

No. 46355-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Paulo Botello-Garcia,

Appellant.

Lewis County Superior Court Cause No. 12-1-00217-1

The Honorable Judge James Lawler

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Botello-Garcia's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
2. The trial court erred by overruling Mr. Botello-Garcia's objection to the introduction of evidence of uncharged misconduct.
3. The trial court should have excluded uncharged allegations of misconduct, introduced by the state to show Mr. Botello-Garcia's propensity to commit sex crimes.
4. The trial court misinterpreted ER 404(b).
5. The trial court failed to apply the four-step procedure required for admission of prior bad acts evidence under ER 404(b).
6. The evidence of uncharged misconduct was not admissible as *res gestae* of the charges or as evidence of a common scheme or plan.
7. The probative value of the evidence of uncharged misconduct was outweighed by the danger of unfair prejudice under ER 403.

ISSUE 1: A criminal conviction may not be based on propensity evidence. In this case, the jury heard extensive evidence regarding an uncharged act wholly unrelated to the allegations of the charges. Did Mr. Botello-Garcia's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

ISSUE 2: ER 403 and ER 404(b) prohibit introduction of evidence of uncharged misconduct, except in limited circumstances. Here, the court allowed the state to introduce extensive evidence regarding an uncharged alleged incident that took place in California. Did the trial court err by admitting evidence of uncharged misconduct?

8. Mr. Botello-Garcia's convictions violated his Sixth and Fourteenth Amendment right to an adequate charging document.
9. Mr. Botello-Garcia's convictions violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.

10. The charging document failed to allege critical facts identifying the charges and allowing Mr. Botello-Garcia to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

ISSUE 3: A charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information charging Mr. Botello-Garcia contained identical language for counts II and III, as well as for IV and V, and provided no facts to differentiate the charges from one another or from any other alleged act during the two-year charging period. Did the omission of critical facts infringe Mr. Botello-Garcia's right to an adequate charging document under the Fifth, Sixth, and Fourteenth Amendments and Wash. Const. art. I, §§ 3 and 22?

11. The court exceeded its statutory authority by ordering Mr. Botello-Garcia to pay the cost of his incarceration in county jail without finding that he had the present ability to pay.

ISSUE 4: The legislature only authorized courts to order an offender to pay the cost of his/her incarceration, but only if s/he has the current means to do so. Here, the court ordered Mr. Botello-Garcia to pay \$1,000 to the Lewis County Jail without finding that he had the current ability to pay, and while also finding him indigent. Did the sentencing court exceed its statutory authority?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Paulo Botello-Garcia became G.R.'s stepfather when she was about three years old. RP (2/3/14)¹ 36; RP (2/10/14) 438. G.R. referred to him as her dad. RP (2/3/14) 36.

Mr. Botello-Garcia was very strict with G.R. RP (2/3/14) 37; RP (2/11/14) 614. He did not let her go out with friends much and monitored her computer use. RP (2/3/14) 38.

Shortly before G.R.'s fourteenth birthday, her mother separated from Mr. Botello-Garcia. RP (2/10/14) 424. G.R. and her mother moved out of Mr. Botello-Garcia's home. RP (2/10/14) 430, 472-73.

About six months later, Mr. Botello-Garcia was planning a trip to visit his family in California for the summer. RP (2/4/14) 112; RP (2/10/14) 430. G.R. asked if she could go with him. RP (2/10/14) 458; RP (2/4/14) 132. She wanted to visit her step-cousins, with whom she was close. RP (2/4/14) 114, 132; RP (2/10/14) 458. The pair drove from Washington to Colorado and California. RP (2/4/14) 113-18. Once they were in California, Mr. Botello-Garcia went to Mexico and left G.R. with her cousins. RP (2/4/14) 118; RP (2/11/14) 510-11.

¹ The record also contains a volume of *voir dire* transcript from (2/3/14). None of the citations in this brief refer to that volume.

Approximately a year after the separation, G.R.'s mother was considering reuniting with Mr. Botello-Garcia. RP (2/10/14) 473. G.R. did not want them to get back together. RP (2/4/14) 115. G.R. said that she would rather see Mr. Botello-Garcia dead. RP (2/11/14) 615. At that same time, her mother found a notebook in G.R.'s room in which G.R. alleged that Mr. Botello-Garcia had touched her inappropriately. RP (2/10/14) 433, 473; Ex. 6. Those allegations ended G.R.'s mother's attempts to reconcile with Mr. Botello-Garcia. RP (2/10/14) 475.

