

NO. 41239-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON OLSON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence of a later rape of which Mr. Olson was convicted.

2. The prosecutor committed misconduct in closing argument.

3. Cumulative error deprived Mr. Olson of a fair trial.

4. The sentencing court erred in ordering Mr. Olson to pay a filing fee and costs of court-appointed counsel.

5. The sentencing court erred in prohibiting Mr. Olson from drinking alcohol.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of acts other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts. In this case, Mr. Olson admitted he committed third-degree rape but denied he committed second-degree rape by forcible compulsion. The trial court allowed the State to call as a witness the victim of another rape Mr. Olson committed, during which he brutally attacked the victim at gunpoint. Although the trial court admitted the evidence of the other act to show motive, intent, and common scheme or plan, the evidence was relevant only to

show propensity to commit rape by forcible compulsion. Did the trial court commit prejudicial error in admitting this evidence?

2. A prosecutor commits misconduct if he or she comments on the defendant's exercise of constitutional rights, states an opinion on witness credibility, or describes the verdict as the "truth." Here, the prosecutor argued that Mr. Olson "feigned tears," "manipulated and distorted the truth," and tailored his testimony to the definition of third-degree rape. The prosecutor also told the jury its verdict would represent the truth. Did the prosecutor commit misconduct in closing argument?

3. Courts may not impose costs on defendants unless they have a present or future ability to pay. Here, the court imposed attorney costs and filing fees upon Mr. Olson, even though the evidence showed Mr. Olson has no assets, has significant debts, and will likely never be released from prison. Did the sentencing court err in ordering Mr. Olson to pay the filing fee and costs of court-appointed counsel?

4. Courts may not impose conditions of community custody that are not crime-related. Here, the prosecutor stated that Mr. Olson was not under the influence of alcohol or drugs when he committed the crime, and the Presentence Report indicated that

Mr. Olson does not generally drink alcohol. Did the sentencing court err in imposing a no-alcohol condition as part of community custody?

C. STATEMENT OF THE CASE

Aaron Olson and Anthony Emery were each charged with two counts of second-degree rape by forcible compulsion for acts they committed together against K.B.R. CP 1-3, 6-9. Mr. Emery pled guilty, while Mr. Olson proceeded to trial. 1 RP 4. Mr. Olson's explanation of events was that he committed third-degree rape but not second-degree rape. He testified that although the victim did not consent, there was no force or threat. 8 RP 449-60, 69-97, 539-49. He was emotional and remorseful during his testimony. 8 RP 511.

K.B.R. testified that she was walking home from the store when Mr. Olson and Mr. Emery asked if she wanted a ride. 5 RP 87-90. She accepted the offer because it was raining. 5 RP 90. After she got in the car, Mr. Olson and Mr. Emery started groping her. 5 RP 95. They asked if she would give them oral sex, but she said she just wanted to go home, so Mr. Olson started driving. 5 RP 95. He parked near her house, and told her she could get out after she gave them oral sex. 5 RP 99-100. She said no, but he

repeatedly told her that everything would be okay, and she should just “chill out.” 5 RP 100, 160. She later told police that Mr. Olson said “chill out” in a relaxed manner, not a threatening manner. 4 RP 70. She stopped struggling and submitted to the sex acts because she did not want Mr. Olson to move the car away from her house. 5 RP 103. According to K.B.R., Mr. Olson and Mr. Emery did not threaten her with harm. 5 RP 160.

The State sought to introduce evidence of another rape Mr. Olson and Mr. Emery committed, against G.C.F. This rape occurred after the K.B.R. incident, but the trial occurred first and resulted in a conviction. CP 56. The State sought admission under RCW 10.58.090 and ER 404(b). CP 28-52. The defense objected both before trial and during trial. 1/8/10 RP 1-46; 6 RP 234-43.

The trial court expressed doubts that a later event fell within the scope of RCW 10.58.090, and decided not to rule on the statutory issue. The court admitted the evidence under ER 404(b) for purposes of showing intent, motive, or common scheme or plan. CP 53-59.

