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COURT OF APPEALS
DIVISION II

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NO. 36586-3-II

STATE OF WASHINGTON
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY
DEPT. DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LaCHANCE, JR.,

Appellant.

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

The Honorable H. John Hall, Judge
The Honorable Richard L. Brosey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MULTIPLE INSTANCES OF PROSECUTORIAL MIS-CONDUCT VIOLATED LACHANCE'S RIGHT TO A FAIR TRIAL BY IMPARTIAL JURY.
 - a. The Prosecutor Committed Misconduct In Expressing His Personal Opinion Of Defendant's Credibility.

The State claims the prosecutor's professed opinion that LaChance's testimony was "asinine" was not improper, citing State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). Brief of Respondent (BOR) at 5. Brown is inapposite. In that case, the prosecutor's description of defense counsel's theory of the case as "ludicrous" was a strong, but fair, response to the argument made by the defense in closing. Brown, 132 Wn.2d at 566. In contrast, the prosecutor's opinion here expressly focused on LaChance's testimony, not his attorney's argument. It is well established that prosecutorial opinion on the credibility of a witness is improper. United States v. Young, 470 U.S. 1, 8, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984).

The State alternatively contends the prosecutor did not comment on LaChance's credibility because "asinine" means stupid, foolish, unintelligent, or silly. BOR at 5. Credibility is the "quality that makes something (as a witness or some evidence) worthy of belief." Black's Law Dictionary 374 (7th ed. 1999). Telling the jury that, in the prosecutor's opinion,

LaChance's testimony is stupid is a clear and unmistakable opinion on LaChance's credibility as a witness because the remark was intended to portray his testimony as unworthy of belief.

b. The Prosecutor Personally Vouched For The Victim's Credibility And Argued Evidence Not In Record.

The State contends the prosecutor's comments regarding the girls' credibility are not grounds for reversal because they were provoked by defense counsel's closing argument. BOR at 6. While a prosecutor's remarks made in direct response to defense argument are not necessarily grounds for reversal, such remarks "may not go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record." State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 756 (2005). Improper remarks provoked by defense counsel are thus grounds for reversal if the remarks are not a pertinent reply. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (response was improper despite being invited by adversary in closing argument because it exceeded scope of provocation by misstating law).

The prosecutor was quite capable of responding to defense counsel's redemption argument without commenting that "they looked to me to be

scared to death. They looked to me to not want to be here on some kind of redemptive quest." The prosecutor could simply have argued its theory of the case based on the evidence. Personally vouching for the girls' credibility went beyond a pertinent reply.

The State does not address LaChance's argument that the prosecutor improperly bolstered the girls' testimony in telling the jury "they're here giving testimony on crimes they were victims of because they had to be here." BOA at 13-15; 4RP 42. The prosecutor's representation that they "had to be here" was not a fact in the record and therefore went beyond a pertinent reply. A prosecutor commits misconduct when he encourages a jury to render a verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007).

c. The Prosecutor Committed Misconduct By Improperly Invoking The Missing Witness Doctrine Against LaChance.

The State argues the prosecutor properly invoked the missing witness doctrine for the first time in closing argument. BOR at 9-10. "The missing witness doctrine must be raised early enough in the proceedings to provide an opportunity for rebuttal or explanation." State v. Montgomery, 163 Wn.2d 577, 599, 183 P.3d 267 (2008). It is therefore improper for the

prosecutor to first argue a potential defense witness is missing only after both sides have rested, giving the defendant no opportunity to explain the witness's absence. Id. That is precisely what happened in LaChance's case.

The State nevertheless contends the prosecutor was allowed to make the missing witness argument because "[h]ad LaChance called a couple of these witnesses to testify on his behalf, their testimony would not have necessarily been *entirely* 'incriminating.'" BOR at 9 (emphasis added). The prosecutor did not identify just a couple witnesses who should have been called. The prosecutor identified Tolten, Story, LaChance's brother, and LaChance's parents as witnesses that failed to testify. 4RP 16.

The State brief does not even reference the prosecutor's comment on Tolten's absence, presumably because Tolten's testimony that he gave drugs to M.D. would have been incriminatory. Instead, the State only cites potential testimony from LaChance's brother that the drug scale belonged to him and Myra Story's potential testimony that the pornography belonged to her. BOR at 9-10. The State points out neither possession of a scale or adult pornography constitutes a crime. BOR at 9. The State cites no authority for its implied argument that invocation of the missing witness

doctrine is proper when the witnesses' testimony would only have been partially incriminatory.

Furthermore, the prosecutor's closing argument did not target these particular aspects of what they could have testified to. Rather, the argument was an unqualified reference to the absence of Story and LaChance's brother. 4RP 16.

