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DIVISION II  
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STATE OF WASHINGTON  
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No. 47379-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Charles Paschal,**

Appellant.

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Clark County Superior Court Cause No. 13-1-00502-6

The Honorable Judge Suzan Clark

**Appellant's Opening Brief**

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### ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Paschal'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. Paschal's objection and allowing the state to introduce evidence of uncharged misconduct.
3. The trial court should have excluded testimony regarding an uncharged allegation of domestic violence from 2010.
4. The trial court failed to apply the four-step procedure required for admission of prior bad acts evidence under ER 404(b).
5. 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. Did Mr. Paschal'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. Did the trial court err by admitting allegations of domestic violence from 2010, in violation of ER 403 and ER 404(b)?

6. The trial court erred by giving Instruction No. 5.
7. Instruction No. 5 included an unconstitutional judicial comment on the evidence, in violation of Wash. Const. art. IV, § 16.
8. Instruction No. 5 violated due process by assuming the truth of the state's evidence regarding the 2010 allegation of domestic violence.
9. The trial court improperly suggested to jurors that there was "a previous incident in 2010 between the defendant and Katherine Martin."

**ISSUE 3:** An instruction that assumes the truth of a fact in the face of conflicting evidence violates art. IV, § 16. Did Instruction No. 5 include a judicial comment on the evidence because it assumed there was "a previous incident in 2010 between the defendant and Katherine Martin"?

10. Mr. Paschal was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel provided ineffective assistance by failing to object to inadmissible hearsay.
12. Defense counsel provided ineffective assistance by failing to object to evidence that was irrelevant and inadmissible under ER 402 and ER 403.
13. Defense counsel provided ineffective assistance by failing to object to inadmissible opinion testimony.
14. Defense counsel provided ineffective assistance by failing to object to inadmissible testimony designed to inflame passion and prejudice.

**ISSUE 4:** An unreasonable failure to object to evidence that is prejudicial and inadmissible deprives an accused person of the effective assistance of counsel. Did defense counsel's repeated failure to object to inadmissible and prejudicial evidence deny Mr. Paschal the effective assistance of counsel?

15. Mr. Paschal's convictions for first-degree assault and first-degree rape infringed his Fifth and Fourteenth Amendment prohibition against double jeopardy.
16. Mr. Paschal's assault and rape convictions should have merged.

**ISSUE 5:** Convictions for rape and assault merge where the assault charge elevated the degree of the rape. Did the court violate the Fifth and Fourteenth Amendment prohibition against double jeopardy by entering convictions for both assault and first-degree rape?

**ISSUE 6:** Multiple convictions violate double jeopardy if based on the "same evidence." Did the trial court violate double jeopardy by entering judgment and imposing sentence for both assault and first-degree rape, where both convictions rested on the same evidence?

17. The sentencing court miscalculated Mr. Paschal's offender scores on each charge.
18. The sentencing court failed to properly determine Mr. Paschal's overall standard range.

19. The sentencing court improperly based the overall standard range on consecutive sentences for the rape and assault charges.
20. The sentencing court erred by applying the special rules for serious violent offenses in the absence of a finding that the rape and assault charges were separate and distinct offenses.
21. The prosecution failed to establish that the rape and assault convictions were separate and distinct.
22. The sentencing court erred by adopting Finding of Fact No. 2.1 (Judgment and Sentence), indicating that none of the current offenses comprised the same criminal conduct.
23. The sentencing court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence), outlining the standard range for each offense.
24. The sentencing court erred by imposing an exceptional sentence based on a miscalculated standard range.

**ISSUE 7:** Special sentencing rules apply to multiple serious violent offenses, but only if they comprise separate and distinct criminal conduct. Did the trial court err by applying these special rules without finding that the rape and assault comprised separate and distinct criminal conduct?

