

No. 47286-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kevin Bowen,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00928-1

The Honorable Judge Leila Mills

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The Information charging Mr. Bowen deprived him of his Sixth and Fourteenth Amendment right to adequate notice of the charges against him.
2. Mr. Bowen's conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
3. The Information failed to charge the crime of possessing a stolen vehicle.
4. The charging language for Mr. Bowen's possession of a stolen vehicle charge was deficient because it failed to include the critical element that he had withheld or appropriated the car to the use of someone other than the true owner.

ISSUE 1: Charging language for possession of a stolen vehicle fails to include all essential elements if it does not allege that the accused person "with[held] or appropriate[d] the [vehicle] to the use of any person other than the true owner or a person entitled thereto." Was the Information charging Mr. Bowen constitutionally deficient when it did not include that language?

5. The charging language for Mr. Bowen's possession of a stolen vehicle charge was deficient because it did not allege possession of "specifically described property."
6. The charging language for Mr. Bowen's possession of stolen property charge was deficient because it did not allege possession of "specifically described property."
7. By omitting critical facts, the Information charging Mr. Bowen did not permit him to adequately prepare his defense or defend against subsequent prosecution for the same offense.

ISSUE 2: Charging language for possession of stolen property offenses must allege that the accused person illegally possessed "specifically described property." Was the Information charging Mr. Bowen deficient when it did not include any

language describing the stolen vehicle or stolen property he was alleged to have possessed?

8. Mr. Bowen's convictions were based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
9. The trial court erred by overruling Mr. Bowen's objection and allowing the state to introduce evidence of an unrelated, uncharged burglary and two car thefts, all committed by persons unknown.
10. The trial court should have excluded the evidence of the unrelated burglary and car thefts, which were not relevant to the charges against Mr. Bowen under ER 401 and 402.
11. The risk of unfair prejudice outweighed the probative value of the evidence under ER 403.
12. The evidence of uncharged misconduct was not admissible under ER 404(b).
13. The evidence was not admissible as *res gestae* of the offenses with which Mr. Bowen was charged.

ISSUE 3: A criminal conviction may not be based on propensity evidence. Did Mr. Bowen's convictions violate his Fourteenth Amendment right to due process because they were based in part on propensity evidence?

ISSUE 4: Evidence is not admissible if it is irrelevant or if its probative value is outweighed by the risk of unfair prejudice. Did the court err by admitting evidence of a burglary and two car thefts that were not linked to Mr. Bowen in any way but which the state used as circumstantial evidence of his guilt?

14. Mr. Bowen was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
15. Defense counsel provided ineffective assistance by unreasonably failing to object to inadmissible evidence of drug paraphernalia found in the car Mr. Bowen was driving.

ISSUE 5: Defense counsel provides ineffective assistance by unreasonably failing to object to inadmissible evidence. Did Mr. Bowen's counsel provide ineffective assistance by waiving objection to irrelevant, prejudicial evidence of drug paraphernalia found in the car he was driving?

16. The court erred by ordering Mr. Bowen to pay \$4,335 in legal financial obligations absent any inquiry into whether he had the means to do so.

17. The court erred by entering finding of fact 4.1. CP 315.

ISSUE 6: A court may not order a person to pay legal financial obligations (LFOs) without conducting an individualized inquiry into his/her means to do so. Did the court err by ordering Mr. Bowen to pay \$4,335 in LFOs while also finding him indigent and without analyzing whether he had the money to pay?

18. The court erred by ordering Mr. Bowen to pay \$500 to the Kitsap County Sheriff's Office.

19. The court erred by ordering Mr. Bowen to pay \$100 into an expert witness fund.

ISSUE 7: A court exceeds its authority by ordering payment of legal financial obligations beyond what is permitted by statute. Did the court exceed its authority by ordering Mr. Bowen to pay a \$500 contribution to the Kitsap County Sheriff's office and a \$100 contribution to an "expert witness fund," neither of which are authorized by statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kevin Bowen was attending a wake for a recently-deceased family friend at his mother's home. RP 280.¹ There were 25-50 people in and around the small trailer for the memorial. RP 280, 295.

Mr. Bowen's mother asked him to go pick up his niece in Port Orchard. RP 281.

