

No. 44816-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Gambill,

Appellant.

Lewis County Superior Court Cause No. 13-1-00171-8

The Honorable Judge James Lawler

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Gambill his Sixth and Fourteenth Amendment right to counsel.
2. The trial judge erred by denying Mr. Gambill's repeated requests for appointment of new counsel.
3. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Gambill and his court-appointed attorney.
4. The prosecutor committed misconduct that was flagrant and ill-intentioned.
5. The prosecutor committed misconduct that deprived Mr. Gambill of his Fourteenth Amendment right to a fair trial.
6. The prosecutor committed misconduct by minimizing and shifting the state's burden of proof in violation of Mr. Gambill's Fourteenth Amendment right to due process.
7. State witnesses provided improper opinion testimony that invaded the province of the jury.
8. State witnesses improperly opined that the car was "stolen," an essential element of the offense.
9. Mr. Gambill's conviction violated his Fourteenth Amendment right to due process because it was based in part on inadmissible evidence showing that he was a dangerous or frightening person.
10. Police violated Mr. Gambill's Fourth Amendment right to be free from unreasonable seizures when they seized him without probable cause or a reasonable suspicion.
11. Police invaded Mr. Gambill's right to privacy under Wash. Const. art. I, § 7 by seizing him without probable cause or a reasonable suspicion.
12. Mr. Gambill's conviction was improperly based (in part) on unlawfully seized evidence and identification testimony.

13. Mr. Gambill was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
14. Defense counsel unreasonably advocated against his client's position instead of seeking permission to withdraw.
15. Defense counsel unreasonably failed to object to prosecutorial misconduct.
16. Defense counsel unreasonably failed to object to improper opinion testimony.
17. Defense counsel unreasonably failed to object to inadmissible testimony singling out Mr. Gambill as a dangerous person.
18. Defense counsel unreasonably failed to seek suppression of evidence unlawfully seized.
19. Defense counsel failed to subject Mr. Gambill's case to meaningful adversarial testing.
20. Cumulative instances of deficient performance prejudiced Mr. Gambill.
21. The trial court erred by imposing attorney fees in the amount of \$1,200.
22. The imposition of attorney fees without any findings regarding Mr. Gambill's present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person who is indigent has a constitutional right to have counsel appointed. When Mr. Gambill asked for the appointment of new counsel and described a complete breakdown in the attorney-client relationship, the trial court denied his request without sufficient inquiry. Did the court's refusal to appoint new counsel and failure to inquire sufficiently into the attorney-client relationship violate Mr. Gambill's Sixth and Fourteenth Amendment right to counsel?

2. A prosecutor may not commit misconduct that prejudicially infringes the accused person's Fourteenth Amendment right to a fair trial. Here, the prosecutor committed flagrant and ill-intentioned misconduct by improperly shifting the burden of proof. Did the prosecutor's flagrant and ill-intentioned misconduct violate Mr. Gambill's Fourteenth Amendment right to due process?
3. A prosecution witness may not testify to an opinion on the accused person's guilt. Here, three police officers improperly opined that the car Mr. Gambill drove was stolen. Did the improper opinion testimony invade the province of the jury in violation of Mr. Gambill's Sixth and Fourteenth Amendment right to a jury trial?
4. Police may not seize a person without probable cause or a reasonable suspicion of criminal activity. Here, police seized Mr. Gambill based on a hunch that he'd been driving a stolen car. Did the warrantless seizure violate Mr. Gambill's rights under the Fourth Amendment and Wash. Const. art. I, §7?
5. An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably advocated against his client's position instead of seeking permission to withdraw, unreasonably failed to move for suppression of evidence unlawfully seized, and failed to object to prosecutorial misconduct, improper opinion testimony, and inadmissible evidence that singled out Mr. Gambill as a dangerous person. Was Mr. Gambill deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
6. Defense counsel must subject the state's case to meaningful adversarial testing. Here, defense counsel made no opening statement, raised no objections at trial, failed to cross-examine five of the state's seven witnesses, proposed only one jury instruction, and conceded every element except one. Was Mr. Gambill constructively denied the assistance of counsel in

violation of his Sixth and Fourteenth Amendment right to an attorney?

7. A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed \$1,200 in attorney fees without making such a finding. Did the trial court violate Mr. Gambill's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Gambill was parked on the side of Interstate Five in Lewis County. Trooper Thornburg came upon him and asked if the vehicle was disabled. Mr. Gambill replied that it was. RP (4/22/13) 5, 45-49. While they waited for the tow truck, Mr. Gambill gathered some items and walked across the freeway. RP (4/22/13) 50-51.

This caused Thornburg to conclude that the vehicle was stolen, so he ordered Mr. Gambill to stop and called for additional troopers. RP (4/22/13) 51-52. They eventually arrested Mr. Gambill. The bag Mr. Gambill was carrying contained the side-view mirror that had broken off the car. When Thornburg returned to his car with Mr. Gambill in custody, he received the information from dispatch that the car was stolen. RP (4/22/13) 53-56.

The state charged Mr. Gambill with Possession of a Stolen Vehicle. CP 1. The court found him indigent and appointed attorney David Brown to represent him. Order Appointing Attorney, Supp. CP.