**ISSUE 8:** Two serious violent offenses are not separate and distinct if they occurred at the same time and place, against the same victim, with the same overall criminal purpose. Should the trial court have scored the assault and rape charges using the ordinary scoring rules set forth in RCW 9.94A.589(1)(a)?

25. The court erred by ordering Mr. Paschal to pay \$9,142.08 in legal financial obligations absent any individualized inquiry into his ability to pay.
26. The court erred by entering finding of fact 2.5 (Judgment and Sentence).

**ISSUE 9:** 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. Paschal to pay \$9,142.08 in LFOs, while also finding him indigent and without analyzing whether he had the money to pay?

27. The trial court erred by giving Instruction No. 3.
28. The trial court's reasonable doubt instruction violated Mr. Paschal's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
29. The trial court's reasonable doubt instruction violated Mr. Paschal's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
30. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
31. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

**ISSUE 10:** A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Paschal's constitutional right to a jury trial?

**ISSUE 11:** A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a "reasonable doubt" as a doubt "for which a reason exists," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Paschal's constitutional right to a jury trial?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Charles Paschal and Katherine Martin had two children together. RP 236. They had lived and worked together for a time, but their relationship had hit a rough patch. RP 237-238, 245.

The couple had agreed to resume living in the same home and went to IKEA for furnishings for Mr. Paschal to set up a barber shop in the garage. RP 245, 694. Mr. Paschal worked on assembling the items while Martin and the children made and ate dinner. RP 245-246, 693-695. The children watched a movie, and the parents argued. RP 246-248, 300, 694-697. Both adults were drinking. RP 171-172, 695.

At some point, Martin hit Mr. Paschal and he pushed her away. RP 705. She came back at him, and he hit her on her face. RP 706-707. They argued more, and she left the house. RP 709-711. Martin went to a neighbor's, and the neighbor called the police. RP 266-275. Mr. Paschal went to his oldest child's mother's house for some time, and then returned to the home and was arrested. RP 483, 717, 720-721. When he saw the police at the house, he said that he wanted to report an assault. RP 484, 722.

The state charged Mr. Paschal with attempted murder one, assault one, rape one, two counts of assault two, and unlawful imprisonment.

Each charge included aggravating circumstances of domestic violence with minor children within sight or sound.<sup>1</sup> CP 9-13.

Mr. Paschal admitted he struck Martin five times. RP 706-707, 731. He also admitted that at some point, as Martin attempted to leave, he blocked the door. RP 709. RP 707. Martin claimed that Mr. Paschal ripped off her clothing, raped her, drug her throughout the house, held her prisoner, strangled her, all while continuing to beat her, for hours. RP 249-260, 288-294, 402. But Mr. Paschal denied all these allegations.<sup>2</sup>

Prior to the start of evidence, Mr. Paschal's attorney moved to prevent law enforcement witnesses from giving opinions about the source of Martin's injuries. RP 100. The court granted the motion. RP 101-102.

Deputy Kennison told the jury Martin told him Mr. Paschal tried to force his penis into her mouth, and that her face was swollen and consistent with what she described. RP 167-168. Lead Detective Luvera also described Martin's allegations of rape, strangling and suffocation, and said that in her experience and training, what Martin reported was consistent with her injuries. RP 320-341.

The prosecutor sought to present a past incident of alleged domestic violence to the jury. RP 78-82. The defense objected, noting

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<sup>1</sup> The state charged but later dismissed two counts of witness tampering. RP 676.

<sup>2</sup> The couple's six-year-old daughter testified, remembering only that dad had burned something on the floor and mom got very very mad. RP 307.

that Martin was not a recanting witness, nor had she ever tried to minimize the allegations. RP 81. Without weighing the prejudice or probative value, the trial court judge ruled the evidence admissible. RP 82. The jury heard that three years before, the police were called based on Martin's allegation that Mr. Paschal broke her nose. RP 238-239. Several photos of her alleged injuries from this 2010 incident were shown to jurors. RP 240-243.