Several days later, G.R. also reported to a teacher that Mr. Botello-Garcia had touched her sexually. RP (2/3/14) 100. She had an interview with a detective and described the touching. RP (2/4/14) 129-31.

Eventually, Mr. Botello-Garcia was charged with six counts of child molestation. Information, Supp CP.

Mr. Botello-Garcia moved for a bill of particulars. RP (7/27/12) 3; CP 1-2. He noted that the charging language was identical for each of the charges. RP (7/27/12) 3-4. He stated that he was unable to decipher six distinct acts from the state's discovery and did not understand what acts he was being accused of. RP (7/27/12) 3-6. The court ordered the state to provide a bill of particulars. CP 8.

The bill of particulars alleged that Mr. Botello-Garcia had touched G.R.'s chest and "butt area," and that he'd tried to put his hand down her

pants. CP 9. It also alleged that G.R. had manual contact with Mr. Botello-Garcia's penis. CP 9.

Later, G.R. also alleged that Mr. Botello-Garcia had attempted to force her to provide him with oral sex. RP (2/4/14) 140. Several months after that, G.R. alleged for the first time that Mr. Botello-Garcia had also tried to force her to engage in penile-vaginal penetration while they were in California. RP (2/3/14) 64-73, 112; RP (2/4/14) 159.

Eventually, the state amended the Information to charge Mr. Botello-Garcia with one count of first degree child molestation, two counts of second degree child molestation, and two counts of second degree rape of a child (for the incidents involving oral sex). CP 30-36. Mr. Botello-Garcia was eventually acquitted of the charge of child molestation in the first degree. RP (2/13/14) 865.

The language charging Mr. Botello-Garcia with second degree child molestation was identical for counts II and III. CP 31-33. It read as follows:

On or about or between January 14, 2009 and January 13, 2011, in Lewis County, State of Washington, the above-named defendant, being at least thirty-six months older than G.R. (DOB: 1/14/1997), who was at least twelve years old but less than fourteen years old and not married to the defendant and not in a state registered domestic partnership with the defendant, did have sexual contact with G.R. or did knowingly cause another, who was under the age of eighteen years, to have sexual contact with G.R. contrary the Revised Code of Washington 9A.44.086

CP 31-33.

The language charging Mr. Botello-Garcia in counts IV and V was also identical and read as follows:

On or about or between September 1, 2009 and January 13, 2011, in Lewis County, State of Washington, the above-named defendant did have sexual intercourse with G.R. (DOB: 1/14/1997), who was at least twelve years old but less than fourteen years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than G.R.; contrary to the Revised Code of Washington 10.99.020.

CP 33-35.

At the beginning of trial, the state moved *in limine* for permission to introduce evidence regarding G.R.'s allegation that Mr. Botello-Garcia had tried to rape her in California, six months after she moved out of his home. RP (2/3/14) 15-16. The prosecution argued that the allegation was *res gestae* of the charges. RP (2/3/14) 16. The prosecutor also stated that the Courts of Appeals had held that "all prior conduct" is admissible in child abuse and domestic violence cases. RP (2/3/14) 16-17. Over Mr. Botello-Garcia's objection, the court accepted the state's reasoning and permitted the evidence. CP (2/3/14) 20.

The court did not find by a preponderance of the evidence that the California incident had occurred. RP (2/3/14) 15-20. It also did not determine the relevance of the evidence to prove an element of the crimes with which Mr. Botello-Garcia was charged. RP (2/3/14) 15-20. The

court did not weigh the evidence's probative value against its prejudicial effect. RP (2/3/14) 15-20.

G.R. testified at length regarding the trip to California and provided a detailed account of the alleged rape attempt that took place there. RP (2/3/14) 64-73. The court did not give an instruction limiting the jury's consideration of G.R.'s testimony about the California incident in any manner. CP 38-65.

The jury convicted Mr. Botello-Garcia of counts II through V. RP (2/13/14) 865.