Mr. Gambill asked for a new attorney two weeks before trial, and the court denied the request. RP (4/15/13) 3. He asked again the week before trial. RP (4/15/13) 3. Mr. Brown told the court that when he went

to see Mr. Gambill in jail, Mr. Gambill “refused” to see him. RP (4/15/13)

3. The court did not rule on the motion. RP (4/15/13) 4.

Four days before trial was expected to begin, Mr. Gambill again asked for a new attorney. He filed a letter indicating that Mr. Brown had made vulgar references to him, had been untruthful, and had threatened him and his family. Defendant’s Letter to Judge, Supp. CP. When asked, Mr. Brown said that he and Mr. Gambill were not speaking, and noted that the letter raised additional concerns about their relationship. RP (4/18/13) 5-6. The trial judge denied Mr. Gambill’s motion, stating that the charge “looks straightforward.” He then confirmed the case for trial. RP (4/18/13) 6.

On the first day of trial, Mr. Gambill expressed confusion about his charges and the state’s case against him. RP (4/22/13) 8-10. Mr. Brown told the court that he had reviewed the state’s case with Mr. Gambill several times. RP (4/22/13) 9-10. Defense attorney and client then argued, in court, over whether or not Mr. Brown had reviewed police reports with Mr. Gambill. RP (4/22/13) 10.

Judge James Lawler told Mr. Gambill that he could sit in court, read the documents, and ask questions of his attorney, but that the trial process would not be stopped. RP (4/22/13) 10-11. Mr. Gambill conveyed that his attorney had visited him in jail and told him that he (the

attorney) could not defend him (the client). RP (4/22/13) 11. He said the last time they spoke, Mr. Brown hung up the phone and left the jail interview room. RP (4/22/13) 11.

When Mr. Gambill told the judge that his attorney had threatened him, the judge retorted that he did not believe it. RP (4/22/13) 12. Mr. Gambill said that his attorney called him stupid and crazy and told him he'd get hurt. RP (4/22/13) 13. Judge Lawler responded that he had known Mr. Brown for many years and that he just did not believe what Mr. Gambill was saying. RP (4/22/13) 14.

After the prosecutor's opening statement, Mr. Brown "reserved" his opening. RP (4/22/13) 25. After the state rested its case, Mr. Brown waived opening statement altogether. RP (4/22/13) 85-86.

At trial, two witnesses testified about events occurring prior to Mr. Gambill's contact with Trooper Thornburg. Jeffrey Strode told the court that Mr. Gambill bumped his vehicle while he was in line at an espresso stand in Winlock. RP (4/22/13) 35-36. Without any objection from defense counsel, he testified that the barista asked him to stay in the area because she feared Mr. Gambill. RP (4/22/13). Mr. Brown declined to cross examine Strode. RP (4/22/13) 38-39.

Leah Greenwood was the barista. She testified that she'd been afraid of Mr. Gambill and had asked Strode to stay with her. RP (4/22/13)

43. She said that she told Strode that Mr. Gambill was probably drunk. RP (4/22/13) 43. Again, there was no objection to this testimony, nor was there any defense cross examination of Greenwood. RP (4/22/13) 43, 45.

Trooper Thornburg was allowed to testify that he'd concluded—based on Mr. Gambill walking away from him across the freeway—that the vehicle was stolen. Defense counsel did not object. RP (4/22/13) 51. He also told the jury that dispatch “confirmed” the vehicle was stolen by contacting the registered owner. RP (4/22/13) 56. Defense counsel made no objection to this testimony. RP (4/22/13) 56.

Trooper Sills told the jury that he had received information about an erratically driven car. RP (4/22/13) 69. Trooper Brunstad said that the car Mr. Gambill was driving was stolen, and that it was also reported as a possible driving under the influence. RP (4/2/13) 77-78. Trooper Hicks repeated the barista's statements about being afraid of Mr. Gambill. RP (4/22/13) 84. No objections were lodged to any of this testimony. RP (4/22/13) 68-85.

Mr. Brown had no cross examination for Sills, Brunstad, or Hicks. RP (4/22/13) 72, 78, 85.

During closing argument, the prosecutor told the jury that the case just hinged on one thing: whether Mr. Gambill was aware that the car was stolen. RP (4/22/13) 98. He later stated that Mr. Gambill knew the car

was stolen because he had been the one to steal it. RP (4/22/13) 100. Mr. Brown agreed that Mr. Gambill's knowledge was the only issue. RP (4/22/13) 104.

The jury returned a verdict of guilty. At sentencing, the state requested that Mr. Gambill be assessed \$1,200 in attorney fees, and the defense did not object. The court ordered the amount be paid. RP (4/23/13) 3, 5.

Mr. Gambill timely appealed. CP 15.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. GAMBILL'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court "necessarily abuses its discretion" by violating an accused person's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court, likewise, abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*,

310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

B. The trial judge infringed Mr. Gambill's right to counsel by failing to inquire into the breakdown of the attorney-client relationship.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *Cross*, 156 Wn.2d at 607. To compel an accused to "undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever." *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a

meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’”

United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001).

Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Adelzo-Gonzalez*, 268 F.3d at 776-777. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez*, 268 F.3d at 776-777.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict and by refusing to appoint new counsel. Mr. Gambill informed the court on at least three occasions that the relationship with his attorney had broken down and that he desired new counsel. RP (4/15/13) 3-4; RP (4/18/13) 5-6; RP (4/22/13) 8-14. Mr. Gambill also wrote a letter to the court detailing the deterioration of the attorney-client relationship and requesting a new attorney. Defendant’s Letter to Judge, Supp CP. The court summarily dismissed Mr. Gambill’s letter for stating only “conclusory allegations”. RP (4/18/13) 6.