Mr. Bowen tried to leave, but his car was blocked in by numerous other cars. RP 281-282, 296-298. He went back into the house and tried to find the cars' owners so they could move their cars and let him back out. RP 281-282, 296-98. The process became complicated and eventually someone who was attending the wake offered to let Mr. Bowen borrow his car instead. RP 282, 298.

The other man tossed Mr. Bowen his keys and Mr. Bowen drove off to pick up his niece in the borrowed car. RP 282-283, 298.

On the way back, Mr. Bowen was pulled over with his niece in the car.² RP 157, 180, 279. When the officer ran the car's license plate, it came back as stolen. RP 159. It later turned out that some items in the back of the car had been stolen as well. RP 180-221.

¹ Unless otherwise specified, all citations to the verbatim report of proceedings refer to the volumes encompassing the trial, dates 1/12/15 through 1/20/15.

Upon his arrest, the police found a small baggie in Mr. Bowen's pocket. Information filed 9/16/14, Supp. CP. A field test of the substance inside was positive for methamphetamine. Information filed 9/16/14, Supp. CP.

The state charged Mr. Bowen with possession of a stolen vehicle using the following language:

On or about March 8, 2014, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly possess a stolen motor vehicle, contrary to Revised Code of Washington 9A.56.068.
CP 2.

The state also charged Mr. Bowen with possession of stolen property using this language:

On or about March 8, 2014, in the County of Kitsap, State of Washington, the above-named Defendant did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, said property being in excess of seven hundred fifty dollars (\$750.00) in value, contrary to the Revised Code of Washington 9A.56.140(1) and RCW 9A.56.160(1)(a).
CP 2.

The state also levied the charge of drug possession. CP 1.

Before trial on the other charges, Mr. Bowen sought to enter an Alford plea to drug possession. RP 20-23; Statement of Defendant on

² Mr. Bowen did not tell the officer about the wake or picking up his niece. RP 158. Instead he told him that he had borrowed the car from a friend to move some things. RP 158.

Plea of Guilty filed 1/12/15, Supp. CP. He agreed that the court could review the police reports or statement of probable cause to establish the factual basis for the plea. Statement of Defendant on Plea of Guilty filed 1/12/15, Supp. CP

The statement of probable cause does not allege that the deputies ever did any testing of the substance seized from Mr. Bowen beyond the field test. Information filed 9/16/14, Supp. CP. There is no police report in the court file.

At trial, the state offered evidence of other crimes that had been committed a few days before the theft of the car Mr. Bowen was driving (the Ford). Over Mr. Bowen's objection, the father of the car's owner testified that the house had been burglarized and two other cars had been stolen three to seven days before the Ford went missing. RP 119-120, 125.

Mr. Bowen moved *in limine* to exclude evidence of the burglary other car thefts, arguing that it was irrelevant to the charged offenses and that there was no evidence linking Mr. Bowen to those prior events. RP 92-96. But the court overruled the objection, allowing the evidence as *res gestae* of the charged offenses. RP 97.

The state elicited detailed testimony regarding the condition of the home after the other burglary, what was stolen, and the details of the two other missing cars. RP 118-120.

The state's police witnesses also testified about drug paraphernalia found in the center console of the car Mr. Bowen had driven. RP 232-233. The state presented photographs of hypodermic needles, dirty spoons, and straws. Ex 72, 74. The prosecutor also elicited testimony regarding how the paraphernalia was used and what drugs it could be used to ingest, including methamphetamine. RP 232-233.

Mr. Bowen's attorney did not object to any of the evidence regarding the drug paraphernalia in the car. RP 51-53; 232-233.

The court did not conduct any inquiry into Mr. Bowen's financial situation at sentencing. RP (2/27/15) 7-31. A pre-sentence assessment provided that he had no income and had over \$40,000 in debt from prior legal financial obligations (LFOs). Report filed 2/18/15, Supp. CP. The court found Mr. Bowen indigent for purposes of appeal. CP 337-38. Still, the court ordered Mr. Bowen to pay \$4,335 in LFOs. CP 315.

This timely appeal follows. CP 323.

ARGUMENT

I. THE INFORMATION CHARGING MR. BOWEN WITH POSSESSION OF A STOLEN VEHICLE AND POSSESSION OF STOLEN PROPERTY WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO INCLUDE ALL ESSENTIAL ELEMENTS AND CRITICAL FACTS.