At sentencing, the court ordered Mr. Botello-Garcia to pay \$1,000 to the Lewis County Jail. CP 109. The order required him to begin payment within 60 days of the Judgment and Sentence. CP 110. It ordered the Department of Corrections (DOC) to issue a notice of payroll deduction. CP 110. The court did not find that Mr. Botello-Garcia had the present means to pay the cost of his incarceration. CP 105.

Mr. Botello-Garcia timely appealed. CP 120-21.

ARGUMENT

I. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. BOTELLO-GARCIA'S RIGHT TO DUE PROCESS BY ADMITTING EXTENSIVE PROPENSITY EVIDENCE.

A. Standard of Review.

Constitutional errors are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). The state must prove harmlessness beyond a reasonable doubt in order to overcome the presumption that constitutional error is prejudicial. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person's substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Evidentiary rulings are reviewed for abuse of discretion. *State v. Slocum*, --- Wn. App. ---, 333 P.3d 541, 547 (September 4, 2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* A court also abuses its discretion by taking a view that no reasonable person would make, applying the wrong legal standard, or basing a ruling on an erroneous view of the law. *Id.* A reviewing court considers whether a reasonable judge would have ruled

as the trial judge did. *State v. Gunderson*, No. 89297-1, 2014 WL 6601061, at *2, --- Wn.2d ---, --- P.3d --- (Nov. 20, 2014).

When the trial court admits evidence pursuant to a contested motion *in limine*, the losing party preserves a standing objection and the issue is preserved for appeal.² *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). An evidentiary error requires reversal if, within reasonable probabilities, the erroneous admission of evidence affected the outcome of the trial. *Slocum*, 333 P.3d at 550.

B. The court erred by admitting propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.³ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).⁴ A conviction

² Mr. Botello-Garcia did not argue a due process violation in the trial court. The argument may be raised for the first time on appeal because it constitutes manifest error affecting a constitutional right. RAP 2.5 (a)(3).

³ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

⁴ Washington courts are not bound by decisions of the federal circuit courts. *In re Crace*, 157 Wn. App. 81, 98 n. 7, 236 P.3d 914 (2010) *reversed on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012). However, decisions of the federal courts of appeal can provide guidance to Washington courts as they interpret the Fourteenth Amendment's due process clause.

based in part on propensity evidence is not the result of a fair trial.⁵
Garceau, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*,
519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

In addition to constitutional limitations, the rules of evidence
prohibit the introduction of propensity evidence.⁶ Under ER 404(b),

[e]vidence 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.

ER 404(b) must be read in conjunction with ER 403, which requires that
probative value be balanced against the danger of unfair prejudice.⁷

Gunderson, No. 89297-1, 2014 WL 6601061, at *3.

A trial court must begin with the presumption that evidence of
uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App.
444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d

⁵ A violation of due process that has practical and identifiable consequences is a manifest error affecting the accused person's constitutional right. RAP 2.5(a)(3). It may therefore be raised for the first time on review.

⁶ Evidentiary errors such as a misapplication of ER 403 and ER 404(b) are not themselves constitutional errors. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The Washington Supreme Court has not been asked to decide whether or not a conviction based on propensity evidence violates the accused person's Fourteenth Amendment right to due process. Neither *Smith* nor *Jackson* considered whether a conviction based on propensity evidence violates due process.

⁷ ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 333 P.3d at 546.

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 333 P.3d at 546.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted, the court must give a limiting instruction to the jury. *Gunderson*, No. 89297-1, 2014 WL 6601061, at *3.

The potential for prejudice from admission of other bad acts evidence is “at its highest in sex offense cases.” *Slocum*, 333 P.3d at 543-44 (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). Such evidence is inadmissible ‘not because it has no appreciable probative value but because it has too much.’ *Id.* The evidence presents a danger that the jury will convict not because of the strength of the evidence of the

charges but because of the jury's overreliance on evidence of other acts.

Id.

Over Mr. Botello-Garcia's objection, the trial court permitted extensive evidence regarding an allegation of attempted rape. G.R. claimed that the incident occurred in California several months after the alleged pattern of abuse had ended. RP (2/3/14) 15-20, 64-73. The court agreed with the state's argument that the evidence was admissible as *res gestae* of the charges. RP (2/3/14) 16, 20. The court also accepted the prosecutor's contention that appellate courts have ruled that "all prior conduct is admissible" in child abuse and domestic violence cases. RP (2/3/14) 16-17, 20. The court admitted the evidence in violation of ER 404(b) and of Mr. Botello-Garcia's right to due process. *Garceau*, 275 F.3d at 776, 777-778; *Slocum*, 333 P.3d at 543-44.

