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion.”).

Furthermore, Carlile testified, “Well, at that point, I believed we had probable cause to make an arrest for burglary, since we had the purse, the shoe prints matched at the residence, and the purse had magically showed up.” 4RP 221. Officer Riches likewise testified, “Once I had the shoes compared, I believed -- at that point, I felt I had probable cause to arrest Mr. McFarland, for the burglary.” 4RP 279. There was no reason for the officers to state they had probable cause to arrest McFarland and give their reasons. In Montgomery, the State argued the jury already knew Montgomery had been arrested because the officers believed he was guilty, so their opinions on guilt added nothing new. 163 Wn.2d at 595. The court rejected this argument, concluding “this unavoidable state of affairs does not justify allowing explicit opinions on intent.” Id.

Such repeated failure to object to speculative, impermissible testimony on ultimate issues of fact cannot be characterized as a reasonable defense strategy. Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (deficient performance for failing to object to introduction of defendant’s prior drug convictions); State v. Klinger, 96 Wn. App. 619, 623, 980 P.2d 282 (1999) (deficient performance for not moving to suppress marijuana found in storage shed behind defendant’s cabin); State v. C.D.W., 76 Wn. App. 761, 764, 887 P.2d 911

(1995) (deficient performance for failing to object to admission of defendant's confession).

Furthermore, defense counsel had a duty to know the law and object accordingly. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law); see also State v. Ermert, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance).

For the reasons discussed in section 1.c., supra, Carlile's opinion testimony was highly prejudicial. Defense counsel's failure to object to additional opinion testimony by Riches and Elton further prejudiced the outcome of McFarland's trial. These three police witnesses essentially removed every issue of fact from the jury: McFarland's credibility, Fuller's credibility, and who ultimately committed the burglary. Indeed, in closing argument, the prosecutor emphasized the only disputed issue in the case was *who*—McFarland or Fuller—committed the burglary. 5RP 401-02. Given the blatantly impermissible nature of the discussed testimony, the trial court would have—or should have—sustained objections from defense counsel. There is a reasonable probability that the result of McFarland's trial would

have been different had the improper opinion testimony been objected to and, accordingly, excluded.

This Court should reverse and remand for a new trial because McFarland was denied his right to effective assistance of counsel. Thomas, 109 Wn.2d at 232.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER McFARLAND'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. In determining LFOs, courts “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). RCW 10.01.160(3) forbids imposing LFOs unless “the defendant is or will be able to pay them.”

The Washington Supreme Court has recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they

completely satisfy their LFOs.” Id. at 836-37. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. at 837.

The Blazina court thus held RCW 10.01.160(3) requires trial courts consider an individual’s current and future ability to pay before imposing discretionary LFOs. Id. at 837-39. The “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id. If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. at 834.

The trial court imposed \$200 in discretionary court costs.<sup>6</sup> CP 10; RCW 10.01.160(1), (2); RCW 9.94A.760; State v. Smits, 152 Wn. App. 514, 521-22, 216 P.3d 1097 (2009) (recognizing courts costs are discretionary). At sentencing, however, the trial court failed to make an individualized inquiry into McFarland’s current or future ability to pay these discretionary LFOs. See CP 10-11; 6RP 456-57; 7RP 20. The court said only, “Impose

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<sup>6</sup> The court also imposed a mandatory \$500 victim assessment and \$100 biological sample fee. CP 10.

the \$500 Victim Penalty Assessment, \$100 biological sample fee, \$200 filing fee.” 6RP 456 (initial sentencing hearing); 7RP 20 (final sentencing hearing). The court did not even enter the written boilerplate finding of ability to pay. CP 10-11; see Blazina, 182 Wn.2d at 838 (“[T]he court “must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.”).

Oddly, when defense counsel asked if the court would find McFarland indigent for the appeal, the court recognized, “Obviously, he’s indigent, he didn’t have a good work history before, and he’s been in custody -- or he’s in custody now.” 6RP 458. This was corroborated by the Department of Correction’s (DOC) drug offender sentencing alternative assessment of McFarland. At the time of sentencing, McFarland was almost 40 and DOC reported McFarland “had remained unemployed since he was 19 years old.” CP 17; 7RP 17. DOC further noted McFarland “is doing poor financially. He mostly supports himself through criminal activity.” CP 17. McFarland has struggled with drug addiction since he was 13 years old. CP 17. This suggests the trial court would have waived discretionary LFOs had it actually considered McFarland’s ability to pay or considered the discretionary nature of the court costs.

The State may argue the trial court did not impose discretionary court costs, but rather a mandatory criminal filing fee. Though the trial court

called it a “filing fee” at sentencing, the judgment and sentence specifies “[c]ourt costs.” 6RP 456; CP 10. “An oral decision by the trial court which is inconsistent with the written findings cannot be used to impeach those written findings.” State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996). Based on the written judgment and sentence, then, the court imposed court costs, not a criminal filing fee.

