

NO. 74527-1-I

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

STATE OF WASHINGTON

Respondent

v.

JOEY L. McFARLAND,

Appellant

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October 18, 2016
Court of Appeals
Division I
State of Washington

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT..... 14

 A. PERMITTING A POLICE OFFICER TO TESTIFY ABOUT HS
 HIS OPINION ON THE DEFENDANT'S GUILT AND WITNESS
 CREDIBILITY WAS CONSTITUTIONAL ERROR BUT HARMLESS
 IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT. 14

 B. DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN, AS A
 TRIAL TACTIC, HE ELICITED AND DID NOT OBJECT TO
 OPINION TESTIMONY FROM OFFICERS ABOUT THE
 DEFENDANT'S GUILT AND WITNESS CREDIBILITY..... 21

 1. Defense Counsel Made A Tactical Decision Not To Object And
 To Affirmatively Elicit Opinion Testimony. 21

 C. THE COURT PROPERLY IMPOSED ONLY MANDATORY
 LFOS.....26

 D. THE COURT SHOULD IMPOSE APPELLATE COSTS. 29

 1. A Constitutionally-Valid Statute Provides For The Recoupment
 Of Costs From Indigent Offenders. 29

IV. CONCLUSION..... 39

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Association Collectors v. King County</u> , 194 Wash. 25, 76 P.2d 998 (1938).....	32, 34
<u>City of Richland v. Wakefield</u> , no. 92594-1 (9/22/16)	30
<u>City of Seattle v. Heatley</u> , 70 Wn. App. 573, 954 P.2d 658 (1993) 25	
<u>City v. Heatley</u> , 70 Wn. App. 573, 854 P.2d 658 (1993), <u>review denied</u> , 123 Wn.2d 1011 (1994).....	15
<u>Hall v. American National Plastics, Inc.</u> , 73 Wn.2d 203, 437 P.2d 693 (1968).....	33
<u>In re Dill</u> , 60 Wn.2d 148, 372 P.2d 541 (1962)	33
<u>In re Sehome Park Care Ctr., Inc.</u> , 127 Wn.2d 774, 903 P.2d 443 (1995).....	35
<u>Knight v. City of Yelm</u> , 173 Wn.2d 325, 267 P.3d 973 (2011)	37
<u>National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1</u> , 66 Wn.2d 14, 400 P.2d 778 (1965).....	33
<u>Pilch v. Hendrix</u> , 22 Wn. App. 531, 534 P.2d 824 (1979)	31
<u>Ramsdell v. Ramsdell</u> , 47 Wash. 444, 92 P. 278 (1907).....	33
<u>Rettkowski v. Dep't of Ecology</u> , 128 Wn.2d 508, 910 P.2d 462 (1996).....	37
<u>State v. Barr</u> , 99 Wn.2d 75, 658 P.2d 1247 (1983)	37
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	15
<u>State v. Blank</u> , 131 Wn.2d 230, 930 P.2d 1213 (1997)	29, 30, 35, 36, 37
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	27, 36, 37
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	16
<u>State v. Frederick</u> , 100 Wn.2d 550, 674 P.2d 136 (1983)	29
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969).....	18
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	22
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	15, 19
<u>State v. Herrera-Pelayo</u> , __ Wn. App. __, No.73093-2-I at Para. 7 (Div.I, August 1, 2016).....	27
<u>State v. Johnson</u> , 152 Wn. App. 924, 219 P.3d 958 (2009)	17
<u>State v. Keeney</u> , 112 Wn.2d 140, 112 P.2d 140, 769 P.2d 295 (1989).....	30
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	14, 15
<u>State v. Kunze</u> , 97 Wn. App. 832, 988 P.2d 977 (1999).....	24
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009)	21
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	27

<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>review denied</u> , 113 Wn.2d 1002 (1989).....	25, 26
<u>State v. McCracken</u> , 194 Wn. App. 1060, no.37026-7-II at *5 (Div.II, July 6, 2016).....	27
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	22
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008)	15
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	31
<u>State v. Perez-Valdez</u> , 72 Wn.2d 808, 817 265 P.3d 853 (2011)..	16
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004)	22
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 365 (1998).....	21
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016)	36
<u>State v. Stoddard</u> , 192 Wn. App. 222, 366 P.3d 474 (2016)	27
<u>State v. Stuff</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	18
<u>State v. Wakefield</u> , 130 Wn.2d 464, 925 P.2d 183 (1996).....	18
<u>State v. Walker</u> , 153 Wn. App. 701, 224 P.3d 814 (2009).....	34
<u>Tyree v. General Insurance Co.</u> , 64 Wn.2d 748, 394 P.2d 222, 226 (1964).....	33
<u>Water Dist. No. 111 v. Moore</u> , 65 Wn. App. 392, 397 P.2d 845 (1964).....	33
<u>Weiss v. Bruno</u> , 83 Wn.2d 911, 912, 523 P.2d 915 (1974)	37
<u>FEDERAL CASES</u>	
<u>Kirtsaeng v. John Wiley & Sons, Inc.</u> , ___ U.S. ___, 136 S.Ct. 1979, 195 L.Ed.2d 368 (2016).....	31
Laws of 2015, ch. 265, § 22	36
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984).....	21
<u>WASHINGTON STATUTES</u>	
Laws of 1995, ch. 275, § 3	30
Laws of 2015, ch. 265, § 22	36, 38
RCW 10.01.160(3)	37
RCW 10.73.150.....	29
RCW 10.73.160.....	29, 30, 35, 36, 37, 38
RCW 10.73.160(3)	29, 31, 37
RCW 10.73.160(4)	30
<u>COURT RULES</u>	
ER 701	24
RAP 2.5(a)(3).....	15
<u>OTHER AUTHORITIES</u>	
J. Heller, <u>Catch-22</u> (1961)	29