According to LaChance, the blue bag containing meth and drug paraphernalia belonged to Story. 3RP 75, 76. 92. Story would have incriminated herself had she corroborated LaChance's testimony on this point. According to LaChance, his brother owned the scale. 3RP 76, 92. According to M.D., his brother gave meth to the girls. 3RP 48-49.¹ His brother would have incriminated himself if he corroborated this testimony.

Even if testimony from LaChance's brother regarding the scale and Story regarding the pornography would not have been incriminatory, it was still improper to invoke the missing witness doctrine in regards to these two because such testimony would have been unimportant.

The missing witness doctrine applies "only if the potential testimony is material and not cumulative." Montgomery, 163 Wn.2d at 598.

¹ LaChance testified, in reference to smoking methamphetamine with M.D. and M.M. that "[M.D.] comes in, gives my brother something, he gives us something, get the scale, we break it down, we smoke what's there, not very much." 3RP 94.

Testimony that is not "key" or is otherwise "unimportant" does not merit invocation of the doctrine. Montgomery, 163 Wn.2d at 599; State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

Who owned the pornography was a collateral issue. The evidence that mattered was that LaChance showed a pornographic video to the girls and had sex with them, regardless of who owned the video. Similarly, who owned the scale was not important. The evidence that was important was that LaChance gave meth to the girls and that the substance itself was found in his bedroom.

The prosecutor also pointed out LaChance's parents did not testify. 4RP 16. The State does not argue LaChance's parents had any important testimony to offer.

d. The Prosecutor Did Not Incite The Jury To Convict LaChance By Means Of Innuendo.

The opening brief argued the prosecutor committed misconduct by inciting the jury to convict LaChance by means of innuendo in questioning LaChance about giving meth to his daughter without producing extrinsic evidence to back up the implied fact. Brief of Appellant (BOA) at 1, 23-28.

The State points out Shannon testified in rebuttal that LaChance told her he had given meth to his daughter. BOR at 12. The State is correct

to point out appellate counsel's inadvertent error in overlooking this portion of Shannon's rebuttal testimony. The innuendo argument is accordingly withdrawn.

2. THE COURT'S AMENDMENT OF THE JUDGMENT AND SENTENCE VIOLATED LACHANCE'S DUE PROCESS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDING.

The State claims LaChance had no right to be present at the amended sentencing stage because imposition of additional legal financial obligations "would have had no relation to his opportunity to defend against the amounts requested." BOR at 28.

As pointed out in the opening brief, "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." BOA at 49 (quoting Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). The State does not address this point.

A defendant has the right to be present at the sentencing stage if the court's actions are discretionary rather than ministerial. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). Imposition of non-mandatory court costs is a discretionary determination. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The court here exercised its

discretion to impose additional punishment in the form of attorney fees without giving LaChance the opportunity to inform the court of his ability to pay those fees. RCW 10.01.160(3) states:

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

The unambiguous language of RCW 10.01.160(3) requires the court to consider the defendant's financial resources and the burden on the defendant before it enters an order imposing costs. See Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997) (legislature's use of the word "shall" in statute shows intent to impose a mandatory duty). Such consideration is necessary to ensure "the defendant is or will be able to pay" the costs. RCW 10.01.160(3).

The State nevertheless claims the court had no statutory duty to ascertain LaChance's ability to pay attorney costs prior to imposing them, citing State v. Blank, 131 Wn.2d 230, 233, 930 P.2d 1213 (1997). BOR at 28-30. Blank is inapposite and the State's argument is specious.

Regardless of whether the court had a statutory duty to determine LaChance's ability to pay, the imposition of attorney fees was a discretion-

ary act. LaChance therefore had the right to be present and given an opportunity to inform the court about his ability to pay, thereby potentially influencing the court's discretionary decision.

In any event, Blank and the other cases cited by the State do not support its argument that the court had no statutory duty to determine LaChance's ability to pay. The Supreme Court in Blank addressed the constitutionality of RCW 10.73.160. Blank, 131 Wn.2d at 233. RCW 10.73.160 provides for recoupment of appellate costs from a convicted defendant. Unlike RCW 10.01.160, RCW 10.73.160 does not specifically require the court to take financial resources and ability to pay into account before imposing court costs. Id. at 238.²

Blank held inquiry into the defendant's ability to pay prior to imposing costs under RCW 10.73.160 is not *constitutionally* required. Id. at 242. Constitutional fairness principles are implicated when the State seeks to collect and the defendant is unable to pay. Id.