G.C.F. testified at length about the brutal kidnapping and rape Mr. Olson and Mr. Emery committed against her and for which they were convicted. The attack occurred late at night in a dark

parking lot, and was perpetrated with a gun. 6 RP 340-64. Other witnesses also discussed the G.C.F. rape, and the prosecutor referenced it in closing argument. 6 RP 312-38; 8 RP 517-19.

The prosecutor also said in closing argument that Mr. Olson “feigned tears” on the witness stand and was lying about his remorse. 8 RP 511. He said, “I submit to you that the defendant’s outburst appeared contrived, an act.” 8 RP 525. He said:

Mr. Olson testified that he read the definition of rape. What is the inference from that, that he read the definition of rape? Mr. Olson knows exactly what he needed to say on that stand to convince you or try to convince you of rape 3. He is trying to manipulate the outcome of this trial.

8 RP 552. He told the jury that Mr. Olson was “distorting the truth,” and that their verdict would “represent[] the truth of the matter.” 8 RP 528, 553. He closed by repeatedly saying “it is no longer reasonable to doubt” Aaron Olson’s guilt. 8 RP 558.

The jury convicted Mr. Olson of two counts of second-degree rape. CP 16. The presentencing report stated that Mr. Olson has no assets. PSR at 9.¹ It also indicated that Mr. Olson has only consumed alcohol about 12 times in his life. PSR at 12.

¹ Mr. Olson has filed a supplemental designation of clerk’s papers for the presentence report.

At sentencing, Mr. Olson stated he was sorry, that he “committed evil to innocent people who didn’t deserve it,” and that he would “do his best every day to make a difference in the lives of others.” 10 RP 588. The prosecutor emphasized that Mr. Olson did not commit this crime “clouded by substance abuse or alcohol or something that interfered with his ability to make a rational decision.” 10 RP 583.

The court sentenced Mr. Olson to an indeterminate life sentence with a minimum term of 280 months. CP 20. Without making any finding of ability to pay (other than pre-printed boilerplate language), the Court imposed a total of \$2,800 in legal financial obligations, including \$2,000 in attorney fees and defense costs and a \$200 filing fee. CP 18. The court also ordered that Mr. Olson not consume alcohol while on community custody. CP 28.

Mr. Olson appeals. CP 112-126.

D. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF ANOTHER RAPE UNDER ER 404(B).

The trial court allowed the State to call the victim from another rape case as a witness in this case, and to use that rape to prove Mr. Olson committed rape by forcible compulsion here. The

court admitted the evidence under ER 404(b) pursuant to the intent, motive, and common-scheme exceptions. This ruling was erroneous. The evidence of the other rape was used for the forbidden purpose of proving action in conformity therewith. It was extremely prejudicial, and reversal is required.²

a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404 (b) provides:

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

The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact

² The court did not admit the evidence under RCW 10.58.090, but only under ER 404(b). CP 53-59. RCW 10.58.090 references "prior acts," but the G.C.F. rape occurred after the K.B.R. rape for which Mr. Olson was on trial in this case.

finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise "motive" and "intent" could be used as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th

Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. Fisher, 165 Wn.2d at 744-49 (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404 (b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Id. at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). “[C]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Smith, 106 Wn.2d at 776.

This Court reviews the trial court’s interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. A

trial court's ruling admitting evidence is reviewed for abuse of discretion. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

b. The testimony about the other rape was improperly used to show action in conformity therewith and was substantially more prejudicial than probative. Mr. Olson's explanation of events, to which he testified, was that he committed third-degree rape but not second-degree rape. In other words, he acknowledged the victim did not consent, but denied forcible compulsion. 8 RP 449-60, 69-97, 539-49.

The victim's testimony supported this theory. K.B.R. testified that she was walking home from the store when Mr. Olson and Mr. Emery asked if she wanted a ride. 5 RP 87-90. She accepted the offer because it was raining. 5 RP 90. After she got in the car, Mr. Olson and Mr. Emery started groping her. 5 RP 95. They asked if she would give them oral sex, but she said she just wanted to go home, so Mr. Olson started driving. 5 RP 95. He parked near her house, and told her she could get out after she gave them oral sex. 5 RP 99-100. She said no, but he repeatedly told her that everything would be okay, and she should just "chill out." 5 RP 100, 160. She later told police that Mr. Olson said "chill out" in a

relaxed manner, not a threatening manner. 4 RP 70. She stopped struggling because she did not want them to move the car away from her house. 5 RP 103. According to K.B.R., Mr. Olson and Mr. Emery did not threaten her with harm. 5 RP 160.