Defense counsel also related that he had become concerned about the relationship because Mr. Gambill was no longer speaking with him. RP (4/18/13) 5-6. The court conducted no inquiry into the factual basis for Mr. Gambill's claims. RP (4/18/13) 6.

On the morning of trial, Mr. Gambill again requested new counsel, informing the court that he had not yet gone over the police report and charging documents with his attorney. RP (4/22/13) 9-11. Mr. Gambill stated that the attorney-client relationship had further deteriorated since the last hearing. RP (4/22/13) 11. In response, Judge Lawler simply provided that it did not believe Mr. Gambill's claims because the judge had known defense counsel for a long time and considered him a good attorney. RP (4/22/13) 14. The court gave Mr. Gambill an hour and a half to go over the documents and to prepare his defense with counsel. RP (4/22/13) 14.

The record indicates that the relationship between Mr. Gambill and defense counsel had deteriorated to the point where the two could not work together. *Cross*, 156 Wn.2d at 607; *Williams*, 594 F.2d at 1260.

The trial court should have appointed new counsel. Failing that, the court should have asked specific and targeted questions, encouraging Mr. Gambill to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court

to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The trial court's failure to appoint new counsel or conduct a meaningful inquiry into Mr. Gambill's concerns denied Mr. Gambill's Sixth Amendment right to counsel. *Cross*, 156 Wn.2d at 607. His conviction must be reversed and the case remanded for a new trial.¹ *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. GAMBILL A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

An appellant can also raise prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). Prosecutorial misconduct that violates the constitutional

¹ In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott*, 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

rights of the accused necessitates reversal unless the court finds it harmless beyond a reasonable doubt. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I). A reviewing court analyzes the prosecutor’s statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008) (Jones I).

B. The prosecutor committed prejudicial misconduct by attempting to shift the burden of proof onto Mr. Gambill.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amend VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor’s improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704.

A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). The presumption of innocence is the “bedrock upon which [our] criminal justice system stands.” *State v. Johnson*, 158

Wn. App. 677, 685-86, 243 P.3d 936 (2010); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.² A prosecutor’s argument minimizing that presumption “constitutes great prejudice because it reduces the state’s burden and undermines a defendant’s due process rights.” *Id.*

It follows that a prosecutor commits misconduct by commenting on the lack of defense evidence because the defense has no duty to present evidence. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009).

At Mr. Gambill’s trial, the prosecutor began his argument by claiming that only one element of the charged offense was at issue: whether Mr. Gambill knew that the car was stolen. RP (4/22/13) 98. Mr. Gambill’s plea of not guilty, however, put every element of the offense at issue. Court’s Instructions No. 2, Supp CP. The prosecutor’s argument attempted to minimize the state’s burden to prove each element beyond a reasonable doubt. *Walker*, 164 Wn. App. at 732.

The prosecutor went on to argue that the jury should find the defense theory incredible because Mr. Gambill had not presented sufficient evidence to back it up. RP (4/22/13) 105. In response to the defense argument (that Mr. Gambill could have had reasons for walking

² This violation of Mr. Gambill’s right to the presumption of innocence created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

away from Trooper Thornburg besides knowledge that the car was stolen),
the prosecutor stated that:

The bottom line here is you haven't heard any evidence that a defendant was intoxicated. He may have appeared disoriented, may have appeared intoxicated, but there's no evidence that he was intoxicated. There's no blood draw. There was no breath test. You heard no evidence he suffered from mental health issues. There's been no testimony about that whatsoever. What are you left with? You are left with the defendant was in possession of a stolen vehicle and he knew it and that's why he ran.
RP (4/22/13) 105.

This argument eroded Mr. Gambill's presumption of innocence by commenting on his failure to present certain evidence in his defense.

Dixon, 150 Wn. App. at 54. The state cannot show that this violation of Mr. Gambill's due process rights was harmless beyond a reasonable doubt. *Fuller I*, 169 Wn. App. at 813.

The prosecutor committed misconduct that violated Mr. Gambill's rights to due process and to a fair trial by minimizing the state's burden of proof. *Johnson*, 158 Wn. App. at 685-86. Prosecutorial misconduct requires reversal of Mr. Gambill's conviction. *Id.*

III. TESTIMONY PROVIDING AN IMPROPER OPINION OF GUILT VIOLATED MR. GAMBILL'S RIGHT TO A JURY TRIAL.

A. Standard of Review.

Reviewing courts consider constitutional issues *de novo*. *E.S.*, 171 Wn.2d at 702. Testimony providing an "explicit or nearly explicit"

opinion of the guilt of the accused or the credibility of the alleged victim constitutes manifest error affecting a constitutional right. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). An appellate court may consider such an error for the first time on appeal. RAP 2.5(a)(3).

- B. Law enforcement testimony invaded the exclusive province of the jury by providing an improper opinion that the vehicle Mr. Gambill was driving had been stolen.