The court abused its discretion by admitting the evidence based on an erroneous view of the law. *Slocum*, 333 P.3d at 543-44, 547.

1. Evidence of the California allegation was not admissible as *res gestae* of the charges against Mr. Botello-Garcia.

Res gestae or "same transaction" evidence can be admissible to "complete the story of the crime." *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Such evidence must compose "inseparable parts of the whole deed or criminal scheme." *Id.* *Res gestae* evidence

involving other crimes or bad acts, however, must still meet the requirements of ER 404(b). *Id.* The evidence remains inadmissible to show that the accused has acted in conformity with his/her alleged bad character. *Id.*

Here, the trial court accepted the state's argument that G.R.'s testimony about Mr. Botello-Garcia's alleged act in California was admissible as *res gestae*. RP (2/3/14) 16-17, 20. But the additional allegation was not necessary to "complete the story of the crime." *Id.* Nor was it "inseparable" from the charges. *Id.* Indeed, the California allegation took place six months after G.R. and her mother had moved out of Mr. Botello-Garcia's home. RP (2/4/14) 112; RP (2/10/14) 430. The alleged pattern of abuse had long ended. Far from being an integral part of the charges against Mr. Botello-Garcia, G.R.'s testimony about the California trip presented an entirely separate allegation. The evidence was not admissible as *res gestae* of the charges. *Id.*

2. Evidence of the California allegation was not admissible to establish a common scheme or plan.

Evidence of other bad acts may be admissible to establish that a charge represents part of an overarching common scheme or plan. ER 404(b); *Slocum*, 333 P.3d at 546. Evidence of uncharged misconduct is admissible to demonstrate a common scheme or plan where (1) "several

crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan” or (2) “an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” *Gresham*, 173 Wn.2d at 422.

To make up part of a common plan, multiple acts must not be merely similar but “common features [of the] various acts [must be] naturally explained as caused by a general plan of which the charged crime and prior misconduct are the individual manifestations.” *Slocum*, 333 P.3d at 547 (quoting *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). Evidence that the defendant seized available opportunities to commit crime is insufficient to establish a common scheme or plan. *Id.* at 550.

Here, G.R.’s testimony concerning the California allegation was not admissible as part of a common scheme or plan. *Id.* First, the allegation was not a constituent part of a larger plan that included the charges against Mr. Botello-Garcia. *Gresham*, 173 Wn.2d at 422. Second, the California allegation and the charged offenses did not share common features indicating a common scheme or plan. *Slocum*, 333 P.3d at 547. At most, they suggested that Mr. Botello-Garcia seized available opportunities. *Id.* at 550. Such a pattern is insufficient to establish a common scheme or plan. *Id.* The state failed to establish that evidence

regarding the California allegation was admissible to demonstrate a common scheme or plan, as opposed to as propensity evidence. *Id.*; *Gresham*, 173 Wn.2d at 422.

3. The probative value of the evidence regarding the California allegation was far outweighed by the danger of unfair prejudice.

Evidence introduced under ER 404(b) is inadmissible if its probative value is outweighed by the danger of unfair prejudice. *Gunderson*, No. 89297-1, 2014 WL 6601061, at *3. ER 404(b) should not be read in isolation but in conjunction with the other rules of evidence). Evidence of other bad acts carries a particularly high risk of unfair prejudice in cases involving allegations of sex crimes and domestic violence. *Id.* at *4.

Here, G.R.'s testimony regarding the California allegation was inadmissible under ER 403. The evidence was not relevant to any element of the charges against Mr. Botello-Garcia. Rather, the testimony presented a totally new allegation.

The danger of unfair prejudice stemming from the evidence was very high. G.R.'s testimony about the California incident was the only allegation that Mr. Botello-Garcia attempted penile-vaginal penetration. The jurors likely viewed that allegation as worse than conduct involved with the actual charges. G.R.'s testimony about the California incident

was also more detailed than the cursory explanations she gave of the conduct underlying each charge at issue in the trial. RP (2/3/14) 41-72.

Evidence about the California allegation was inadmissible because the danger of unfair prejudice far outweighed any probative value. ER 403; *Gunderson*, No. 89297-1, 2014 WL 6601061, at *3.