I. ISSUES

1. During his direct examination, a police officer gave improper opinion testimony on the defendant's guilt and on a witness's credibility. There was no objection at trial. Does manifest constitutional error occur when an officer gives his opinion on a defendant's guilt and witness credibility? Is the error harmless when other evidence of guilt is overwhelming?

2. Defense did not object to improper opinion testimony and later elicited the same opinions from other witnesses. Was counsel ineffective for failing to object to opinion testimony when it supported his theory of the case that officers rushed to judgment and performed a shoddy investigation that ignored another viable suspect?

3. At sentencing, the court imposed three legal financial obligations (LFOs), a victim penalty assessment, a biological sample fee, and a filing fee. Did the court exceed its authority when it imposed only statutorily-mandated LFOs after finding the defendant indigent but without an inquiry into his future ability to pay? Should defense have objected to the imposition of mandatory LFOs?

II. STATEMENT OF THE CASE

On the morning of October 22, 2014, while the Clarks were still sleeping, the defendant unlawfully entered their home and stole their personal property.

Kyli and Joshua Clark lived in a two-story house in Marysville with their two children and four dogs. The children and one older dog slept on the first floor. A sliding glass door led from the kitchen to a porch to a completely fenced backyard. A gate in the fence on the side of the house was broken, held shut by a rod that was too high for a short person to move easily. On the same side of the house, the Clarks stored an adult tricycle. 3 RP 139-40, 143, 159-60.

It rained on and off during the night of October 21. When the Clark family went to bed, Mrs. Clark left dry laundry, including a t-shirt, on the kitchen table and her purses on a small table nearby. Although no one had checked that night, the back gate was likely closed since the Clarks' dogs had not left the yard when let out before bed. The slider was locked and the trike (at least the last time they had looked a few days earlier) was on the side of the house. 3 RP 143-44, 157, 160, 200.

Mr. Clark got up at his usual time on October 22, checked the slider, and left for work before 6 a.m. Mrs. Clark woke up just before 7 a.m. when her dogs barked. When she went downstairs to let them out, she noticed that the slider was unlocked. She called her husband to "fuss at him" but then noticed a t-shirt from her laundry was now outside on the patio. It was still dry despite the rain. She told Mr. Clark that she thought someone had been in the house. Mr. Clark hurried home. 3 RP 141-43; 171-73.

Mrs. Clark gathered her children and dogs and called 911. On the kitchen floor she noticed muddy footprints that led to and from the sliding door to a small table where she kept her purses. At least one of them was missing, the one that held her car and house keys, wallet, and phone. 3 RP 145-46, 168. When Mr. Clark arrived home, he found the side gate open, the rod that kept it closed lying in the grass. The adult trike kept in the side yard was gone. 3 RP 178-79.

Marysville Police Officers Riches and Carlile responded within minutes. They noted the still-wet muddy footprints. They noted the slider, a common entry point in burglaries. Officer Riches stayed at the house while Officer Carlile left to check out the neighborhood. 3 RP 198, 200; 4 RP 238, 266.

A few houses away, Officer Carlile noticed a long driveway that led to an apartment shared by Leanna Fuller and the defendant. They were outside in the driveway and bent down when they saw Officer Carlile. Fuller was petite, 90 pounds and five feet tall. The defendant was taller than Officer Carlile who was 5'10". The two straightened up and quickly went inside. The Clark's trike was in front of their home. 3 RP 200, 202; 4 RP 222, 239, 285.

Officer Carlile went down the driveway and told the defendant he wanted to talk about a burglary that had just occurred. The defendant was reluctant to come out but then complied. He told Officer Carlile that he had seen two people walking past 30 minutes earlier. 3 RP 203-04.

Officer Carlile noticed that the defendant was wearing Nike high tops and asked to see the bottom. The tread pattern matched Officer Carlile's recollection of the pattern of the muddy footprints on the Clarks' floor. Officer Riches responded to the scene, confirmed that the shoe tread matched the muddy prints, and asked the defendant to give them his shoes. 3 RP 205-06.

The defendant said the shoes, size ten men's, were not his. He said he been outside earlier near the Clarks' house looking for his dog but he was wearing slippers. He agreed to give the police

his shoes and asked Fuller to get the slippers. Before she went in, Officer Carlile told her he knew the defendant had broken in and that Mrs. Clark just wanted her purse back. Officer Carlile thought that Fuller looked fearful for the defendant, as if he knew that she knew the defendant had committed the burglary. 3 RP 208-10.

Fuller fetched the slippers but not the purse. The defendant confirmed they were the slippers he had been wearing earlier. They were dry. Id.