A. The Information failed to allege that Mr. Bowen “withheld or appropriated” the vehicle, so *State v. Satterthwaite* requires reversal of his conviction for possession of a stolen vehicle.

It is not illegal to possess a stolen vehicle unless one also withholds or appropriates it to the use of someone other than the true owner. RCW 9A.56.140(1).

Because the Information charged Mr. Bowen only with knowingly possessing a stolen vehicle, it omits this essential element and is constitutionally deficient. *State v. Satterthwaite*, No. 45732-6-II, -- Wn. App. --, 344 P.3d 738, 739 (March 10, 2015).

A charging document is constitutionally adequate only if it includes all essential elements of a crime. *Id.*; U.S. Const. Amend. VI; XIV.

A conviction for possession of a stolen vehicle requires the state to prove that the accused “with[held] or appropriate[d] the [vehicle] to the use of any person other than the true owner or a person entitled thereto.” *Id.*; RCW 9A.56.140(1).

Because the “withhold or appropriate” requirement is key to the very illegality of possession of a stolen vehicle, it is an essential element that must be charged in the information. *Satterthwaite* --- Wn. App. ---, 344 P.3d at 740-41.

In *Satterthwaite*, the court reversed a conviction for a charge of possession of a stolen motor vehicle for failure to include that necessary language. *Id.*

The charging language in Mr. Bowen’s possession of a stolen vehicle offense suffers from the same deficiency.³ CP 2.

Because “withhold or appropriate” is an essential element of the charge, and because it is not found even under a liberal construction of the Information, Mr. Bowen’s conviction for possession of a stolen vehicle must be reversed. *Id.*

³ Mr. Bowen did not object to the deficiency in the trial court. However, this doesn’t change the analysis: even construing the document liberally, the necessary elements do not appear in any form, nor can they be found by any fair construction. *Satterthwaite*, --- Wn. App. at ---; 344 P.3d at 739.

If the Information is deficient, prejudice is presumed. *State v. Rivas*, 168 Wn. App. 882, 888, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

- B. The Information was constitutionally deficient because it failed to allege critical facts related to Mr. Bowen’s charges for possession of a stolen vehicle and of stolen property.

The charging language for Mr. Bowen’s possession of a stolen vehicle and stolen property offenses did not include any case-specific facts. CP 2. The Information does not allege that Mr. Bowen possessed a specific vehicle and does not include any language describing the allegedly stolen property. CP 2.

The Information is constitutionally deficient because it does not charge Mr. Bowen with possession of “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002).

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); U.S. Const Amends. VI; XIV.

Any offense charged in the language of the statute must also “be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *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). The charge must 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.*

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 cases involving stolen property, the Information need not name the owner of the property, but must “clearly” charge the accused person with a crime relating to “specifically described property.” *Greathouse*, 113 Wn. App. at 903. When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information fails these requirements because it includes no critical facts. *Russell*, 369 U.S. at 763-64. In the absence of any critical facts, the Information does not give adequate notice of the charges; nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

The Information does not include any description of the stolen vehicle or property that Mr. Bowen was alleged to have possessed. CP 2. Accordingly, even when liberally construed, it does not charge Mr. Bowen with possession of “specifically described property.” *Greathouse*, 113 Wn.

App. at 903. Because of this, the allegation is “too vague and indefinite upon which to deprive [Mr. Bowen] of his liberty.” *Id.* It provides neither adequate notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631.

The Information is constitutionally deficient. Mr. Bowen’s convictions for possession of a stolen vehicle and possession of stolen property must be reversed, and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

II. THE COURT ERRED BY ADMITTING EXTENSIVE IRRELEVANT EVIDENCE OF A PRIOR BURGLARY AND TWO CAR THEFTS THAT WERE NOT LINKED TO MR. BOWEN IN ANY WAY.

Mr. Bowen was pulled over while driving a Ford Explorer that turned out to have been stolen. RP 157-159. There was no evidence linking him to the home from which the Ford was taken. No witness claimed that Mr. Bowen had ever been to the home. Mr. Bowen was not charged with theft or burglary. CP 1-6.

Still, the court admitted testimony that that home had been burglarized and two other cars had been stolen three to seven days before the Ford went missing. RP 92-96, 119-120, 125. A state witness testified at length about the condition of the home after the burglary and what had been stolen. RP 119-120, 125.