Testimony providing an improper opinion of guilt violates the right to a trial by jury. *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds*, 165 Wn. 2d 870, 205 P.3d 916 (2009); U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§ 21, 22. Testimony providing an improper opinion of guilt “is unfairly prejudicial because it invades the exclusive province of the jury.” *Id.* Testimony provides an opinion if it is “based on one’s belief or idea rather than on direct knowledge of the facts at issue.” *Id.* Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331. A law enforcement officer’s improper opinion testimony may be particularly prejudicial because it carries “a special aura of reliability.” *Id.*

Whether testimony includes an improper opinion turns on the circumstances of the case, including “(1) the type of witness involved, (2)

the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009).

Troopers Thornburg and Brunstad both testified that the car Mr. Gambill had been driving was stolen. RP (4/22/13) 51, 56, 77-78. In a case alleging possession of a stolen vehicle, whether the car is stolen is an element of the offense that the state must prove to the jury beyond a reasonable doubt. RCW 9A.56.068.

Turning first to the type of witness involved, as law enforcement officers, the jury likely lent the troopers’ testimony a “special aura of reliability.” *Hudson*, 150 Wn. App. at 653; *King*, 167 Wn.2d at 331. Looking second to the specific nature of the testimony, the Trooper Thornburg first stated that he thought the car was stolen and then claimed that his suspicion had been confirmed by dispatch. RP (4/22/13) 51, 56; *Hudson*, 150 Wn. App. at 653. Trooper Brunstad also stated that he was informed by dispatch that the car was stolen. RP (4/22/13) 77-78. These statements provided explicit opinions of Mr. Gambill’s guilt regarding an element of the offense. RCW 9A.56.068. Considering third and fourth the nature of the charge and the defense, Mr. Gambill’s defense of general denial put every element of the charge—including whether the car was stolen – at issue. *Hudson*, 150 Wn. App. at 653. Finally, the other

evidence before the trier of fact did nothing to cure the prejudicial nature of the troopers' improper opinions. *Id.* Mr. Gambill did not present evidence in his defense and the jury likely took the troopers' opinions on whether the car was stolen as the final word on the issue.

Testimony providing an improper opinion of Mr. Gambill's guilt invaded the province of the jury and violated his right to a fair trial. *Sutherby*, 138 Wn. App. at 617; *Hudson*, 150 Wn. App. at 653. Mr. Gambill's conviction must be reversed. *Sutherby*, 138 Wn. App. at 618.

IV. TESTIMONY VIOLATED MR. GAMBILL'S PRESUMPTION OF INNOCENCE BY SEEKING TO MAKE HIM APPEAR PARTICULARLY DANGEROUS.

A. Standard of Review.

Violations of the right to an impartial jury are reviewed *de novo*. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

B. Testimony that Ms. Greenwood was afraid to be alone with Mr. Gambill violated his right to a fair trial by an impartial jury.

An accused person is entitled to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22. *Gonzalez*, 129 Wn. App. at 900. This right includes the right to the presumption of innocence.

Gonzalez, 129 Wn. App. at 900. The constitutional presumption of innocence is the bedrock foundation of any criminal trial. *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). It is the court’s duty to give effect to the presumption of innocence by “being alert to any factor that could undermine the fairness of the fact-finding process.” *Gonzalez*, 129 Wn. App. at 900 (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)).

Measures suggesting that the accused is particularly dangerous threaten the right to a fair trial. *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). Such practices undermine the presumption of innocence and are inherently prejudicial. *Id.* Whether a courtroom event has negatively effected the presumption of innocence receives “close judicial scrutiny.” *Gonzalez*, 129 Wn. App. at 900-01 (citing *Estelle*, 425 U.S. at 504; *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). The analysis looks to “reason, principle, and common human experience.” *Estelle*, 425 U.S. at 504.

Evidence is inadmissible if its “probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Evidence creates a danger of unfair prejudice if it is “likely to stimulate an emotional

response rather than a rational decision.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010).

The state’s case at Mr. Gambill’s trial was peppered with testimony that was only relevant to prove that Mr. Gambill is an inherently dangerous or frightening person. Greenwood testified that she was afraid to be alone with Mr. Gambill at the espresso stand drive-through because he was “probably drunk or something.” RP (4/22/13) 43. She stated that she asked another customer, Strode, to stay at the stand until Mr. Gambill had left. *Id.* Strode also testified to the exchange, providing that “he didn’t plan on” leaving Greenwood alone with Mr. Gambill. RP (4/22/13) 38. Trooper Hicks, likewise, repeated that Mr. Gambill had given Greenwood “an uneasy feeling.” RP (4/22/13) 84.

This testimony undermined the presumption of Mr. Gambill’s innocence by singling him out as particularly dangerous. *Jaime*, 168 Wn.2d at 862. Greenwood’s opinion of Mr. Gambill and her desire not to be alone with him was not relevant to the charge of possession of a stolen vehicle and created a danger of unfair prejudice. ER 403; *Salas*, 168 Wn.2d at 671.

Testimony singling Mr. Gambill out as particularly dangerous violated his right to a fair trial by undermining the presumption of

innocence. *Jaime*, 168 Wn.2d at 862. This error requires reversal of Mr. Gambill's conviction and remand for a new trial. *Id.*

V. MR. GAMBILL'S UNLAWFUL SEIZURE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7.

A. Standard of Review.

The constitutionality of an investigatory stop or warrantless seizure is a question of law reviewed *de novo*. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011) *review denied*, 272 P.3d 850 (Wash. 2011) (*citing Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

An unconstitutional search or seizure can constitute manifest error affecting a constitutional right raised for the first time on appeal. *State v. Jones*, 163 Wn. App. 354, 360, 266 P.3d 886 (2011) *review denied*, 173 Wn.2d 1009, 268 P.3d 941 (2012) (*Jones II*); RAP 2.5(a)(3).