Detective Luvera testified about her conversation with Martin at the hospital. She told the jury that Martin alleged that Mr. Paschal had always been an "asshole", and that there was always some physical abuse in their relationship. RP 321-322. Luvera said that Martin claimed Mr. Paschal would slap her, pull her hair, push her, and that three years prior he gave her a bloody nose. RP 322.

Luvera spent time with Martin in the hospital and questioned her at some length about her version of the events of the night. She repeated all of her statements to the jury, along with her questions to Martin, without any hearsay objections. RP 320-340.

Luvera gave quotations and details from what Martin said, in response to questioning, including that her children were present for part of the beating: "They saw me dying, screaming. He threatened them, 'Don't you ever tell anyone what you saw.'" RP 326.

At some point, the prosecutor sought to clarify Martin's mental state as she made these statements:

Q. ....[S]ome time has passed between the beating and the conversation and this point in the conversation. What was her demeanor like at that time?

A. I don't know if I documented her demeanor. I don't see that I documented if she was upset or crying while she was telling me this. And I don't recall about that.

RP 334.

After that, more of Martin's claims were repeated. Luvera told the jury that she questioned Martin, and that Martin said she felt blood dripping down her face, that Mr. Paschal tried to be nice and not get her blood on the carpet, and that Mr. Paschal put his hand over her mouth and completely cut off her ability to breathe. RP 334-336.

Detective Luvera told the jury: "She told me that, 'He was going to kill me'" And I asked her if she had any doubt about that. She said, "No."

RP 338.

The defense never raised any objections to all of these statements. RP 320-340.

Sgt. Allais told the jury that "I have done this for 26 years, and as I looked at her I was thinking this is probably the worst domestic assault I've seen." RP 449. He was later invited to expound on this opinion, which he did without objection. RP 503-505. He further repeated all of

the statements that Martin made to him, including that Mr. Paschal had hit her in the face with his penis. RP 452, 454. He also said that he was working with police in Portland to find Mr. Paschal as he had a probation violation warrant. RP 455-456. The defense did not object to this information. RP 456.

The nurse who worked with Martin in the emergency room at the hospital said that Martin told her she had been held captive. RP 536-537. She further said that Martin was memorable:

[A.] ...I was pretty shocked when I saw her....

Q. And what was it about it that shocked you so much that you remember this case out of hundreds of them?

A. Just the extent that she was beaten.

....

And just the extent of her injuries just shocked me, and I would say that this is the most severe case of domestic violence that I have seen in the ER throughout my practice.

Q. And just to recall, since 2012 you've been assigned almost exclusively to the emergency room?

A. Correct.

RP 538.

During rebuttal closing argument, the state emphasized the opinions of officers and medical staff:

It wasn't just Sergeant Allais who said this was one of the worst domestic violence assaults he's seen in 27 years. You also heard testimony from Detective Luvera, who has specialized in domestic

violence assaults on the major crimes unit for the past seven years. This is the worst she's ever seen.

And what I would argue, the most compelling, is Nurse Ruef. She's an ER nurse, this is what she does for a living, she treats emergency people, people that come into the hospital in emergency situations: gunshot wounds, broken arms. And she said to you, "I remembered this case because it shocked me so much. The level of injuries shocked me."

A nurse who is assigned only to the ER for the past two years, was shocked by the level of these injuries.

RP 868.

The court gave a standard reasonable doubt instruction which included this: "A reasonable doubt is one for which a reason exists..." CP 75. The court also instructed the jury to limit their consideration of the alleged prior incident of domestic violence:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and/or photographs pertaining to a previous incident in 2010 between the defendant and Katherine Martin and may be considered by you only for the purposes of assessing Katherine Martin's credibility and/or assessing her actions on March 17, 2013. You may not consider it for any other purpose. Any discussions of the evidence during your deliberations must be consistent with this limitation.  
CP 77.