Police returned to the Clark house to confirm that the treads on the defendant's shoes matched the muddy prints. Fuller apparently followed them because they saw her placing Mrs. Clark's purse on the trunk of their patrol car. Some of Mrs. Clark's property was still inside but her keys were not. Fuller told officers that the defendant had found the purse while he was walking around earlier and that he wanted her to return it because he had gone to work. 3 RP 213-14; 4 RP 220.

The defendant had not gone to work but was standing in some nearby bushes. Officers believed they had probable cause to arrest him and followed him back to Fuller's. The defendant went inside and Fuller, who had followed them back, defied police orders and went inside as well. Other officers arrived. Sgt. Vermeulen

telephoned the defendant who said he had not stolen the purse, had found it on a sidewalk, and was in the bathroom. After a few minutes, he and Fuller emerged separately. 4 RP 220-23, 225, 307-09.

By the time he was questioned at the police station by Officer Carlile and Detective Elton, the defendant had told several versions of events. Officer Carlile asked him why he had lied earlier. The defendant said it was because he did not want the police to think he had stolen the purse. He said he might have gone through the Clarks' gate and into their side yard. He said he had gone through Mrs. Clark's purse but found no keys in it, only junk. Detective Elton believed the defendant was under the influence of narcotics. The defendant admitted he was. 4 RP 227-28, 230, 316.

Police searched Fuller's house pursuant to a warrant. They found Mrs. Clark's house key in another of her purses hidden in insulation in the attic. 4 RP 231.

The defendant was charged with residential burglary, later amended to residential burglary with a victim present. CP 57-8. In August 2015, ten months after the burglary, Fuller told defense

counsel that it was she, not the defendant, who had committed the burglary. 4 RP 367-68.

Just a few weeks before trial, Detective Elton learned of Fuller's confession and reevaluated the evidence. He listened to Fuller's recorded interview. He went to the Clark home to see the rod that held the gate and realized that someone under 5' tall would not have been able to reach the rod to move it and open the gate. Although not an expert in footprints, he believed that the clear muddy footprints demonstrated a heel/toe gait. A woman under 5 feet and weighing only 90 pounds would have been shuffling in size 10 men's shoes and the muddy footprints would have been smeared. After reevaluating the new information and reviewing the officers' reports, he still believed the defendant had committed the burglary. 4 RP 321-23. When Officer Carlile heard Fuller's confession, he thought it was "absolutely asinine." 4 RP 257.

The case was tried in October 2015. The Clarks testified at trial as did Fuller's landlord, Officers Riches and Carlile, Sgt. Vermeulen, and Detective Elton.

Defense counsel cross-examined Officer Carlile about his opinion on the defendant's guilt:

Defense: I'm going to start by asking you a little bit about your state of mind, your state of mind as an investigator, just to get an idea of what your perspective was, and what you were thinking, as you did your work.

Carlile: Okay.

Defense: Is it fair to say that by the time [Fuller] brought you the purse, you already had a pretty firm belief that they were involved in this burglary?

Carlile: That [the defendant] had done it, yes.

Defense: And in fact... you were pretty confident that Joey had done it, and you didn't need that purse to be delivered to you, to form that opinion, right?

Carlile: Not necessarily.

Defense: By the time... you matched the shoes, you had a pretty firm idea in your head that he's the guy who was inside that house?

Carlile: That's correct

4 RP240. Defense followed up with questions that emphasized what he believed were mistakes, flaws, and omissions in the investigation, suggesting they were a result of the officer's rush to judgment:

Defense: [B]y the time [the defendant] was making any statement to you, you had already formed the opinion that he was guilty of this burglary?

Carlile: True.

Defense: So when the jury hears you relaying his statements it's fair to say that's also coming through the filter of your own expectation that he is guilty, whatever he says?

Carlile: I'm taking what was told to me, and portraying it the best that I possible can....

Defense: It's fair to say that when [the defendant] talks about... him saying that maybe he was in the side yard, looking for his dog, you felt like that was excuse-making, correct?

Carlile: Absolutely.

Defense: So he's taking the blame, correct?

Carlile: He is...

Defense: And what's on his mind is his girlfriend's well-being and what's going to happen to her?

Carlile: I don't necessarily believe that. I believe he's more so minimizing... That's my personal belief.

4 RP 246-48. Defense challenged Officer Carlile's interpretation of Fuller's reaction to his suggestion that the defendant had committed the burglary. Defense highlighted that Officer Carlile had not investigated Fuller's movements. 4 RP 249-50. On redirect, the State followed up with questions about what evidence has led Officer Carlile to form his opinions. The officer offered his opinion on Fuller's confession. 4 RP 254-57.

Defense counsel cross-examined Officer Riches about his opinion of witnesses' credibility and the defendant's guilt:

Defense: You had no reason to think that the homeowner... was misrepresenting the truth, right?

Riches: No....

Defense: And on top of all of this, I think you'll agree that you felt like you had your man, by the time you collected those shoes, it was pretty clear to you that in your opinion, you knew who did that?

Riches: After I compared the shoe to the print.

4 RP 297, 299. Defense then focused again on the lack of investigation into Fuller who had "implicated" herself when she returned the purse. 4 RP 301.

Defense counsel cross-examined Det. Elton about his apparent disregard of the defendant's protestations of innocence, about his lack of investigation into Fuller, and about his lack of training in footprint analysis. 4 RP 328-29.