B. Trooper Thornburg did not have reasonable suspicion to investigate Mr. Gambill based on his hunch that the car was stolen.

The Fourth Amendment to the U.S. Constitution protects against unlawful search and seizure. U.S. Const. Amends. IV; XIV. Art. I, § 7 of the state constitution protects against unlawful intrusion into private affairs. Wash. Const. art. I, § 7. Art. I, § 7 provides greater protection

than the Fourth Amendment because it focuses on “the disturbance of private affairs” rather than the reasonableness of police conduct. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011) *review denied*, 173 Wn.2d 1011, 268 P.3d 943 (2012).

With very few exceptions, a seizure of a person must be based on probable cause or an arrest warrant. *State v. Young*, 167 Wn. App. 922, 929, 275 P.3d 1150 (2012). Probable cause exists if the officer possesses facts sufficient for a reasonable person to conclude that criminal activity is afoot. *Id.*

If the state seeks to justify seizure of a person under an exception to the probable cause requirement, the state must establish that exception by clear and convincing evidence. *Diluzio*, 162 Wn. App. at 590, *review denied*, 272 P.3d 850 (2011). If the state fails to meet its burden of establishing an exception, “all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *State v. Westvang*, --- Wn. App. ---, 301 P.3d 64, 68 (2013).

Police may briefly seize a person for questioning based on reasonable suspicion alone. *Young*, 167 Wn. App. at 929. Reasonable suspicion exists if there are specific, articulable facts indicating that a person has been or is about to be involved in a crime. *Id.* A *Terry* stop must be justified at its inception. *Diluzio*, 162 Wn. App. at 590-91. A

mere hunch on the part of law enforcement does not give rise to reasonable suspicion. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). Neither does a startled reaction to seeing law enforcement on the part of an individual. *Young*, 167 Wn. App. at 929. A reviewing court must look to the totality of the circumstances surrounding the stop to evaluate its reasonableness. *Id.*

An encounter that begins as consensual interaction between an individual and law enforcement becomes a seizure if the officer “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Young*, 167 Wn. App. at 930 (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). Examples of a showing of police authority include the presence of several officers, the display of a weapon, or physical touching of the citizen by an officer. *Id.*

Trooper Thornburg initiated contact with Mr. Gambill because Mr. Gambill’s car was disabled on the side of the freeway. RP (4/22/13) 48. The trooper spoke briefly with Mr. Gambill about the towing company, which Mr. Gambill had already called. RP (4/22/13) 49. Thornburg testified that he regularly checks with a towing company upon finding a disabled vehicle to give the driver an estimated time of arrival. RP (4/22/13) 50.

As the trooper was asking dispatch for an estimated arrival time, Mr. Gambill picked up his belongings and walked across the freeway. RP (4/22/13) 51. At that point, Thornburg testified that “the first thing that went through [his] mind is the car’s probably stolen.” RP (4/22/13) 51. The trooper responded by asking dispatch to call additional officers. Mr. Gambill was arrested shortly thereafter. RP (4/22/13) 52-55.

The troopers arrested Mr. Gambill following a show of force. Multiple marked cars contained him within a wooded area. Numerous officers shined spotlights on him, demanded that he reveal himself, and ordered him to lie on the ground. RP (4/22/13) 53-54, 70-71, 75-77, 81-83. They seized a rearview mirror from his bag, and brought him to the espresso stand to be identified by Greenwood. RP (4/22/13) 55, 71, 78, 84-85.

Trooper Thornburg lacked reasonable suspicion. He had Mr. Gambill seized based upon his mere hunch that the car was stolen. *Doughty*, 170 Wn.2d at 63. The evidence seized pursuant to that seizure – the rearview mirror and Greenwood’s identification – should have been suppressed as the fruit of the poisonous tree. *Westvang*, --- Wn. App. ---, 301 P.3d at 68. The prosecutor used the rearview mirror to argue the primary factual issue in the case: that Mr. Gambill knew that the car was

stolen. RP (4/22/13) 101. Mr. Gambill was prejudiced by the introduction of the evidence obtained pursuant to his unlawful seizure.

The introduction of evidence obtained following Mr. Gambill's unlawful seizure violated his Fourth Amendment and art. I, § 7 rights. *Westvang*, --- Wn. App. ---, 301 P.3d at 68. Mr. Gambill's conviction must be reversed. *Id.*

VI. MR. GAMBILL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel's deficient performance prejudiced Mr. Gambill.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kylo*, 166 Wn.2d at 862. Deficient performance

prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

1. Counsel provided ineffective assistance by advocating against his client.

The Sixth Amendment entitles an accused person to a defense attorney who adheres to the duty of loyalty. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (citing *Strickland*, 466 U.S. 668). The right to counsel also includes the right to an attorney free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). If an actual conflict of interest exists, representation is ineffective even absent a showing of prejudice. *Id.* at 427.

In *Regan*, the court found that the accused was denied the effective assistance of counsel when the court required his defense attorney's supervisor to testify that he had informed the client of the time and date of trial. *Regan*, 143 Wn. App. at 430. The situation also forced the attorney to choose between accommodating her supervisor's vacation schedule and pursuing her client's wishes for a trial at the scheduled time. *Id.* at 429. The *Regan* court noted that this, too, created an actual conflict of interest. ("This is a classic example of a choice between alternative courses of

action that was helpful to defense counsel's own interests and harmful to Mr. Regan").