The jury acquitted Mr. Paschal of attempted murder. RP 877. But they convicted him of assault 1, rape 1, two counts of assault 2 and unlawful imprisonment. RP 877-882. The jury also answered in the affirmative to the special verdicts on all convictions. CP 123-135.

At sentencing, the state conceded that the assault charges all merged into one count of first-degree assault. The prosecutor argued against a same-criminal-conduct finding for the rape and assault charges, but did not specifically ask the court to find that those two offenses were separate and distinct.<sup>3</sup> RP 903-905.

Defense counsel argued that all of the charges merged into one count of first-degree rape. In the alternative, the defense asked the court to find and that the assault, rape, and unlawful imprisonment charges comprised the same criminal conduct. CP 136-151; RP 906-909. After hearing argument, the court orally ruled as follows: "I am convinced that the Rape I, the Assault I, and the Unlawful Imprisonment are three separate charges within the meaning of double jeopardy, within the meaning of merger, and within the meaning of same criminal conduct." RP 914. The court's written findings, contained in the judgment and sentence, did not reflect a finding that the offenses were separate and distinct. CP 167-197.<sup>4</sup>

The court calculated Mr. Paschal's offender scores as 0 on the assault charge, 3 on the rape charge, and 4 on the unlawful imprisonment charge. CP 169. The court determined his overall standard range to be

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<sup>3</sup> The prosecutor did argue that the unlawful imprisonment was "separate criminal conduct," claiming that it was completed prior to the assault and the rape. RP 904.

<sup>4</sup> The court did leave blank a checkbox relating to same criminal conduct. CP 168.

213-283 months, applying the special rules for serious violent offenses.  
CP 169. The court imposed an exceptional sentence of 360 months on the assault and rape charges and ran the two sentences concurrently with each other and concurrently with the sentence on the unlawful imprisonment.  
RP 925-926, 931-933; CP 167-197.

The court also assessed a total of \$9,142.08 in legal financial obligations. CP 172. The judge noted that Mr. Paschal was currently indigent, but gave no explanation for her conclusion that he had the future ability to pay. RP 933.

Mr. Paschal timely appeals. CP 184-203.

### ARGUMENT

#### **I. MR. PASCHAL'S CONVICTION WAS IMPROPERLY BASED ON PROPENSITY EVIDENCE.**

Over defense objection, and without going through the balancing process required by ER 403 and ER 404(b), the court admitted allegations of uncharged domestic violence. The court gave a limiting instruction that addressed only one specific allegation.<sup>5</sup> CP 77.

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<sup>5</sup> In addition to the 2010 allegation, hearsay statements improperly introduced through Detective Luvera suggested that Mr. Paschal frequently abused Martin by slapping her, pulling her hair, and pushing her. RP 321-322.

The evidence served no legitimate purpose. Martin did not delay reporting, recant any prior statements, or minimize Mr. Paschal's actions. She did not attempted to placate him or otherwise act in a manner that could only be explained by a history of domestic violence. RP 236-303.

The court's limiting instruction compounded the error. Even though Martin didn't delay reporting, recant, minimize, or behave in a way that needed explanation, the court directed jurors to consider the evidence of domestic violence "for the purpose of assessing Katherine Martin's credibility and/or assessing her actions." CP 77.

In essence, this instruction directed jurors to consider the prior allegations as propensity evidence. It allowed jurors to decide that Martin's current accusations were credible because Mr. Paschal had a propensity to commit domestic violence, as shown by the prior allegations.

A criminal conviction may not be based on propensity evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Mr. Paschal's convictions in this case must be reversed because they were based in part on propensity evidence. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

A. The trial court should have excluded allegations of prior domestic violence under ER 402, ER 403, and ER 404(b).

The prohibition against propensity evidence derives from ER 402, ER 403, and ER 404(b). Here, the trial court misapplied those rules.

When analyzing evidence of uncharged misconduct, 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).