Leanna Fuller testified for the defense. At the time of the burglary, she and the defendant had been dating for about a month. She said she had not slept for days before the burglary because she was on drugs and that she had difficulty remembering what had happened. Despite her lack of memory, she testified that on the morning of October 22 she had gone outside to smoke wearing the

defendant's shoes. Her dog ran off so she got on a bike to follow. She did not remember what bike. 4 RP 345-51.

Fuller said she rode toward the Clarks' house and went into their back yard. She did not remember a fence or a gate, open or shut. Through an open door, she saw purses on the kitchen counter. She did not remember if the door was a slider or hinged, open or closed, locked or unlocked. She went in, took some purses off a counter, and left on a bike. She did not remember what bike. 4 RP 352-55.

Fuller said she got home, took off the defendant's shoes, and changed into her pajamas. She woke up the defendant and told him something she could not remember. He told her to give back the purses because he had been through similar situations. 4 RP 356-57.

Fuller said when the police arrived she was outside again but could not remember why. She and the defendant both talked to police but she could not remember what they said. Only when police mentioned a break-in did she think it might be about her. She said nothing when the police asked for the shoes because she was scared. 4 RP 358-61.

Fuller said after the police left she told the defendant what she had done. He told her to return the purses so she did. She lied when she said he had gone to work. 4 RP 363-54.

Fuller said when she and the police returned to her house, the police either told her to go in and get the defendant, or told him to come out, or maybe she offered to go in. She said she probably did something with Mrs. Clark's missing key but did not know what. 4 RP 365, 367.

Fuller said she did not tell anyone about her part in the burglary until August. She then e-mailed defense counsel who set up an interview with his investigator. She acknowledged that she had previously claimed the defense attorney read her the police reports but no longer knew if that was true. She spoke to the defendant, her fiancé, on multiple occasions after the burglary. She acknowledged that her version of events was fluid and changed from one interview to the next. She said the defense helped her remember. 4 RP 372-75.

Fuller admitted she was not sure what color the defendant's shoes were. She recalled nothing about the Clark's house, back yard, door, kitchen, or where the purses had been. Nor could she say what bike she had ridden to and from the Clarks, where she put

the bike, or if she was outside when the police came. She was uncertain what she had been doing before the break-in. She admitted she had been untruthful to police about the defendant and his whereabouts. 4 RP 372-73, 377, 380-81; 382-85.

Fuller believed that if she were convicted of the burglary she would be facing less time than the defendant because "I know my record's not that bad." 4 RP 386-87, 388.

In closing, defense counsel suggested that the presumption of innocence meant that the jury should ask whether there was evidence that pointed to Fuller's guilt. The police investigation showed, in effect, a rush to judgment. The police saw and heard only what they expected to see and to hear. They preserved only the evidence that pointed to the defendant's guilt. They ignored the fact that the defendant was stepping up for Fuller. They missed the subtext of the defendant's statement that he was innocent but willing to take the blame for the woman he loved. The investigation was flawed because the police had already made up their minds which led them to neglect other avenues of investigation such as Fuller's guilt. 4 RP 412-20.

The jury found the defendant guilty of residential burglary committed while the victim was in the dwelling. CP 33, 34.

At sentencing hearings on December 16 and 28, 2015, the court considered a DOSA/Risk Assessment Report. CP 16-26. The report noted that the 36-year old homeless defendant had begun using methamphetamine and heroin at 13, had been unemployed since 19, and supported himself through his criminal activity. Id. The court imposed an 84-month sentence. It found the defendant indigent with no work history and imposed only mandatory legal financial obligations (LFOs) including a \$500 victim penalty assessment, a \$100 biological sample fee, and a \$200 filing fee. 6 RP 456-58. The Judgment and Sentence reflected nothing different. CP 5-15.

III. ARGUMENT

A. PERMITTING A POLICE OFFICER TO TESTIFY ABOUT HIS HIS OPINION ON THE DEFENDANT'S GUILT AND WITNESS CREDIBILITY WAS CONSTITUTIONAL ERROR BUT HARMLESS IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT.

The general rule is that an appellate court will not consider an alleged error that was not objected to at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). When there is a failure to object, the trial court is deprived of a chance to strike the testimony or give a curative instruction. The rule stops counsel from deliberately ignoring issues that may be unlikely to impact the

verdict but that may provide a basis for a successful appeal. A failure to object is often tactical. Id. at 934. An unpreserved error typically will not be reviewed. Id. 926.

Under RAP 2.5(a)(3), a reviewing court may decide to consider an issue raised for the first time on appeal if the error is both truly of constitutional magnitude and manifest. A manifest error is one that is actually prejudicial and actually affected the defendant's rights at trial. But even manifest constitutional error is subject to harmless error analysis. It is harmless if the court is convinced beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In a criminal trial, one witness should not express a personal opinion of his belief in the veracity of another witness. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); Kirkman, 159 Wn.2d at 926-27. Nor should a witness testify as to his opinion on the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); City v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). Allowing such testimony is reversible error when it violates the defendant's

constitutional right to a jury trial. State v. Perez-Valdez, 72 Wn.2d 808, 817 265 P.3d 853 (2011).

An opinion as to the defendant's guilt that is admitted as part of a recorded conversation may still be improper. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion). That testimony, like live testimony, may invade the province of the jury to determine the ultimate issues. Id. In determining whether testimony is an impermissible opinion, the court must consider, among other things, the type of witness involved and the specific nature of the testimony. Id.