When a conflict of interest arises, the Rules of Professional Conduct require counsel to move to withdraw from further representation of the client. RPC 1.7(a)(2); RPC 1.16(a)(1); RPC 1.7 comment 4.

Mr. Gambill requested a new attorney from the court on numerous occasions, describing a complete breakdown of the attorney-client relationship. RP (4/15/13) 3-4; RP (4/18/13) 5-6; RP (4/22/13) 8-14; Defendant's Letter to Judge, Supp CP. Despite this, defense counsel never moved to withdraw from representation of Mr. Gambill. RP (4/15/13); RP (4/18/13); RP (4/22/13).

On the day of trial, Mr. Gambill renewed his objection to continued representation by his attorney. RP (4/22/13) 8-14. Mr. Gambill said that the relationship had further deteriorated and that counsel had not reviewed the police report and Information with him. RP (4/22/13) 8-9. When asked directly by the court, defense counsel denied Mr. Gambill's claim and stated that they had gone over the documents together. RP (4/22/13) 10.

As in *Regan*, Mr. Gambill's counsel had a "classic" actual conflict of interest when he was given the choice of advocating for his own interests or those of his client. *Regan*, 143 Wn. App. at 429. This actual

conflict requires reversal even absent a showing of prejudice. *Id.* at 427. The Rules of Professional Conduct required defense counsel to withdraw from representation of Mr. Gambill upon revelation of the conflict of interest. RPC 1.7(a)(2); RPC 1.16(a)(1). Counsel never moved to withdraw.

Additionally, once the conflict had arisen, counsel chose to advocate for his own interest by claiming he'd fulfilled his duty as counsel rather than advocating for Mr. Gambill's position. This decision violated defense counsel's duty of loyalty and constituted ineffective assistance of counsel. *McDonald*, 143 Wn.2d at 511.

Mr. Gambill's attorney provided ineffective assistance of counsel when he continued representation after an actual conflict of interest had arisen and the attorney-client relationship had broken down and when he violated his duty of loyalty. *Regan*, 143 Wn. App. at 425; *McDonald*, 143 Wn.2d at 511. Mr. Gambill's conviction must be reversed. *Regan*, 143 Wn. App. at 432.

2. Counsel provided ineffective assistance by failing to object to prosecutorial misconduct.

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). In most cases, failure to object

to prosecutorial misconduct waives the issue for appeal.³ *Glasmann*, 175 Wn.2d at 704. Failure to object to prosecutorial misconduct is generally unreasonable. *Hodge v. Hurley*, 426 F.3d 368, 387 (6th Cir. 2005).

A prosecutor commits misconduct by making arguments minimizing the state's burden of proof. *Walker*, 164 Wn. App. at 732. It is also misconduct for a prosecutor to comment on the lack of defense evidence because the defense has no duty to present evidence. *Dixon*, 150 Wn. App. at 54. Such improper arguments violate the due process right to a fair trial. *Johnson*, 158 Wn. App. at 685-86; U.S. Const. Amend. XIV; art. I, § 3.

The prosecutor argued at Mr. Gambill's trial that the only issue in the case was whether Mr. Gambill knew that the car was stolen. RP (4/22/13) 98. Mr. Gambill's guilty plea, however, placed each element of the offense at issue. Court's Instructions No. 2, Supp CP. Defense counsel did not object to this improper argument. RP (4/22/13) 98. In fact, defense counsel further eroded Mr. Gambill's presumption of innocence by agreeing that the only element at issue was whether Mr. Gambill knew the car was stolen. RP (4/22/13) 103.

³ Exceptions exist for misconduct that is flagrant and ill-intentioned or that creates a manifest error affecting a constitutional right.

The prosecutor committed further misconduct by commenting on the lack of defense evidence and Mr. Gambill's choice not to testify. RP (4/22/13) 105. Defense counsel did not object to these improper arguments. *Id.*

The prosecutor's improper arguments minimized the state's burden of proof and attempted to attribute a burden to Mr. Gambill to prove his defense. Defense counsel had no valid tactical reason for failing to object to the state's attempt to shift its burden of proof onto his client. Defense counsel failed to protect Mr. Gambill's right to a fair trial. *Johnson*, 158 Wn. App. at 685-86. The prosecutor's minimization of the state's burden likely confused the jury and affected the verdict.

Defense counsel provided deficient performance by failing to object to prosecutorial misconduct. *Hurley*, 426 F.3d at 387. Mr. Gambill was prejudiced by counsel's performance. *Id.* Ineffective assistance of counsel requires reversal of Mr. Gambill's conviction. *Kyllo*, 166 Wn.2d at 862.

3. Counsel provided ineffective assistance by failing to object to improper opinion testimony.

Defense counsel's failure to object constitutes ineffective assistance of counsel where there is no valid tactical reason for the failure. *Hendrickson*, 138 Wn. App. at 833. Failing to object to improper opinion

testimony waives the issue for appeal unless the opinion is explicit or nearly explicit. *King*, 167 Wn.2d at 332. Testimony providing an improper opinion of guilt violates the right to a jury trial because it invades the exclusive province of the jury. *Sutherby*, 138 Wn. App. at 617.