In this case, the trial court did not start with a presumption of inadmissibility. RP 80-82. Instead, the court started from the position that prior domestic violence episodes will *always* help jurors assess credibility:

[The cases say] that it doesn't matter if the alleged victim recants, that the prior instances are relevant to essentially assess the defendant's credibility... [T]he law has expanded pretty dramatically in that area and seems to support admissibility of the prior assaults....[T]his area has just incredibly expanded in the last two or three years.

RP 80

The court failed to approach the issue from the correct perspective. This failure infected the court's determination that the jury should hear the evidence.

Before admitting misconduct evidence, the court must find by a preponderance that the misconduct actually occurred. *Slocum*, 183 Wn. App. at 448. The court made no such finding in this case. RP 82. In the absence of such a finding, the evidence should have been excluded. *Id.*

The court must also identify a proper purpose for the evidence. *Id.* Here, the court made vague references to three concepts: credibility, placation, and self-defense.<sup>6</sup> RP 80-82. None of these concepts support admission.

Although Martin's credibility was generally at issue, there was no allegation that she recanted, minimized, or failed to report. *Cf. Gunderson*, 181 Wn.2d at 923. Evidence of past incidents of domestic violence were therefore unnecessary to explain her testimony. *Id.*

Nor did she try to placate Mr. Paschal or otherwise act in a manner that could only be explained by a history of domestic violence. RP 236-303; *cf. Gunderson*, 181 Wn.2d at 923. Martin's testimony about her attempts to resist and escape from Mr. Paschal were not unusual. They were not the sort of counterintuitive actions of a domestic violence victim that a jury would need help understanding.

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<sup>6</sup> The court's limiting instruction directed jurors to consider one specific incident "for the purpose of assessing Katherine Martin's credibility and/or assessing her actions." CP 77. It made no mention of Mr. Paschal's self-defense claim.

Finally, the evidence here could not be used to rebut Mr. Paschal's self-defense claim. He did not claim mistake or accident. Instead, he acknowledged that he punched Martin in the face on purpose. The only possible relevance of the evidence was to show that he had a propensity to commit acts of domestic violence and thus was unlikely to have acted in self-defense. This is the very inference that ER 404(b) forbids. *See State v. Kelly*, 102 Wn.2d 188, 197-98, 685 P.2d 564 (1984); *cf. State v. Thompson*, 47 Wn. App. 1, 11, 733 P.2d 584 (1987).<sup>7</sup>

Before admitting evidence of prior misconduct, the court must determine its relevance to prove an element of the offense. *Slocum*, 333 P.3d at 546. The uncharged domestic violence alleged here were not relevant to any elements of any of the charged crimes. The evidence should thus have been excluded under ER 402, in addition to ER 403 and ER 404(b).

Finally, the court must weigh the probative value of the evidence against its prejudicial effect. *Id.* The trial court failed to do so here. Furthermore, in the context of this case, the uncharged domestic violence allegations had no value except as propensity evidence. They painted Mr.

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<sup>7</sup> The prosecution relied on *Thompson* in its written materials to the trial court. CP 27. In *Thompson*, Division I upheld the admission of "a continuing course of provocative conduct during the course of an evening" and leading up to the charged crime. *Thompson*, 47 Wn. App. at 11. The court also found the evidence admissible as part of the *res gestae*. *Id.*, at 11-12. The evidence here involved prior incidents, not a continuing course of conduct leading up to the charged crimes.

Paschal in a bad light, and suggested that he was guilty because he had a propensity to commit acts of domestic violence. The evidence should have been excluded under ER 403 and ER 404(b).

All the steps outlined above must be performed on the record, and doubtful cases are resolved in favor of exclusion. . *McCreven*, 170 Wn. App. at 458; *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Here, the court failed to perform the required analysis on the record. RP 80-82. The judge erred by admitting the allegations of prior uncharged misconduct.