In Demery, the defendant gave a taped statement to police during which they suggested he was lying. Over defense objection, the tape was played during the trial. Four justices found that the accusation on the tape did not amount to improper opinion testimony because it was part of a police interview technique. 144 Wn.2d at 765. One justice found that the accusation made on the tape was an opinion on the defendant's veracity but harmless error because the statement was not a significant part of the state's case. Id. at 755. The remaining four justices agreed and held that the statement was impermissible opinion testimony. Id. at 770.

In the present case, the defendant complains about an officer's statement to Fuller that he knew the defendant was guilty and his opinion that her reaction showed she knew that as well. The defendant is correct that the first statement was a direct statement on the defendant's guilt and the second is an implicit one. The fact that the statement was recounted in court does not change the error.

The officer implicitly commented on the defendant's guilt. A statement that implies the defendant is guilty may also be manifest constitutional error. State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009). In Johnson, a series of witnesses testified that the defendant's wife had spoken to her husband's alleged rape victim and shortly thereafter attempted suicide. The court found that testimony on the wife's reaction was entirely collateral to the proceedings and highly prejudicial because the inference was that she believed the defendant was guilty. Id. at 934. The error was constitutional and manifest because it actually affected his right to a fair trial. Id.

Under the analysis of Johnson, the officer's opinion in this case was manifest constitutional error. However, the defendant may not complain about the officer's ongoing opinions that were

elicited through specific questioning during cross-examination or by the State in rebuttal. BOA 15-16. The repetition of the opinions during cross-examination is invited error. Under the invited error doctrine, a party may not materially contribute to an error of law and then complain on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). A criminal defendant is precluded from setting up an error so that he may complain later. Id.; State v. Stuff, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999).

The statements made during redirect examination (with the exception of the comment on the credibility of Fuller's confession addressed above) were in response to the issue raised in cross-examination, that the officer had made formed premature opinions based on a lack of evidence or investigation. "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Any other rule would leave the matter "suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." Id.

Because the defendant has demonstrated manifest constitutional error, the court must decide if the error was nonetheless harmless. The court must be convinced beyond a reasonable doubt that the verdict would have been the same absent the error. Guloy, 104 Wn.2d at 425.

That is exactly what occurred here. Even when the officer's initial opinions on the defendant's guilt and witness credibility are excised, the evidence of guilt is still overwhelming.

The physical evidence all pointed to the defendant and to no one else. The defendant's own statements pointed to him and no one else. Fuller's initial statements pointed to the defendant and no one else.

The morning of October 22 was rainy and wet and the defendant's shoes left muddy footprints at the scene of a burglary. The prints were not made by someone shuffling in too-large shoes. The burglar had entered the backyard by removing a rod that was too high for a small person.

Within minutes, police found the defendant outside his home wearing the shoes that made the prints. The defendant claimed they were not his, they were his but he had not been wearing them, and that he had been wearing a pair of slippers that were dry. The

defendant claimed he had been out looking for his dog, then that he had been in the Clark's side yard, then that he had found the purse on the wet street (although it was still dry), and then that he had gone through the purse but taken nothing out of it.

Fuller returned Mrs. Clark's stolen purse and said the defendant had found it in the street and asked her to return it. She said he had gone to work. The defendant was not at work. He admitted he had asked Fuller to return the purse and was sorry he was ruining her life. Fuller did not come forward for ten months and then admitted she could not really remember what happened. Her story was contradicted by the physical evidence.

Admitting Officer Carlile's initial opinions about the defendant's guilt and witness credibility was constitutional error. But defense then elicited virtually identical statements, not only from this officer but from others, about which he cannot complain. They add to the already-overwhelming evidence of the defendant's guilt. Any error was harmless.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN, AS A TRIAL TACTIC, HE ELICITED AND DID NOT OBJECT TO OPINION TESTIMONY FROM OFFICERS ABOUT THE DEFENDANT'S GUILT AND WITNESS CREDIBILITY.

1. Defense Counsel Made A Tactical Decision Not To Object And To Affirmatively Elicit Opinion Testimony.

“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984). For that reason a reviewing court employs a strong presumption that counsel’s performance was reasonable. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

When the basis of a claim of ineffective assistance is the failure to object to evidence, the defendant must show that no legitimate strategic or tactical reasons supported the challenged conduct; that the attorney’s performance fell below a reasonable standard; and that the result of the trial would have been different had the error not occurred. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 365 (1998).

The presumption that counsel’s performance was reasonable includes the presumption that counsel made all significant decisions in the exercise of reasonable professional

judgment. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To rebut the presumption, the defendant must show that "there was no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The reviewing court may not use hindsight to assess defense counsel's performance. Every effort should be made to avoid second-guessing a defense counsel's tactical decision. Grier, 171 Wn.2d at 39-40.

In the present case, defense made a tactical decision not to object to various witnesses' opinions regarding veracity and guilt. Further, counsel made a tactical decision to elicit more testimony on those exact issues during cross-examination.

Defense counsel did not fail to object. He made a decision not to object to testimony that supported his theory of the case. That theory was that law enforcement jumped to conclusions about veracity and guilt, conclusions based not on the evidence but on a minimal investigation and premature decision. Those opinions, he implied, acted as blinders that caused them to ignore the true culprit, the defendant's girlfriend. That theory was woven through

the entire defense case from cross-examination through the defense witness testimony through closing argument.