Troopers Thornburg and Brunstad provided improper opinions that the car Mr. Gambill was driving had been stolen. RP (4/22/13) 51, 56, 77-78. Whether the vehicle was stolen is an element of the offense of possession of a stolen vehicle. RCW 9A.56.068. Because the improper opinions came from law enforcement officers, the jury likely attributed the testimony a “special aura of reliability.” *King*, 167 Wn.2d at 332.

Counsel had no valid tactical reason for failing to object to testimony providing improper opinions of his client’s guilt. Because Mr. Gambill presented no evidence in his defense, the jury likely took the troopers’ testimony as the final word on the issue. Counsel’s failure to object likely affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to object to testimony providing an improper opinion of Mr. Gambill’s guilt. *Hendrickson*, 138 Wn. App. at 833. Mr. Gambill’s conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

4. Counsel provided ineffective assistance by failing to object to testimony undermining the presumption of Mr. Gambill's innocence.

Counsel's failure to object constitutes ineffective assistance absent a valid tactical reason. *Hendrickson*, 138 Wn. App. at 833. Failure to raise an evidentiary error at trial generally waives it for appeal. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009).

Three witnesses at Mr. Gambill's trial testified that Greenwood found him frightening and did not want to be alone with him at the espresso stand. RP (4/22/13) 38, 43, 84. This testimony singled Mr. Gambill out as particularly dangerous and undermined his presumption of innocence. *Jaime*, 168 Wn.2d at 862. As such, the testimony was inherently prejudicial. *Id.* Greenwood's mental state was not relevant to the charge of possession of a stolen vehicle.

Defense counsel had no valid tactical reason for failing to protect the presumption of Mr. Gambill's innocence before the jury. Counsel's failure to object to this testimony constituted deficient performance. *Hendrickson*, 138 Wn. App. at 833. The state's portrayal of Mr. Gambill as a frightening person encouraged the jury to infer guilt and violated his right to be brought before the jury as an innocent person. *Jaime*, 168 Wn.2d 861. Mr. Gambill was prejudiced by counsel's deficient performance.

Defense counsel provided ineffective assistance by failing to object to testimony eroding Mr. Gambill's presumption of innocence.

Hendrickson, 138 Wn. App. at 833. Ineffective assistance requires reversal of Mr. Gambill's conviction. *Kyllo*, 166 Wn.2d at 862.

5. Counsel provided ineffective assistance by failing to seek suppression of evidence seized following an unlawful arrest.

Failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). The state introduced evidence at Mr. Gambill's trial that had been acquired pursuant to his unlawful seizure and arrest. U.S. Const. Amends. IV, XIV; art. I, § 7; *Young*, 167 Wn. App. at 929; RP (4/22/13) 55, 61, 71, 78, 84-85.

The troopers seized Mr. Gambill based only on Trooper Thornburg's hunch that the car he had been driving was stolen. RP (4/22/13) 51. That hunch did not give rise to reasonable suspicion to justify an investigatory stop. *Doughty*, 170 Wn.2d at 63. Nonetheless, defense counsel waived the reserved suppression hearing on the morning of trial. RP (4/22/13) 6.

Counsel had no valid tactical reason for failing to protect Mr. Gambill's Fourth Amendment and art. I, § 7 rights. The state used the unlawfully obtained evidence to argue the primary factual issue at trial:

that Mr. Gambill knew the car was stolen. RP (4/22/13) 101. Thus, Mr. Gambill was prejudiced by his counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862.

Mr. Gambill's counsel provided ineffective assistance when he failed to move to suppress evidence obtained in violation of his client's constitutional rights. *Reichenbach*, 153 Wn.2d at 137. Mr. Gambill's conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

6. Counsel failed to subject the state's case to meaningful adversarial testing.

The language of the Sixth Amendment requires not only that an accused person be provided with counsel, but that counsel "assist" with his/her "defence." U.S. Const. Amends. VI, XIV, . The right to counsel is violated "if no actual 'assistance' 'for' the accused's 'defence' is provided." *United States v. Cronie*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *see also State v. Chavez*, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011).

Such a breakdown occurs, for example, when counsel distances himself from his client and essentially argues no basis for a defense motion. *Chavez*, 162 Wn. App. 439.

The right to the effective assistance of counsel includes "the right of the accused to require the prosecution's case to survive the crucible of

meaningful adversarial testing.” *Cronic*, 466 U.S. at 657. Failure of counsel to subject the state’s case to such adversarial testing “makes the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. When an accused person is constructively denied the assistance of counsel altogether, no showing of prejudice is required to establish ineffective assistance. *Cronic*, 466 U.S. at 659; *Chavez*, 162 Wn. App. at 439.

Mr. Gambill’s defense counsel made no opening statement. RP (4/22/13) 25, 85-86. Counsel waived a (previously reserved) suppression hearing despite the fact that his client had been seized in violation of his constitutional rights. RP (4/22/13) 6. Counsel failed to conduct any cross-examination of five of the state’s seven witnesses. RP (4/22/13) 39, 45, 72, 78, 85. Counsel asked a total of eighteen questions of the two witnesses he did cross-examine. PR (4/22/13) 34-35, 64-66. Counsel did not make a single objection at trial. *See generally* RP (4/22/13).