But the trial court allowed the State to call G.C.F., who testified at length about how Mr. Olson and Mr. Emery abducted and brutally raped her at gunpoint several months after the K.B.R. incident. 6 RP 340-64. The only relevance of this testimony was to show that because Mr. Olson raped G.C.F. with forcible compulsion he must have raped K.B.R. with forcible compulsion. This is precisely the purpose forbidden by ER 404(b).

State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) is on point. There, the trial court admitted evidence of two prior sexual assaults which were very similar to the charged crime and occurred within the same year. Id. at 189. As in this case, the trial court ruled the evidence was admissible to show motive and common scheme or plan. Id. This Court reversed, noting that although the trial court listed proper purposes for the evidence, “the evidence demonstrates little more than a general propensity to commit indecent liberties, precisely the purpose forbidden under ER 404(b).” Id. at 191. The same is true here. Although the trial court

admitted the G.C.F. rape to show motive, intent, and common scheme or plan, the evidence demonstrated little more than a propensity to commit rape by forcible compulsion, precisely the purpose forbidden by ER 404(b).

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) is also instructive. There, the trial court admitted evidence of prior acts to rebut a defense, but this Court reversed because the way the evidence would rebut the defense was by showing a propensity to act in conformity with prior behavior. Id. at 982. Pogue involved a prosecution for possession of cocaine. Id. at 981. The accused raised a defense of unwitting possession, and the State offered evidence of prior cocaine possession to rebut the defense. Id. at 982. This Court pointed out that “[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.” Id. at 985.

Similarly here, the only logical relevance of G.C.F.’s testimony is based on a propensity argument: Because Mr. Olson committed rape with forcible compulsion against G.C.F., it is more likely that he committed rape with forcible compulsion against

K.B.R. As in Pogue, the admission of the other act violated ER 404(b).

In addition to offering the G.C.F. rape to prove motive and common scheme, the State offered it to prove intent. But intent is not an element of rape. State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003). Where intent is not a material issue, other acts are not admissible to demonstrate intent. Bowen, 48 Wn. App. at 195. And even if intent were an element, the only way the G.C.F. incident proves intent in this case is through a forbidden propensity implication.

State v. Holmes explains this phenomenon. There, this Court reversed the defendant's burglary conviction because the trial court had improperly admitted evidence of the defendant's two prior convictions for theft. 43 Wn. App. 397, 717 P.2d 766 (1986). The State argued, and the trial court agreed, that the evidence was relevant to prove intent. Id. at 398. This Court held the admission of the prior acts violated ER 404(b):

Although the two prior juvenile convictions for theft may arguably be logically relevant if you accept the basic premise of once a thief, always a thief, it is not legally relevant. It is made legally irrelevant by the first sentence in ER 404(b). The only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so

again after entering the Thompson home. This falls directly within the prohibition of ER 404(b).

Holmes, 43 Wn. App. at 400.

In Wade, 98 Wn. App. 328, this Court similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. Id. at 332. The court reminded the prosecution that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334 (emphasis in original). Such a non-propensity theory rarely exists:

When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially asking the fact finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case.

Id. at 335.

As in all of the above cases, the other bad act evidence in this case was ostensibly admitted for proper purposes, but its only relevance was for the improper purpose of proving action in conformity therewith. Its admission therefore violated ER 404(b).

Additionally, the admission of the G.C.F. rape violated ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative. The rape of G.C.F. was absolutely horrific. Unlike in this case, Mr. Olson and Mr. Emery held a gun to G.C.F. and forced her into their car. Also unlike this case, the other rape occurred in the middle of the night, and did not take place near the safety of the victim's home. The trial court did not limit the evidence of the other rape to the judgment and sentence, but allowed G.C.F. herself to testify emotionally about the terrible act perpetrated upon her. This served to inflame the passions of the jury against Mr. Olson, and was substantially more prejudicial than probative.

c. Reversal is required. Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury

placed upon the improperly admitted evidence, a new trial is necessary.” Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff’s immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: “We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury.” Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of a prior rape conviction is at least an order of magnitude greater. Indeed, “in sex cases, ... the prejudice potential of prior acts is at its highest.” Saltarelli, 98 Wn.2d at 363. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury.