Officer Carlile's initial opinions formed the foundation for the defense case. Defense counsel started his cross-examination by saying he wanted to explore the officer's "state of mind as an investigator" to get "an idea of what [his] perspective was, and what [he] was thinking" as he investigated the case. Defense specifically asked Officer Carlile if he believed Fuller and the defendant had committed the burglary. Defense asked if Officer Carlile was confident that the defendant was the burglar.

Other than his comment on Fuller's confession (discussed above), Officer Carlile's testimony on redirect merely clarified the bases and timing of his opinion. That was in direct response to repeated questions by defense. Again, the testimony supported his theory that Officer Carlile had worn blinders when he prematurely ended his investigation without exploring the possibility that Fuller was the burglar.

The tactical nature of counsel decision not to object to Officer Carlile's testimony is illustrated by the rest of defense questioning. Defense counsel asked Officer Riches if evidence of the muddy footprints was conclusive that the defendant was

involved in the crime. 4 RP 295. He asked if Officer Riches believed he “had [his] man” by the time he had collected the shoes. 4 RP 299. As with the first officer, defense pursued a line of questioning that explored the link between the officers’ opinions and the failure to investigate Fuller. Officer Riches admitted that Fuller had “at least implicated herself, to the extent that she returned the purse.” 4 RP 301. Defense also elicited Officer Riches’ opinion on the Clarks’ credibility. 4 RP 297.

Defense built further on this theory when he cross-examined Detective Elton. He accused the detective of ignoring the defendant’s claims of innocence and the message implicit in them, that he was not guilty but was covering for his girlfriend. Defense again suggested that this contributed to the lack of investigation into Fuller. 4 RP 328-29.

Nor was it ineffective for defense not to object to Detective Elton’s testimony about the muddy footprints. A lay witnesses may give opinions and make inferences based on their rational perceptions if the opinions are not based upon scientific or specialized knowledge. ER 701; State v. Kunze, 97 Wn. App. 832, 850, 988 P.2d 977 (1999). The opinion must be based on personal knowledge “derived from the witness’s own perceptions,

and from which a reasonable lay person could rationally infer the subject matter of the offered opinion.” Id. A lay person’s observations of intoxication is a good example. City of Seattle v. Heatley, 70 Wn. App. 573, 580, 954 P.2d 658 (1993).

That is exactly and what Detective Elton’s opinion was. Detective Elton testified that he was no expert. His opinion was a good example of something that is within common knowledge. Most people would rationally infer that a person walking in extremely oversized shoes would walk with a shuffling gait. Almost everyone has had this experience. Virtually everyone has seen a child walking in adult shoes. That is exactly what Det. Elton’s opinion on the footprint comparison was as was his opinion on whether a 5’ tall person could have reached the rod holding the gate shut. Everyone has had the experience of reaching for something that is too high. Det. Elton testified to what a reasonable lay person could have inferred from the bar, the shoe prints, and the shoes themselves. This was not an opinion on any ultimate fact, no objection needed to be made, and none would have been sustained.

“The decision of when or whether to object is a classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763,

770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). In the present case, defense counsel did not neglect to object; he decided not to object. His purpose was to gather testimonial evidence to support his theory of the case, that the police had ignored the true suspect by forming premature opinions based on faulty observations. The defendant cannot have been prejudiced by the admission of evidence that supported his theory of the case.

Defense theory of the case, a rush to judgment, was the only one that explained the defendant's statements ever-changing statement as containing a subtext that matched Fuller's eleventh hour confession, that he was taking the blame for a crime she had committed. It was the only one that explained the lack of physical evidence tying Fuller to the burglary. It was a reasonable trial tactic.

C. THE COURT PROPERLY IMPOSED ONLY MANDATORY LFOS.

The defendant asks this court to consider for the first time on appeal whether the court erred in imposing \$200 filing fee without an objection below. He also claims that the filing fee is a discretionary cost. He is wrong on both counts.

First, this court should not consider the issue because it was not preserved in the trial court. In State v. Blazina, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015), the Supreme Court held that the issue of LFOs, when not raised below, was not issue that could be raised automatically for the first time on appeal. The Blazina court considered the issue but specifically said that “this error will not taint sentencing for similar crimes in the future.” Id. at 834.

Second, if this court were to consider the issue, the defendant would not prevail. Whether any specific legal financial obligation was validly imposed must be determined by reference to the statute that authorized that particular obligation. Every division of the Court of Appeals has agreed that the filing fee is a mandatory fee, not a discretionary cost. State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); State v. Herrera-Pelayo, __ Wn. App. __, No.73093-2-I at Para. 7 (Div.I, August 1, 2016); State v. McCracken, 194 Wn. App. 1060, no.37026-7-II at *5 (Div.II, July 6, 2016). They must be imposed regardless of indigency. Herrera-Pelayo at Para 7.

In the unpublished opinion of Herrera-Pelayo, this court rejected an identical argument. It reasoned that the statute

provides that the clerk "shall collect" certain fees including the criminal filing fee. "Use of the word "shall" indicates that this fee is mandatory." Id. And in the context of the statute, the word "liable" was not ambiguous. Id. at para. 10. A convicted felon is not *likely* to incur the filing fee; he is *subject* to the fee. Id. at para 11.