The court admitted the evidence of the unrelated, uncharged burglary and car thefts over Mr. Bowen's objection. RP 92-97. The trial judge ruled that the evidence was part of the *res gestae* of the possession of stolen vehicle and possession of stolen property offenses because the crimes had occurred "very close in time" to one another. RP 97.

The court erred by admitting the evidence, which was irrelevant and highly prejudicial.

A. The evidence of the unrelated burglary and thefts was inadmissible under ER 402 and ER 403.

Evidence is not relevant unless it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is not admissible. ER 402.

Here, the evidence of the unrelated burglary and car thefts at the home were not relevant to any issue at trial. The other crimes did not shed any light upon whether Mr. Bowen knew that the car and items inside were stolen. The evidence was inadmissible under ER 401 and 402.

Evidence must also be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Here, the evidence of the unrelated burglary and car thefts at the home had virtually no probative value and carried a significant risk of unfair prejudice.

The only potential purpose of the evidence was to garner sympathy for the alleged victim, who had lost property far beyond that at issue in Mr. Bowen's case. The evidence encouraged the jury to want to hold someone accountable despite the absence of evidence that Mr. Bowen had anything to do with the burglary and the other missing cars. The evidence was inadmissible under ER 403.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

The prosecutor began her closing argument by repeating the details of the prior burglary and car thefts from the home and entreating the jury that "details matter." RP 347-48. The state's attorney explicitly encouraged the jury to find Mr. Bowen guilty based on the evidence of the unrelated, uncharged offenses instead of based on the evidence relevant to the case. Mr. Bowen was prejudiced by the improper admission of that evidence.⁴ *Id.*

⁴ Indeed, the court stated at sentencing that it thought Mr. Bowen had been "audacious" by going back to the home a second time to take more." RP (2/27/15) 24. This was despite the fact that the state had not presented any evidence that Mr. Bowen had ever been to the house,

The court abused its discretion by admitting extensive, irrelevant, prejudicial evidence. *Id.*; ER 402, 403. Mr. Bowen’s convictions for possession of a stolen vehicle and stolen property must be reversed. *Id.*

B. The evidence was inadmissible under ER 404(b).

Evidence of “other crimes, wrongs, or acts” is inadmissible “to prove the character of a person in order to show action in conformity therewith.” ER 404(b).

When analyzing evidence of uncharged misconduct under ER 404(b), a trial court must begin with the presumption that the evidence is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The burden is on the state to overcome this presumption. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must find by a preponderance of the evidence, *inter alia*, that the misconduct actually occurred. *Slocum*, 183 Wn. App. at 448. Such a finding would have been

much less that he was connected to the prior burglary and theft. The prejudicial nature of the testimony overcame even the court’s ability to judge the case based only on the actual evidence against Mr. Bowen.

impossible in this case because the state had no evidence linking Mr. Bowen to the prior thefts at the home.⁵

The evidence of the unrelated burglary and car thefts was inadmissible under ER 404(b). *Id.*

C. The evidence was inadmissible under the *res gestae* exception.

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.*

Here, the burglary and car thefts at the home occurred three to seven days before the Ford went missing. RP 119-120, 125. Those crimes were not “inseparable parts” of a single criminal scheme. *Mutchler*, 53 Wn. App. at 901. Indeed, only speculation linked those other crimes to the theft of the Ford at all. The evidence was not necessary to “complete the story” of Mr. Bowen’s possession of a stolen vehicle and stolen property offenses. *Id.*

⁵ Before admitting evidence under ER 404(b), the court must also identify the purpose for which it is introduced, determine whether it is relevant to any element of the charged crime, and weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448. Beyond a passing reference to the *res gestae* of the charged crimes, the court failed to conduct any of this required analysis on the record before admitting evidence of the other burglary and thefts. RP 92-97.

Res gestae evidence involving other crimes or bad acts must also still meet the requirements of ER 404(b). *Id.* As outlined above, the evidence of the unrelated burglary and car thefts in Mr. Bowen's case was not admissible under ER 404(b).

The court abused its discretion by admitting evidence of the unrelated burglary and car thefts as part of the *res gestae* of Mr. Bowen's charges. *Id.*

D. The court violated Mr. Bowen's right to due process by permitting the jury to convict him based on propensity evidence.