It is reasonably probable that Mr. Olson would have been convicted of the lesser included offense of third-degree rape rather than second-degree rape if not for the erroneous admission of G.C.F.’s testimony of the other rape. As explained above, the victim’s testimony in this case supported Mr. Olson’s explanation that he acted without consent but did not use forcible compulsion.

The detailed description of the forcible compulsion used in the other case likely tipped the scales toward conviction of the greater crime in this case. Accordingly, this Court should reverse and remand for a new trial at which evidence of the G.C.F. rape will be excluded.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY ACCUSING MR. OLSON OF LYING, DESCRIBING THE VERDICT AS THE “TRUTH,” AND ASKING THE JURY TO DRAW AN ADVERSE INFERENCE FROM MR. OLSON’S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

a. The prosecutor committed misconduct. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008).

It is misconduct for a prosecutor to assert his or her personal opinion as to the credibility of a witness. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). But here, the prosecutor argued that Mr. Olson “feigned tears,” and said, “he is manipulating you, he is manipulating the truth, and he is distorting the truth in an effort to avoid responsibility.” 8 RP 553. These statements constituted misconduct. Reed, 102 Wn.2d at 145-46 (finding misconduct where prosecutor called defendant a “liar and manipulator”).

It is also misconduct for the prosecutor to tell the jury its job is to “declare the truth,” because the “jury’s job is not to ‘solve’ a case,” but “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). But here, the prosecutor did just that, stating, “you will return a verdict that represents the truth of the matter.” 8 RP 528. Under Anderson, this argument was improper.

The prosecutor committed further misconduct by stating his opinion as to guilt. After improperly informing the jury that its duty was to “return a verdict that represents the truth,” the prosecutor stated, “The truth is that Aaron Olson raped [K.B.R.] on May 18th.” 8 RP 528. This is like the improper statement held to be misconduct in Reed, 102 Wn.2d at 144-46. There, the prosecutor stated: “He’s a cold murder two. It’s cold. There is no question about murder two.” Id. at 144. The Supreme Court held that these statements constituted misconduct because a prosecutor may not assert his personal opinion of the guilt of the accused. Id. at 145-46. Similarly, in Henderson, this Court held it was improper for the prosecutor to state, “This was not an altercation. It was a robbery.” State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

Here, by stating that “the truth is that Aaron Olson raped [K.B.R.],” the prosecutor committed misconduct.

The prosecutor also improperly encouraged the jury to draw an adverse inference from Mr. Olson’s exercise of his constitutional rights to appear, defend, and testify. Const. art. I, § 22. The prosecutor said:

Mr. Olson testified that he read the definition of rape. What is the inference from that, that he read the definition of rape? Mr. Olson knows exactly what he needed to say on that stand to convince you or to try to convince you of rape. He is trying to manipulate the outcome of this trial in the same way he was trying to manipulate your feelings by feigning crying.

8 RP 552. This type of comment on the exercise of a constitutional right constitutes misconduct. State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (prosecutor committed misconduct by commenting in closing argument about the defendant’s exercise of his constitutional right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutor improperly infringed upon defendants’ election to remain silent by stating in closing, “you would hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence”).

Finally, the prosecutor committed misconduct by stating in rebuttal:

Ladies and gentlemen, it is no longer reasonable to doubt any of the elements in Count I and Count II. It is no longer reasonable to doubt that Aaron Olson is guilty of rape in the second degree for vaginally raping [K.B.R.]. It is no longer reasonable to doubt that Aaron Olson is guilty of rape in the second degree for facilitating the rape of [K.B.R.] at the hands of Tony Emery.