Third, any argument that the \$200 imposed was an unspecified court cost, not a filing fee, is belied by the record. The court specifically said it was imposing a \$200 filing fee. The Judgment and Sentence has the \$200 fee listed section that includes a filing fee. CP 5-15. Aside from the \$500 listed as a victim penalty assessment and the \$100 listed as a biological sample fee, no other costs appear on the Judgment and Sentence. This was the filing fee.

Finally, defense counsel was not ineffective for failing to object. As already discussed, the \$200 filing fee was mandatory. Had defense objected to the trial court's imposition of this mandatory fee, the objection would have been fruitless and would not have changed the result.

D. THE COURT SHOULD IMPOSE APPELLATE COSTS.

1. A Constitutionally-Valid Statute Provides For The Recoupment Of Costs From Indigent Offenders.

The defendant argues that the sole reason this court should deny costs is his indigence. RCW 10.73.160(3) specifically provides for an award of costs that includes recoupment of fees for court appointed counsel. Counsel is only appointed for defendants who are indigent. RCW 10.73.150.

The defendant's argument would create a "Catch-22." In the novel of that title, an airman could be removed from flight duty for mental illness, but only on his own request – and making the request proved that he wasn't mentally ill. See State v. Frederick, 100 Wn.2d 550, 558 n. 3, 674 P.2d 136 (1983), quoting J. Heller, Catch-22 (1961). Similarly, under the defendant's argument, an indigent defendant can be required to recoup the costs of his appeal – but only if he isn't indigent. The defendant's argument is in effect a negation of the statute, which this court has already held constitutionally valid. See State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

The meaning of RCW 10.73.160 can be determined by reviewing its history. Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil

cases. The State could recover costs incurred by the prosecutor, but not expenses incurred by the Appellate Indigent Defense Fund on the defendant's behalf. State v. Keeney, 112 Wn.2d 140, 112 P.2d 140, 769 P.2d 295 (1989). In 1995, the legislature authorized the State to seek recoupment of appellate costs by enacting RCW 10.73.160. Laws of 1995, ch. 275, § 3.

In Blank, this court upheld the constitutionality of RCW 10.73.160. The court held that it was not necessary to determine the defendant's ability to pay before imposing appellate costs. It pointed out that "it is nearly impossible to predict ability to pay over a period of 10 years or longer." Rather, the issue of inability to pay is properly resolved via motion to remit costs under RCW 10.73.160(4). Blank, 131 Wn.2d at 242; see City of Richland v. Wakefield, no. 92594-1 (9/22/16) (discussing standards for remission of costs). In accordance with this valid statute, indigent offenders should be required to pay costs, including recoupment of expenses incurred on their behalf.

2. This Court's Exercise Of Discretion With Regard To Appellate Costs Has Always Been Based On The Issues Raised And The Manner In Which They Were Litigated, Not The Parties' Financial Status.

This court has recognized that an award of costs is discretionary with the appellate court. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). By itself, however, this statement means little. Rather, it creates a need for this court to determine the standards that govern that discretion. "Without governing standards or principles, [discretionary] provisions threaten to condone judicial 'whim' or predilection." Kirtsaeng v. John Wiley & Sons, Inc., ___ U.S. ___, 136 S.Ct. 1979, 1986, 195 L.Ed.2d 368 (2016).

The appropriate standards can be determined by reviewing this court's cases concerning awards of costs. RCW 10.73.160(3) provides that "[c]osts ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." The statute thus preserved existing procedures for awarding costs. Under those procedures, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

This court's reluctance to make exceptions is illustrated by Association Collectors v. King County, 194 Wash. 25, 76 P.2d 998 (1938). There, vendors had sold goods to the County that were used in the operation of the County Jail. Some of these sales exceeded the Sheriff's budget. The trial court granted the vendors judgment against the Sheriff personally, but denied recovery against the County. On appeal, this court reached the contrary result: it reversed the judgment against the Sheriff but granted judgment against the County.

The vendors asked this court not to award costs against them. They pointed out that they were clearly entitled to recover against someone. The true controversy was between the Sheriff and the County. This court rejected their request. "[W]hile the court has some latitude in the matter of costs, we fear that to depart from the ordinary rule that costs on an appeal shall be awarded to the successful party for the purpose of relieving the hardship of one of the parties would result in hardship to others." Id. at 44.

Despite the rule that normally allows costs, this court has recognized several situations in which costs are properly denied. One situation is where the reversal resulted from an error that was attributable to the successful appellant. For example, costs were

denied when a judgment was reversed because the action was premature, because the successful appellant was responsible for bringing the premature action. Water Dist. No. 111 v. Moore, 65 Wn.2d 392, 393, 397 P.2d 845 (1964). Similarly, costs were denied when reversal was based on issues that the successful appellant should have called to the attention of the trial court. See, e.g., In re Dill, 60 Wn.2d 148, 372 P.2d 541, 543 (1962); Ramsdell v. Ramsdell, 47 Wash. 444, 92 P. 278 (1907).