A criminal conviction also may not be based on propensity evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); ER 404(b); *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

The use of propensity evidence to prove a crime may violate due process.⁶ 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). A conviction based in part on propensity evidence is not the result of a fair trial.⁷ *Garceau*, 275 F.3d at 776, 777-778; *see also Old*

⁶ 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).

⁷ 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.

Chief v. United States, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Here, the evidence of the prior thefts at the home supported a propensity-based inference that Mr. Bowen was more likely to have known the Ford and the items inside were stolen because he had stolen before. The unfairness of this inference is exacerbated by the fact that there was no evidence that Mr. Bowen had been involved in the prior offenses in any way. Still, the prosecutor argued in closing that the prior burglary and car thefts were evidence of Mr. Bowen's guilt. RP 347-348.

Constitutional error is presumed prejudicial. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*

Here, the state relied on the prior thefts and other two stolen cars in closing argument. RP 347-348. The prosecutor encouraged the jury to infer that Mr. Bowen was involved in far more criminal activity than simple possession of a stolen car containing some stolen items. RP 347-348. The state cannot establish harmlessness beyond a reasonable doubt. *Id.*

Mr. Bowen's convictions violated his right to due process because they are based in part on propensity evidence. *Wade*, 98 Wn. App. at 336; *Gunderson*, 181 Wn.2d at 922. Those convictions must be reversed. *Id.*

III. MR. BOWEN’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO INADMISSIBLE, HIGHLY PREJUDICIAL EVIDENCE OF DRUG PARAPHERNALIA FOUND IN THE CAR HE WAS DRIVING.

When Mr. Bowen was arrested, the police found drug paraphernalia in the console of the car he had been driving. RP 232-233. The state did not levy any charges regarding the paraphernalia. CP 2-4. At trial, the state elicited extensive evidence about the paraphernalia, including photographs and officer testimony regarding how it was used and that it could be used to ingest numerous drugs, including methamphetamine. RP 232-233; Ex 72, 74.

The evidence of the drug paraphernalia did not shed any light on the factual issue at trial – whether Mr. Bowen knew the car he was driving and the items inside had been stolen. The paraphernalia also did nothing strengthen the evidence that Mr. Bowen was tied to the car beyond having driven it once. Still, defense counsel did not object to its admission. RP 51-53, 232-233.

Mr. Bowen’s attorney provided ineffective assistance⁸ by failing to object to the evidence of drug paraphernalia in the car. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). The

⁸ An accused person had the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

evidence was not admissible and was highly prejudicial. ER 401; ER 402; ER 403; ER 404(b).

The paraphernalia in the car did not have “any tendency to make the existence of any fact that is of consequence” more or less probable. ER 401; ER 402. There was nothing linking Mr. Bowen to the paraphernalia. Even if there had been, the presence of drug paraphernalia did nothing to clarify whether Mr. Bowen had knowingly possessed a stolen car and other stolen property.

The probative value of the paraphernalia evidence was also substantially outweighed by the danger of unfair prejudice. ER 403. Beyond simply admitting the evidence of the paraphernalia’s existence, the state also elicited testimony about how it was used and what drugs it could be used to ingest. RP 232-233.

In this trial, the state took the extra step of making it clear that the paraphernalia demonstrated that someone who had been in the car was a meth user. This encouraged the jury to infer that Mr. Bowen was more likely to have stolen or knowingly possessed stolen items because of alleged drug use instead of based on the admissible evidence. The paraphernalia evidence was inadmissible under ER 403.

The paraphernalia was also inadmissible as evidence of uncharged misconduct. ER 404(b). The court failed to conduct the necessary

balancing on the record or to identify a proper purpose for which it was offered. *Slocum*, 183 Wn. App. at 448. Indeed, such an analysis would have come out in favor of exclusion given the complete disconnect between drug paraphernalia and the charges at issue at trial.

A failure to object constitutes deficient performance when counsel has no valid tactical reason to waive objection. *Hendrickson*, 138 Wn. App. at 833. Counsel had no justification for waiving objection in this case.