8 RP 558. This argument is similar to the rebuttal given in Venegas, in which the prosecutor argued that the presumption of innocence “erodes little by little, bit by bit, and at the conclusion of all of the evidence, including the defendant’s witnesses and the defendant herself, that presumption no longer exists, then that’s when the State has proven the case beyond a reasonable doubt.” State v. Venegas, 155 Wn. App. 507, 525, 228 P.3d 813 (2010). This Court held such comments “a clear misstatement of the law,” admonishing that the presumption of innocence “may only be overcome, if at all, during the jury’s deliberations.” Id.

b. The misconduct prejudiced Mr. Olson, requiring reversal.

Where a prosecutor commits misconduct not affecting a constitutional right, an appellate court will reverse and remand for a new trial if there is a substantial likelihood that the misconduct

affected the jury's verdict. State v. Jackson, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). Even if a defendant does not object to improper remarks at trial, reversal is required if the remarks are so "flagrant and ill-intentioned" that they cause prejudice that a curative instruction could not have remedied. Jones, 144 Wn. App. at 290.

Where a prosecutor improperly encourages the jury to draw an adverse inference from the exercise of a constitutional right, it is subject to the constitutional standard of prejudice. In other words, the court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt on the greater charge rather than the lesser. Moreno, 132 Wn. App. at 671-72.

Here, some of the misconduct is subject to the constitutional standard and some to the nonconstitutional standard. Under either standard, the improper comments prejudiced Mr. Olson. As explained in section (1) above, the victim's testimony in this case supported Mr. Olson's theory that he acted without consent but did not use forcible compulsion. The prosecutorial misconduct likely tipped the scales toward conviction of the greater crime in this

case. Accordingly, this Court should reverse and remand for a new trial.

3. CUMULATIVE ERROR DENIED MR. OLSON A FAIR TRIAL.

Even if each of the above errors individually does not warrant a new trial, they do in the aggregate. “Under the cumulative error doctrine, we may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless.” Venegas, 155 Wn. App. at 522. Here, as in Venegas, the improper evidentiary ruling combined with prosecutorial misconduct denied Mr. Olson his right to a fair trial. The State’s proof on the forcible compulsion element was weak, and it was essentially allowed to retry Mr. Olson for the G.C.F. rape in order to secure a conviction for the second-degree rape of K.B.R. The prejudice caused by this highly inflammatory evidence was then exacerbated by the prosecutor’s improper comments on Mr. Olson’s veracity and the exercise of his constitutional rights. This Court should reverse and remand so that Mr. Olson may have a fair trial.

4. THE SENTENCING COURT ERRED IN IMPOSING COSTS AND FEES AND IN IMPOSING A NO-ALCOHOL CONDITION.

a. The sentencing court erred in imposing costs because Mr. Olson is indigent and lacks the ability to pay. The sentencing court imposed legal financial obligations (“LFOs”) totaling \$2,800. CP 18. Although the \$100 DNA fee and \$500 Victim Penalty Assessment (“VPA”) are mandatory, it was improper for the court to impose \$2,000 in attorney costs and a \$200 filing fee given Mr. Olson lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for the costs unless the defendant has or will have the means to do so. State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing costs. Id. This requirement is both constitutional and statutory. Id. A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing attorney costs and fees upon Mr. Olson because substantial evidence does not

support a finding that Mr. Olson has or will have the ability to pay. On the contrary, the Presentence Report states that Mr. Olson has “no assets,” \$2,600 of non-legal debt, and LFO’s from another case. PSR at 9. Thus, the community corrections officers did not propose the imposition of attorney fees. PSR at 16.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In Richardson, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. State v. Richardson, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). And in Baldwin, this Court affirmed the imposition of costs because the Presentence Report “establishe[d] a factual basis for the defendant’s future ability to pay,” and stated that the defendant should be “held accountable for legal financial obligations normally associated with this offense.” State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991).

But unlike the defendant in Richardson, Mr. Olson is not employed. He will likely spend the rest of his life in prison as a result of the convictions in this case combined with the convictions in the G.C.F. case, for which the sentences are consecutive. And unlike in Baldwin, the Presentence Report in this case indicated a

lack of ability to pay and proposed no attorney costs. Thus, this Court should strike the discretionary costs imposed.

b. The sentencing court erred in imposing a no-alcohol condition of community custody because it is not crime-related.

When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). Former RCW 9.94A.505 (effective until August 1, 2009); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Mr. Olson was convicted of two offenses occurring on May 18, 2005. CP 16.