Blank is irrelevant to LaChance's case because a different statute is at issue here and LaChance is not claiming the court was constitutionally required to ascertain his ability to pay before imposing costs. Rather, RCW

² State v. Mahone, another case cited by the State, likewise did not involve imposition of trial costs under RCW 10.01.60, but rather imposition of appellate costs under RCW 10.73.160. State v. Mahone, 98 Wn. App. 342, 347-49, 989 P.2d 583 (1999).

10.01.160 requires the court to determine LaChance's ability to pay. This is a statutory argument, not a constitutional one.

The State's cites State v. Curry, 62 Wn. App. 676, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 829 P.2d 166 (1992) for the proposition that an indigent's status at the time of sentencing does not bar an award of court costs because determination of the ability to pay court costs before imposing them is not constitutionally required. BOR at 28-29. Again, LaChance does not claim he had a constitutional right to the determination.

The State cites State v. Baldwin, 63 Wn. App. 303, 310-12, 818 P.2d 1116 (1991) for the proposition that formal findings of fact are not required for imposition of recoupment of attorney fees at sentencing. BOR at 29. LaChance does not argue otherwise. His claim does not turn on the lack of formal findings.

Citing the court of appeals decision in Curry, the court in Baldwin stated "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." Baldwin, 63 Wn. App. at 310. But the court of appeals decision in Curry supports LaChance's argument that a defendant has a statutory right under RCW 10.01.160 to have the court consider ability to pay before imposing court costs. Curry, 62 Wn. App. at 682-83 (rejecting claim that sentencing

judges failed to properly take account of financial resources as required under RCW 10.01.160(3) because "the record reflects that the sentencing judges were apprised of the appellants' financial situations.); see also State v. Williams, 65 Wn. App. 456, 460, 828 P.2d 1158, 840 P.2d 902 (1992) (court abuses its discretion when it imposes court costs without knowledge of the defendant's financial situation or inquiry into the defendant's resources).

Even if Baldwin is correct that the "meaningful" time to examine ability to pay is at the time of collection, such characterization does not trump the plain language of 10.01.160(3), which plainly requires such examination at the time of sentencing.

The State also argues LaChance knew that he would be held responsible for attorney fees in an amount "to be determined," as if notification that fees could be imposed justifies violation of his right to be present when the court exercises its discretion regarding imposition of the fees. BOR at 28. In this regard, the State claims the notation "tbd" next to the attorney fee category on the judgment and sentence means "to be determined." BOR at 27, 28.

The abbreviation "tbd" can mean "to be determined." It can also mean "to be decided." Either way, LaChance retained the right to be

present when the court imposed the fee because the court was statutorily required to take into account his financial resources in making a discretionary decision regarding his ability to pay the attorney fees. RCW 10.01.160(3). The court did not do so during the initial sentencing, either in relation to the attorney fees or any other costs.

3. THE COURT WRONGLY ORDERED THE DEPARTMENT OF CORRECTIONS TO GIVE LACHANCE LESS CREDIT FOR TIME SERVED THAN WAS ACTUALLY DUE.

LaChance, through appellate counsel, has filed a motion to strike specified portions of the State's brief that rely on a document outside the record as well as the document itself, which was attached to the State's brief as Appendix A.

Even if this Court considers the State's argument, LaChance's claim still prevails. The State claims there is no problem because it obtained a document from the Lewis County jail showing the jail "certified" to the Department of Corrections (DOC) that LaChance must receive credit in the correct amount of 143 days served. BOR at 30-31. But nothing in appendix A shows the Lewis County jail notified DOC of this information. Indeed, Appendix A does not even reference the Lewis County jail.

Moreover, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and *exclude any serious misapprehensions*

by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926) (emphasis added). The court ordered LaChance confined in the custody of DOC. CP 7. DOC, not the Lewis County jail, is the entity responsible for executing LaChance's sentence. The warrant of commitment orders DOC to give him only two days credit instead of 139 days credit. CP 117. Even if Lewis County jail informed DOC of the credit for time served, DOC could reasonably be expected to follow a direct order from the court as opposed to a piece of paper from the Lewis County jail on this matter. Remand is appropriate to correct the warrant of commitment and thereby clarify DOC will properly credit LaChance for time served.

B. CONCLUSION

For the reasons stated, this Court should reverse conviction on all counts and remand for a new trial. In the event this court declines to

reverse conviction, this Court should reverse the challenged portions of the sentence.

DATED this 7th day of August, 2008.

Respectfully submitted,

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DIVISION II**

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vs.)	COA NO. 36586-3-II
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2008 AUG - 7 PM 4: 18

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
BY _____
REPLY

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF AUGUST, 2008.

x *Patrick Mayovsky*