Mr. Bowen's attorney had no basis to want the drug paraphernalia and related testimony admitted against his client. It was not relevant to the defense theory, which was that Mr. Bowen had borrowed the car and did not know that it or its contents were stolen. *See* RP 373-390. The only possible purpose of the evidence was to permit the jury to infer that Mr. Bowen was a drug user. Counsel provided deficient performance by failing to object. *Id.*

Mr. Bowen was prejudiced by his attorney's deficient performance.⁹ *Kyllo*, 166 Wn.2d at 862. As outlined above, an objection to the evidence would have been sustained at trial.

⁹ Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862.

Once the paraphernalia was admitted, however, the prosecutor was able to ask the officers about it and elicit testimony linking Mr. Bowen to methamphetamine use. RP 232-233. This encouraged the jury to infer that Mr. Bowen was a drug user and more likely to steal or possess stolen property to support his habit. There is a reasonable probability that defense counsel's failure to object affected the outcome of trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Bowen's attorney provided ineffective assistance by failing to object to inadmissible evidence of the drug paraphernalia in the car he was driving absent a valid tactical reason. *Id.*; *Hendrickson*, 138 Wn. App. at 833. Mr. Bowen's convictions for possession of a stolen vehicle and possession of stolen property must be reversed. *Id.*

IV. THE STATE FAILED TO PROVIDE AN ADEQUATE FACTUAL BASIS TO SUPPORT MR. BOWEN'S ALFORD PLEA TO DRUG POSSESSION.

There is no evidence in the record that the deputies ever conclusively established that the material seized from Mr. Bowen's pocket was a controlled substance. The closest thing is a mention in a Statement of Probable Cause that a field test came back positive for methamphetamine. Information filed 9/16/14, Supp. CP.

Because a field test, alone, is not enough to conclude that substance Mr. Bowen possessed was actually contraband, there is an inadequate factual basis for Mr. Bowen's Alford plea to drug possession.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004).¹⁰

A guilty plea is not voluntary if it is not supported by sufficient factual basis. *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111 (2000). The factual basis for a guilty plea must be developed on the record at the time the plea is taken. *Id.* at 415. Failure to sufficiently develop the facts on the record at the time of a plea requires vacation of the conviction and dismissal of the charge with prejudice. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006).

In the case of an *Alford* plea, (because the accused does not admit guilt) the court must establish an independent factual basis for the plea. *State v. Scott*, 150 Wn. App. 281, 295, 207 P.3d 495 (2009). The factual

¹⁰ Constitutional violations are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 316 P.3d 469 (2013). The voluntariness of a guilty plea may be raised for the first time on appeal. *State v. Mendoza*, 157 Wn.2d 582, 589, 141 P.3d 49 (2006); *State v. Walsh*, 143 Wn.2d 1, 4, 17 P.3d 591 (2001). The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).

basis for an *Alford* plea is inadequate unless it is sufficient for a jury to find the accused guilty of the offense. *In re Cross*, 178 Wn.2d 519, 526, 309 P.3d 1186 (2013) *cert. denied sub nom. Cross v. Washington*, 135 S.Ct. 1701 (2015).

A conviction for drug possession requires proof that the material found on the accused person is actually a controlled substance. *State v. Colquitt*, 133 Wn. App. 789, 794, 137 P.3d 892 (2006). A field test of the substance is insufficient to meet this element. *Id.*; *See also State v. Roche*, 114 Wn. App. 424, 440, 59 P.3d 682 (2002), *as amended* (Dec. 4, 2002).

At Mr. Bowen's plea hearing, the state did not develop an adequate factual basis for a plea to drug possession. RP 20-23. The trial judge stated she was gleaning the factual basis for the charge from the police report in the court file. RP 22. But the report states only that the police field tested the substance found on Mr. Bowen and that the field test was positive.¹¹ Information filed 9/16/14, Supp. CP.

Without more, the positive field test was inadequate to establish that the substance in Mr. Bowen's possession was a controlled substance.

¹¹ There is no actual police report in the court file. No document is attached to Mr. Bowen's statement on plea of guilty. Statement of Defendant on Plea of Guilty filed 1/12/15, Supp. CP. There is, however, a Statement of Probable Cause drafted by the arresting deputy on the date of Mr. Bowen's arrest. Information filed 9/16/14, Supp. CP. Because it is the only document resembling a police report contained in the file, Mr. Bowen assumes the court reviewed this Statement of Probable Cause to establish the factual basis for his *Alford* plea. The form Mr. Bowen signed permitted the court to consider a police report or a statement of probable cause. Statement of Defendant on Plea of Guilty filed 1/12/15, Supp. CP.