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. 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 risk of prejudice in domestic violence cases is very high. *Gunderson*, 181 Wn.2d at 923. Because of this, the state must establish an “overriding probative value” before the court may admit evidence of prior domestic violence. *Id.*

The state failed to establish “overriding probative value.” *Id.* Here, there is a reasonable probability that the prior domestic violence allegations led jurors to convict on the basis of propensity. The allegations

of uncharged domestic violence included not only Martin's testimony about the 2010 allegation, but also photographs allegedly showing her injuries from that event and Detective Luvera's recitation of Martin's hearsay statement, in which she claimed that domestic violence was ongoing and frequent. This evidence was highly prejudicial, and served no legitimate purpose.

Mr. Paschal and Martin provided different versions of events. Although he admitted he'd punched her in the face and prevented her from leaving, he absolutely denied raping her, strangling her, or suffocating her. Jurors were likely to favor Martin's testimony because they believed Mr. Paschal had a propensity to commit domestic violence: he'd done bad things before, and must have done what she said he'd done on this occasion. *Id.*

The court's limiting instruction contributed to the problem. The court told jurors they could consider one prior act of domestic violence to assess Martin's credibility and her actions. Since she didn't delay reporting, recant, or minimize, there was nothing to explain regarding her credibility. Since she didn't placate or act in a way that might have baffled jurors, there was nothing to explain regarding her actions.

Instead, the court's instruction encouraged the jury to draw the forbidden propensity inference. Martin's account was credible, under the

court's instruction, because Mr. Paschal had a propensity toward domestic violence. CP 77.

The court should have excluded the evidence under ER 402, ER 403, and ER 404(b). Its admission prejudiced Mr. Paschal. His convictions must be reversed and the case remanded for a new trial. *Id.*

B: The erroneous admission of propensity evidence violated Mr. Paschal's right to due process.

The use of propensity evidence to prove a crime may violate due process.<sup>8</sup> 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 (9<sup>th</sup> Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial.<sup>9</sup> *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).

Mr. Paschal's uncharged acts of alleged domestic violence were irrelevant, except to show that he had a propensity to commit domestic

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<sup>8</sup> 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).

<sup>9</sup> 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.

violence. The admission of the evidence violated his right to due process.<sup>10</sup> *Garceau*, 275 F.3d at 776, 777-778.

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.*

In this case, Mr. Paschal admitted hitting Martin in self-defense. He denied suffocating, strangling, or raping her. Under these circumstances, the state cannot show beyond a reasonable doubt that he would have been convicted of first-degree assault and first-degree rape without the improper evidence. *Gunderson*, 181 Wn.2d at 922-923. Mr. Paschal's convictions must be reversed, and the case remanded with instructions to exclude the evidence at any retrial. *Id.*

## **II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE.**

In his testimony, Mr. Paschal did not admit that he had assaulted Martin in 2010. Nor did he admit there was an incident between the two of them in 2010. Despite this, the court's limiting instruction assumed that such an incident had occurred in 2010. The instruction referenced evidence consisting of "testimony and/or photographs *pertaining to a*

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<sup>10</sup> Although Mr. Paschal did not object on constitutional grounds, the argument may be made for the first time on review under RAP 2.5(a)(3).

*previous incident in 2010 between the defendant and Katherine Martin.”*

CP 77 (emphasis added).

A jury instruction includes a comment on the evidence<sup>11</sup> when it assumes as true facts that are contested. *State v. McDonald*, 70 Wn.2d 328, 330-31, 422 P.2d 838 (1967). In this case, Instruction No. 5 included a comment of the type identified by the *McDonald* court.

In *McDonald*, the instruction included a comment because it began as follows: “Evidence has been offered of the escape of the defendant, or attempted escape, after arrest.” *Id.* Such an instruction “assumes as true the escape, or attempted escape.” *Id.*<sup>12</sup>

Similarly, in this case, the court’s limiting instruction referenced evidence “pertaining to a previous incident in 2010 between the defendant and Katherine Martin.” CP 77. As in *McDonald*, this instruction “assumes as true” that there was a previous incident in 2010 between the defendant and Martin. *Id.*<sup>13</sup>

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<sup>11</sup> The Washington constitution provides “Judges shall not charge juries with respect to matters of fact, nor comment thereon...” Art. IV, § 16. In this case, the court instructed jurors in a manner that violated both of these rules. CP 77.