In this case, former RCW 9.94A.505 directed the sentencing court to impose a standard range sentence and community custody. RCW 9.94A.505(2)(a)(2005). Because Mr. Olson was convicted of a sex offense, he was subject to a term of community custody under the conditions authorized in RCW 9.94A.700(4) and (5). Former RCW 9.94A.700(4) sets forth the mandatory standard conditions of community custody, such as reporting to the

Department of Corrections. In addition, the court may order special discretionary conditions set forth at RCW 9.94A.700(5), such as having no contact with the crime victim, participating in crime-related treatment or counseling, not consuming alcohol, or other “crime-related prohibitions.”³ State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Former RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13) (2008).

The burden is on the State to demonstrate that a condition of community supervision is statutorily authorized. Cf. State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA places burden on State to prove existence and comparability of out-of-state convictions for offender score purposes); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (same); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on

³ Former RCW 9.94A.715(2) permits the court to require the defendant, as a condition of community custody, to participate in rehabilitative programs or other affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

government to demonstrate discretionary supervised release condition is appropriate in a given case). A sentencing error may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

In this case, the sentencing court lacked the authority to impose a no-alcohol condition on Mr. Olson. The court did not find and the State did not assert the basis for the prohibition. Indeed, the prosecutor emphasized that Mr. Olson did not commit this crime “clouded by substance abuse or alcohol or something that interfered with his ability to make a rational decision.” 10 RP 583. And the presentence report indicated that Mr. Olson has only consumed alcohol about 12 times in his life. PSR at 12. Thus, the alcohol prohibition was improper.

The Ninth Circuit addressed a similar issue in United States v. Betts, 511 F.3d 872 (9th Cir. 2007). There, a defendant sentenced for conspiracy was ordered to abstain from alcohol as a condition of supervised release. Id. at 874, 877. There was, however, nothing in the record to suggest alcohol played any role in the defendant’s crime or that he had any past problems with alcohol. Id. at 878. The trial court did not believe the defendant had an alcohol problem, but imposed the condition as part of his

routine, finding the defendant had the burden of convincing the court that the discretionary condition was not required. Id. at 880.

The Betts Court held the condition was improper because the government did not meet its burden of demonstrating prohibiting the defendant from consuming alcohol was appropriate in his individual case, as the condition did not meet the statutory goals of rehabilitation, protection of the public, or deterrence of future criminal behavior. Betts, 511 F.3d at 878, 880.

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probably exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

Id. at 880.

The SRA provides even more limited power to the sentencing court to prohibit conduct as a condition of community custody than does the federal statute at issue in Betts. In Washington, prohibitions must be crime-related, although affirmative conduct may be imposed as needed for rehabilitation or community protection. Former RCW 9.94A.715(2)(a). As this

Court explained in State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003), it is error to mandate alcohol counseling without evidence to indicate the requirement of alcohol counseling was crime-related. Likewise, the prohibition on use, possession, or purchase of alcohol, subject to mandatory searches of private property, is not crime-related.

There is no indication or finding that alcohol played a part in the offenses Mr. Olson committed. To the contrary, the evidence showed Mr. Olson generally does not drink and did not consume alcohol on the night in question. Thus, the condition of community custody forbidding him from drinking alcohol is not authorized by the SRA. The remedy is to strike the improper condition. State v. Riles, 135 Wn.2d 326, 353, 957 P.2d 655 (1998).

E. CONCLUSION

For the reasons set forth above Mr. Olson respectfully requests that this Court reverse his convictions and remand for a new trial. In the alternative, the costs and no-alcohol condition should be stricken from the sentence.

DATED this 9th day of May, 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41239-0-II
v.)	
)	
AARON E. OLSON,)	
)	
APPELLANT.)	

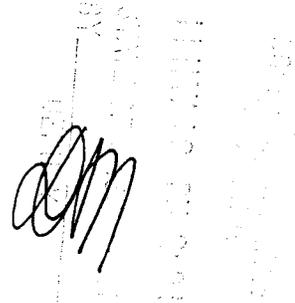
DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 9th DAY OF MAY, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 9th DAY OF MAY, 2011.

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