Colquitt, 133 Wn. App. at 794. Accordingly, the factual basis for Mr. Bowen's Alford plea was inadequate. *Cross*, 178 Wn.2d at 526.

Because the state failed to establish a complete factual basis for Mr. Bowen's plea, it cannot sustain its burden of demonstrating that the plea was voluntary. *S.M.*, 100 Wn. App. at 414. Mr. Bowen's drug possession conviction must be dismissed with prejudice. *R.L.D.*, 132 Wn. App. at 706.

V. THE COURT'S ORDERS RELATED TO LEGAL FINANCIAL OBLIGATIONS VIOLATED ITS STATUTORY AUTHORITY.

A. The trial court erred by ordering Mr. Bowen to pay \$4335 in legal financial obligations without inquiring into his ability to pay.

Mr. Bowen was found indigent at the end of trial. CP 337-338.

The court received a report pre-sentencing, providing that Mr. Bowen had no income and at least \$40,000 in debt from prior legal financial obligations (LFOs). Report filed 2/18/15, Supp. CP. Still, the court ordered him to pay \$4,335 in additional LFOs. CP 315.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 315 (finding 4.1). But the court did not conduct any particularized inquiry into Mr. Bowen's financial situation at sentencing or

at any other time. RP (2/27/15) 7-31. The court erred by ordering Mr. Bowen to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that “[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court from ordering LFOs absent an individualized inquiry into the person’s ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person’s other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Bowen’s ability to pay LFOs. RP (2/27/15) 7-31. The court did not consider his financial status in any way despite the information that he had no income and significant debt. RP (2/27/15) 7-31; Report filed 2/18/15, Supp. CP. Indeed, the court also found Mr. Bowen indigent for purposes of appeal. CP 337-338.

The *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34

standard for indigency, courts should seriously question that person's ability to pay LFOs”).

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 182 Wn.2d at 834-35. The *Blazina* court recently chose to review the LFO-related issue raised in this case, finding that “National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court’s lead and consider the merits of Mr. Bowen’s LFO claim even though it was not raised below.

The court erred by ordering Mr. Bowen to pay \$4,335 in LFOs absent any showing that he had the means to do so. *Blazina*, 182 Wn.2d at 839. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

B. The court exceeded its authority by ordering Mr. Bowen to pay \$100 into an “expert witness fund” and \$500 to the Kitsap County sheriff’s office.

The court may order an offender to pay “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2).

The court may not order an offender to pay LFOs that are not authorized by 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). Nor may the court order payment of “expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.” RCW 10.01.160.

The court exceeded its authority by ordering Mr. Bowen to pay \$100 into an expert witness fund and \$500 to the Kitsap County Sheriff’s office. CP 315.

First, no statute authorizes imposition of costs for expert witnesses or the sheriff’s office, in general. Second, the costs of operating the crime lab and the sheriff’s department were not “specially incurred by the state in prosecuting” Mr. Bowen. RCW 10.01.160(2).

For these reasons, the assessments for the expert witness fund and sheriff’s office must be vacated, and Mr. Bowen’s case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

CONCLUSION

The language charging Mr. Bowen with possession of a stolen vehicle and stolen property was constitutionally deficient. The court

abused its discretion and violated Mr. Bowen's right to due process by admitting extensive, irrelevant, prejudicial evidence that encouraged the jury to convict him based on propensity. Mr. Bowen's attorney provided ineffective assistance of counsel by failing to object to additional irrelevant and prejudicial evidence of drug paraphernalia found in the car Mr. Bowen was driving. The factual basis is inadequate to support Mr. Bowen's Alford plea to drug possession. Mr. Bowen's convictions must be reversed.

In the alternative, the court erred by ordering Mr. Bowen to pay \$4,335 in LFOs absent any indication that he had the means to do so. The court also exceeded its authority by ordering him to pay LFOs that are not authorized by any statute. Mr. Bowen's case must be remanded for resentencing.

Respectfully submitted on July 7, 2015,

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

Kitsap County Prosecuting Attorney
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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 July 7, 2015.



Jodi R. Backlund, WSBA No. 22917
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July 07, 2015 - 10:37 AM

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