4. Mr. Botello-Garcia was prejudiced by the erroneous admission of propensity evidence.

When there is significant conflicting evidence, the erroneous admission of evidence under ER 404(b) is more likely to be prejudicial. *See e.g. Slocum*, 333 P.3d at 551. The improper admission the California allegation requires reversal if there is a reasonable probability that it affected the outcome of the trial. *Id.* at 550.

In this sex offense case, the risk of prejudice is particularly high. *Gunderson*, No. 89297-1, 2014 WL 6601061, at *4. The California allegation was described in far more detail than the conduct for which Mr. Botello-Garcia was actually charged. RP (2/3/14) 41-72. The alleged conduct was also more shocking and offensive than that underlying the charges. Indeed, the court stated upon admitting the evidence that “it goes towards proving the state’s case.” RP (2/3/14) 20. It is apparent that the judge believed the evidence had the ability to affect the outcome of the trial.

Additionally, the court failed to give a limiting instruction. The judge did not warn jurors against using the California incident as evidence of Mr. Botello-Garcia's propensity to commit the charged crimes.⁸ CP 38-65; *Gunderson*, No. 89297-1, 2014 WL 6601061, at *3. Mr. Botello-Garcia was prejudiced by the erroneous admission of the propensity evidence. *Id.*

The trial court misinterpreted ER 404(b) and infringed Mr. Botello-Garcia's Fourteenth Amendment right to due process by denying his motion to exclude propensity evidence.

The court abused its discretion by admitting the testimony, which was not relevant to show a common scheme or plan or to give the full story of the charged allegations. *Gresham*, 173 Wn.2d at 422; *Mutchler*, 53 Wn. App. at 901. The court accepted the prosecutor's argument that "all prior conduct is admissible" in child abuse and domestic violence cases. RP (2/3/14) 16-17, 20; *Slocum*, 333 P.3d at 547. That statement was an erroneous interpretation of the law. *Id.* Accordingly, the court's ruling constituted an abuse of discretion. *Id.*

⁸ Defense counsel did not request a limiting instruction. But the language of *Gunderson* places the burden of informing the jury that it cannot consider uncharged conduct as propensity evidence upon the court. *Gunderson*, No. 89297-1, 2014 WL 6601061, at *3.

The danger of unfair prejudice from the testimony also outweighed any probative value. ER 403. The prejudice was magnified by the absence of any limiting instruction. CP 38-65.

The court violated Mr. Botello-Garcia's right to due process and ER 404(b) by admitting extensive propensity evidence. *Garceau*, 275 F.3d at 776, 777-778. His convictions must be reversed. *Id.* at 778.

II. THE INFORMATION CHARGING MR. BOTELLO-GARCIA WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE CRITICAL FACTS.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

- B. The document charging Mr. Botello-Garcia fails to allege sufficient facts to allow him to an acquittal or conviction as a bar against a second prosecution for the same crime.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.⁹ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).¹⁰ The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

⁹ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

¹⁰ The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amend. V, XIV.

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information charging Mr. Botello-Garcia does not enumerate any facts beyond the alleged victim’s initials. CP 30-36. Each charge encompasses a period spanning either seventeen months or two years. CP 31-35. The language of charges II and III is identical. RP 31-33. The language of charges IV and V is identical as well. CP 33-35. In short, the charging language could have encompassed any alleged sexual misconduct against G.R. within the lengthy charging periods. CP 31-35.

The language charging Mr. Botello-Garcia is deficient. It is insufficient to allow him to plead the Information as a bar to future prosecution for the same alleged acts. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. Mr. Botello-Garcia could be subsequently

charged with any act of sexual misconduct against G.R. between her twelfth and fourteenth birthdays and the Information would fail to demonstrate that he had already faced prosecution for that same act.¹¹

The Information is constitutionally deficient. Mr. Botello-Garcia's convictions must be reversed and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

III. THE COURT ERRED BY ORDERING MR. BOTELLO-GARCIA TO REIMBURSE THE LEWIS COUNTY JAIL.

A. Standard of Review.

Issues of statutory interpretation are reviewed *de novo*. *Keithly v. Sanders*, 170 Wn. App. 683, 687, 285 P.3d 225 (2012).