Even if this Court holds the trial court imposed a criminal filing fee, such a fee is discretionary. Division Two of this Court has indicated that the \$200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). McFarland disagrees. The Lundy court provided no rationale or analysis of the statutory language supporting its conclusion. See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (Division Three’s mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency). Because Lundy was wrongly decided, this Court should decline to follow it.

The language of RCW 36.18.020(2)(h), which provides authority to impose a filing fee, differs from other statutes that mandate fees. For instance, the victim penalty assessment statute specifies: “When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” RCW 7.68.035 (emphasis added). The same is true of the

DNA collection fee statute, which commands: “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added).

RCW 36.18.020(2)(h) is not the same. It provides that, upon conviction, “an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” (Emphasis added.) In contrast to the DNA collection and victim penalty assessment statutes—both of which demonstrate the legislature knows how to unambiguously mandate the imposition of an LFO—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a \$200 criminal filing fee. Although the statute states “[c]lerks of superior courts shall collect” the fee, the statute’s does not indicate the fee cannot be waived by a judge. Many superior courts never impose the \$200 filing fee. The \$200 filing fee is a discretionary LFO, not a mandatory one.

This is consistent with the definition of “liable.” Being liable for a fee and being required to pay a fee are different things. “Liability” for a fee does not make the fee mandatory given that the term “liable” encompasses a broad range of possibilities, from making a person “obligated” in law to pay to imposing a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed. 1990). Thus, “liable” can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the

statutory language must be interpreted in McFarland's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The Washington Supreme Court recently appeared skeptical that the \$200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, 436 n.3, 74 P.3d 83 (2016). The court identified those fees designated as mandatory by the legislature (victim penalty assessment and DNA collection fee), then separately identified the criminal filing fee as one that has merely been *treated* as mandatory. Id. This shows the supreme court sees a distinction. This Court should not follow Lundy and instead hold the criminal filing fee is discretionary under the plain language of RCW 36.18.020(2)(h).

Finally, the State may ask this Court to decline review of the erroneous LFO order. The Blazina court held the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). 182 Wn.2d at 834. The court nevertheless concluded "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id. Asking this Court to decline review would essentially ask this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating McFarland's discretionary LFOs and remanding for resentencing.

4. McFARLAND'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Defense counsel's failure to object to discretionary LFOs fell below the standard expected for effective representation. There was no reasonable strategy for not requesting the trial court comply with the requirements of RCW 10.01.160(3). McFarland was sentenced on December 28, 2015, over nine months after the supreme court's decision in Blazina. CP 5. Defense counsel was accordingly on notice that the trial court was required to consider McFarland's ability to pay discretionary LFOs. Defense counsel was also on notice that Blazina gives appellate courts discretion to decline to consider imposition of discretionary LFOs where defense counsel fails to object at sentencing. Given the case law and clear statutory mandates, counsel's failure to object constitutes deficient performance.

Counsel's failure to object was also prejudicial. As discussed above, the hardships that can result from LFOs are numerous. Blazina, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the likelihood of recidivism. Id. at 836-37. Furthermore, in a remission hearing to set aside LFOs, McFarland will bear the burden of proving manifest hardship, and he will have to do so without

appointed counsel. RCW 10.01.160(4); State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. McFarland incurs no possible benefit from LFOs. Given McFarland's indigency and nearly complete lack of work history, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered McFarland's current and future ability to pay. CP 1-3, 17. McFarland's right to effective assistance of counsel was accordingly violated. This Court should also vacate the LFO order and remand for resentencing on this alternative basis.

5. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If McFarland does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for costs).

As discussed, McFarland's ability to pay must be determined before discretionary LFOs are imposed.<sup>7</sup> The trial court made no such finding. Also as discussed, McFarland has been unemployed since he was 19, is doing poor financially, and "mostly supports himself through criminal activity." CP 17. McFarland was homeless at the time of trial. CP 17. He has been addicted to heroin and methamphetamine almost continuously since 13 years old. CP 17-18. Imposing discretionary appellate costs in such circumstances would be inequitable and unjust.

The trial court also entered an order finding McFarland indigent for purposes of the appeal. CP 1-3. There has been no order finding McFarland's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume McFarland remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against McFarland in the event he does not substantially prevail on appeal.

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<sup>7</sup> See Duncan, 185 Wn.2d at 436 (recognizing "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations," and a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements," including "[t]he financial resources of the defendant must be taken into account" (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

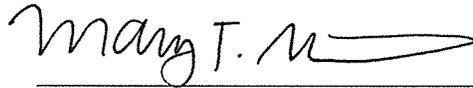
D. CONCLUSION

For the reasons stated above, this Court should reverse McFarland's conviction and remand for a new trial. This Court should also vacate the LFO order and remand for resentencing.

DATED this 30<sup>th</sup> day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink that reads "Mary T. Swift" followed by a long horizontal flourish.

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