Counsel did not subject the state’s case to “meaningful adversarial testing.” *Cronic*, 466 U.S. at 659. Because of this, prejudice need not be shown. *Id.* Mr. Gambill was denied his Sixth Amendment right to the effective assistance of counsel. *Id.* His conviction must be reversed and the case remanded for a new trial. *Id.*

- C. The cumulative effect of counsel's ineffective assistance requires reversal of Mr. Gambill's conviction.

The cumulative effect of defense counsel's errors can require reversal even if each act of deficient performance, standing alone, would not. *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).

Defense counsel had an actual conflict of interest when he had to choose to protect either his own interests or his client's. RP (4/22/13) 8-14; *Regan*, 143 Wn. App. at 427. Counsel's choice to protect his own interests rather than to move to withdraw from representation of Mr. Gambill violated his duty of loyalty. RP (4/22/13) 8-14; *Regan*, 143 Wn. App. at 427.

Mr. Brown failed to make an opening statement. RP (4/22/13) 25, 86. He didn't make a single objection at trial, despite prosecutorial misconduct shifting the burden of proof, improper opinions of Mr. Gambill's guilt, and testimony eroding the presumption of innocence by singling Mr. Gambill out as particularly dangerous. RP 38, 43, 51, 56, 77-78, 84, 98, 105. Counsel did not move to suppress evidence obtained in violation of his client's Fourth Amendment and art. I, § 7 rights. RP (4/22/13) 6; *Young*, 167 Wn. App. at 929. Finally, counsel failed to subject the state's case against Mr. Gambill to meaningful adversarial testing. *Cronic*, 466 U.S. at 659.

The cumulative effect of counsel's failures denied Mr. Gambill a fair trial and requires reversal of his conviction. Lindstadt, 239 F.3d at 199.

VII. THE COURT ORDERED MR. GAMBILL TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones III); *E.S.*, 171 Wn.2d at 702.

B. The court violated Mr. Gambill's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974) (Fuller II). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

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.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.⁴ *Fuller II*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of*

⁴ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

sentencing that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller II*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller II*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.⁵

⁵ See e.g. *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. See e.g. *Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller II*, 417 U.S. at 53.

Additionally, where defense counsel fails to subject the state's case to "meaningful adversarial testing," the accused is constructively denied the assistance of counsel. *Cronic*, 466 U.S. at 659; *Chavez*, 162 Wn. App. at 439. In such a case, an order recouping the cost of court-appointed counsel requires the accused to pay for counsel who provided no "assistance" for his/her "defence." *Cronic*, 466 U.S. at 659; U.S. Const. Amends. VI, XIV.

The lower court found Mr. Gambill indigent at both the beginning and the end of the proceedings. Order Appointing Attorney, Supp CP; CP 16-18. Nonetheless, it ordered him to pay \$1,200 in fees for his court-

N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

appointed attorney without first entering a finding regarding his present or future ability to pay. RP (4/23/13) 5; CP 4-14.⁶

Additionally, Mr. Gambill was constructively denied counsel when court-appointed attorney failed to subject the state's case to meaningful adversarial testing. *Cronic*, 466 U.S. at 659; *Chavez*, 162 Wn. App. at 439.

The court violated Mr. Gambill's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first finding that he had the ability to do so. *Fuller II*, 417 U.S. at 53. The court also erred in ordering Mr. Gambill to pay the cost of an attorney who constructively denied him the assistance of counsel. *Cronic*, 466 U.S. at 659. The order requiring him to pay \$1,200 in attorney fees must be vacated. *Id*

CONCLUSION

The court erred by failing to appoint new counsel or to conduct meaningful inquiry into the breakdown in the relationship between Mr. Gambill and his attorney. Prosecutorial misconduct minimizing the state's

⁶ Although the court entered boilerplate language that it had "considered... the defendant's present and future ability to pay legal financial obligations..." no such consideration appears on the record and the court did not enter a finding that Mr. Gambill actually did have the ability to pay. CP 7.

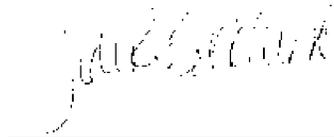
burden of proof violated Mr. Gambill's right to a fair trial. Testimony providing an improper opinion of Mr. Gambill's guilt violated his right to a trial by jury. Testimony seeking to make Mr. Gambill appear dangerous undermined the presumption of his innocence. The introduction of unlawfully seized evidence violated his Fourth Amendment and art. I, § 7 rights.

Mr. Gambill received ineffective assistance of counsel when his defense attorney violated his duty of loyalty, and failed to seek permission to withdraw. Defense counsel also provided ineffective assistance when he failed to object to prosecutorial misconduct and improper testimony, failed to move for suppression of unlawfully-obtained evidence, and failed to subject the state's case to meaningful adversarial testing. These errors require reversal of Mr. Gambill's conviction.

In the alternative the court violated Mr. Gambill's right to counsel when it ordered him to pay the cost of his court-appointed attorney without first determining whether he had the means to do so. The order that Mr. Gambill pay the cost of his public defender must be vacated.

Respectfully submitted on August 5, 2013,

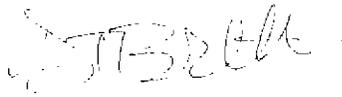
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jason Gambill, DOC #878082
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

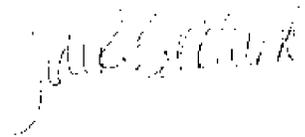
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 5, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

August 05, 2013 - 3:33 PM

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