B. The sentencing court did not have the authority to order Mr. Botello-Garcia to pay the cost of his incarceration without first determining whether he had the *current* ability to pay.

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).

¹¹ In addition, the Information failed to give adequate notice of the alleged offenses. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. Although the state provided a bill of particulars relating to the original Information, it did not provide an updated bill after amending the Information.

A sentencing court may only order a person to pay the cost of his/her incarceration upon finding that s/he “*at the time of sentencing*, has the means to pay the cost of incarceration.” RCW 9.94A.760(2) (emphasis added). The plain language of the statute permits the court to require payment of incarceration costs only of someone who has the *current* ability to pay. RCW 9.94A.760(2).

This requirement stands in contrast to that regarding other LFOs, of which the court may order payment as long as the person “is or will be able to pay them.” RCW 10.01.160(3). This language – which applies to all LFOs except for costs of incarceration – permits an order of payment even if the accused cannot pay at the time of sentencing but will be able to pay at some future date. RCW 10.01.160(3).

Here, the court did not check the box next to the boilerplate finding that Mr. Botello-Garcia had the “present means to pay the cost of incarceration.” CP 105. In fact, the court found Mr. Botello-Garcia indigent on the day of sentencing. CP 122-23. Even so, the court ordered him to pay \$1,000 to the Lewis County Jail. CP 109. The court ordered Mr. Botello-Garcia to begin payment of his LFOs within sixty days of the date of the Judgment and Sentence and ordered the Department of Corrections (DOC) to immediately issue a notice of payroll deduction. CP 110.

The court exceeded its statutory authority by ordering Mr. Botello-Garcia to pay the cost of his pre-trial incarceration when he did not have the means to do so at the time of sentencing. RCW 9.94A.760(2); *Hathaway*, 161 Wn. App. at 651-653. The order that Mr. Botello-Garcia pay \$1,000 to the Lewis County Jail must be vacated. *Id.*

C. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute.

Hathaway, 161 Wn. App. at 651-653.¹² A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *superseded on other grounds as recognized in State v. Cobos*, No. 89900-2, 2014 WL 6687191, at *1, --- Wn.2d ---, --- P.3d --- (Nov. 26, 2014); *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing

¹² *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).¹³

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* The cases do not govern Mr. Botello-Garcia's claim that the court lacked statutory authority to order him to pay the cost of his incarceration without first determining whether he had the ability to do so.¹⁴

¹³ See also, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

¹⁴ The issue will likely be resolved when the Supreme Court issues its opinion in *Blazina*.

Additionally, a court may consider challenges to LFOs for the first time on appeal when doing so is necessary “in order to preserve the ends of justice.” RAP 1.2(c); *Hathaway*, 161 Wn. App. at 651.

Because the sentencing court ordered Mr. Botello-Garcia to begin payment of the \$1,000 ordered to the Lewis County Jail within 60 days of the date of Judgment and Sentence, consideration of this issue is necessary to serve the ends of justice. *Id.*; CP 110. The court also ordered DOC to issue a notice of payroll deduction. CP 110. Mr. Botello-Garcia is unlikely to be able to take advantage of the statutory mechanisms for challenging this erroneous LFO during his incarceration but is subject to having any DOC wages withheld nonetheless. This court should consider the merits of Mr. Botello-Garcia’s claim.

CONCLUSION

The court violated Mr. Botello-Garcia’s right to due process and ER 404(b) by admitting extensive evidence regarding an allegation of uncharged misconduct. The Information charging Mr. Botello-Garcia was insufficient because it failed to allege any critical facts. Mr. Botello-Garcia’s convictions must be reversed.

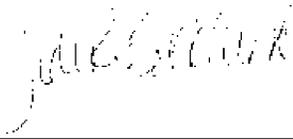
In the alternative, the court exceeded its statutory authority by ordering Mr. Botello-Garcia to pay \$1,000 to the Lewis County Jail when

he did not have the financial means to do so at the time of sentencing.

That order must be vacated.

Respectfully submitted on December 9, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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Aberdeen, WA 98520

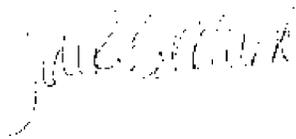
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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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 December 9, 2014.



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BACKLUND & MISTRY

December 09, 2014 - 12:59 PM

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