The court has recognized other situations in which costs may be denied. They may be denied as a sanction for violations for appellate rules. See, e.g., Tyree v. General Insurance Co., 64 Wn.2d 748, 753, 394 P.2d 222, 226 (1964). They may be denied when the court decides the case on an issue that was not raised by either party. Hall v. American National Plastics, Inc., 73 Wn.2d 203, 205, 437 P.2d 693, 694 (1968), Costs may likewise be denied when the court decides the merits of a moot case. Such a decision is in the public interest, not for the benefit of either party. National Electrical Contractors Assoc. v. Seattle School Dist. No. 1, 66 Wn.2d 14, 23, 400 P.2d 778 (1965).

All of these examples share a fundamental feature. All of them are based on the issues raised and the manner in which they

were argued. It does not appear that this court has ever denied costs based on financial hardship to a party. Rather, the court has refused to recognize hardship as a reason for denying costs. Association Collectors, 194 Wash. at 44.

This distinction reflects the nature of the appellate process. Appellate courts resolve cases on the basis of the record. "This court simply is not in a position either to take evidence or to weigh contested evidence and make factual determinations." State v. Walker, 153 Wn. App. 701, 708 ¶ 17, 224 P.3d 814 (2009). Consequently, a decision to grant or deny costs cannot be based on matters such as ability to pay. That ability can rarely be predicted from facts in the record – to the extent that it is predictable at all. Instead, decisions about costs must be based on facts in the record.

In this case, the record provides no basis for denying costs. This was a standard appellate proceeding in which the parties litigated for their own benefit. The defendant has not pointed to any misconduct that would justify denial of costs. The only basis asserted by the defendant is his alleged inability to pay – which is not a proper basis for denial. Any issue of hardship should be

resolved by using the statutory procedure for remission of costs. Blank, 131 Wn.2d at 242. The State is entitled to costs.

This analysis is consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, this Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court and the Court of Appeals routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, appellate courts construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders.

See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

The defendant relies on State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). There, the Court of Appeals held: “Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor.” Id. at 389 ¶ 24. This analysis is contrary to Blank. It tries to do exactly what this court considered “nearly impossible” – predict the defendant’s ability to pay over a lengthy period. Blank, 131 Wn.2d at 242. This court should reject an exercise of discretion on the basis of a factor that is generally not reflected in the appellate record and is largely impossible to predict. Rather, discretion as to costs should be exercised in the manner that it always has been – by looking at factors connected with the issues raised and the manner in which the appeal was litigated.

3. Because Blazina Was Decided Under A Substantially Different Statute, It Is Irrelevant To This Case.

The defendant places heavy reliance on State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). The court there construed the statute dealing with awards of trial costs, RCW 10.01.160. That

statute specifically precludes courts from imposing costs “unless the defendant is or will be able to pay them.” RCW 10.01.160(3). As discussed above, RCW 10.73.160 contains no comparable provision. The holding of Blazina is therefore irrelevant to the present case.

In Blazina, this court discussed the burdens that financial obligations can place on offenders. Although this is an important consideration, it is not the only legitimate consideration. As this court has recognized, restitution can be a rehabilitative tool. State v. Barr, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983). Recoupment of appellate costs is a form of restitution – it makes the offender responsible for out-of-pocket expenses that were incurred by the public as a direct result of his crime.

There are also issues of fairness involved. Washington follows the “American rule” – ordinarily each party bears its own attorney fees. Rettkowski v. Dep’t of Ecology, 128 Wn.2d 508, 514, 910 P.2d 462, 465 (1996). Under some circumstances, a prevailing party can be granted its attorney fees against its opponent. See, e.g., Knight v. City of Yelm, 173 Wn.2d 325, 346-47 ¶¶ 33-34, 267 P.3d 973 (2011) (statutory award of attorney fees in zoning cases); Weiss v. Bruno, 83 Wn.2d 911, 912, 523 P.2d 915, 916 (1974)

(challenge to patently unconstitutional expenditure of public funds). Criminal cases, however, present a paradoxical situation. Because of the State's obligation to provide an adequate defense to indigents, the winning party (the State) is required to pay the attorney fees for the losing party (the defendant). The Legislature could reasonably conclude that the costs of an appeal should, to the extent possible, be borne by the guilty offender, not the innocent taxpayer.

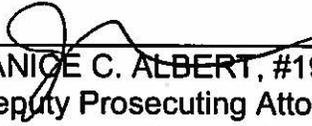
The issue of appellate costs involves conflicting policy considerations. Within constitutional limitations, resolving those conflicts is a matter for the Legislature. The Legislature is continuing to study these issues. In 2015, it amended RCW 10.73.160 to remove juvenile offenders from its coverage. Laws of 2015, ch. 265, § 22. The Legislature has not, however, altered the statute with regard to adult offenders. This court should not substitute its own ideas of public policy for those of the Legislature. In accordance with standard procedures, costs should be awarded in this case.

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on October 18, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

JOEY L. McFARLAND,

Appellant.

No. 74527-1-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

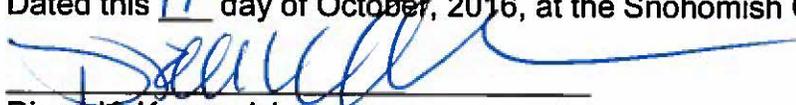
The undersigned certifies that on the 19th day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary T. Swift, Nielsen, Broman & Koch, Swiftm@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of October, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office