<sup>12</sup> The instruction allowed jurors to consider the defendant’s flight as evidence of guilt. *Id.*, at 330 n. 1.

<sup>13</sup> For additional examples, see *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 533, 452 P.2d 729 (1969); *State v. Dale*, 110 Wash. 181, 189, 188 P. 473 (1920); *State v. Walters*, 7 Wash. 246, 250, 34 P. 938 (1893). In each case, the trial court gave an instruction that assumed the truth of facts at issue in the trial.

Such comments are presumed prejudicial.<sup>14</sup> *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*

This is a higher standard than that normally applied to constitutional errors. *Id.* Here, the record does not affirmatively show an absence of prejudice. The comment went directly to contested facts at trial. By instructing jurors in a manner that favored Martin's version of events, the judge increased the likelihood of conviction.

Jurors likely took the court's improper comment as an endorsement of Martin's credibility and a repudiation of Mr. Paschal's veracity. The improper comment thus influenced more than just the jury's assessment of the allegations of prior acts of domestic violence. Instead, the judge's improper comment caused jurors to accept Martin's claim that Mr. Paschal raped her, choked her, and suffocated her, despite his denials.

Because the record does not affirmatively show a lack of prejudice, the convictions must be reversed and the charges remanded for a new trial.

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<sup>14</sup> A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Mr. Paschal did not object to the improper instruction, which was drafted by the trial judge. RP 658-659. However, he may raise the issue for the first time on appeal as a manifest error affecting his constitutional rights. *Id.*; RAP 2.5(a)(3).

*Id.* Since the prior misconduct is inadmissible (as argued above), there will be no need for a reworded limiting instruction on retrial.

**III. MR. PASCHAL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.<sup>15</sup>**

A. Defense counsel should have objected to inadmissible hearsay introduced through the testimony of Detective Luvera, Deputy Kennison, Sergeant Allais, and Nurse Jorgensen.

Defense counsel did not raise a single objection when the state introduced Martin's hearsay statements to every police officer who spoke with her. As a result, jurors heard Martin's account multiple times throughout trial. None of the hearsay fit within an exception to the hearsay rule. Counsel's unreasonable failure to object to this evidence prejudiced Mr. Paschal.

Detective Luvera, the last officer to interview Martin, provided the most comprehensive version of her account. Luvera began speaking with her after 5:30 a.m., more than two hours after police were called. RP 116, 318.

At that point, Martin had already spoken with at least two other officers. RP 166, 352. Although Martin cried at times while she spoke

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<sup>15</sup> Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

with Luvera, there was no suggestion that she was still under the excitement of the alleged incident. RP 320, 324, 327. Luvera could not recall Martin's demeanor later in the conversation, yet counsel still allowed her to relay her statements. RP 334.

Mr. Paschal's lawyer also allowed Sergeant Allais and Deputy Kennison to tell jurors what Martin said during their conversations with her. Kennison spoke with her twice: once while EMTs were treating her, and later when he returned to the hospital around 4 a.m. RP 157-160, 166-167. According to Kennison, during the latter conversation, Martin told him that Mr. Paschal had raped her. RP 166-167. Allais, who spoke to her next, didn't arrive at the hospital until 4:45 a.m. RP 448. He relayed many statements she made to him, but did not provide any testimony regarding her demeanor. RP 452-454. Despite this, Mr. Paschal's attorney made no objection.

Counsel also allowed hearsay in through Nurse Jorgensen, whose forensic exam, conducted after Martin had received treatment, was not for purposes of diagnosis.<sup>16</sup> RP 619-620, 634. Jorgensen's interview commenced after 7:00 a.m. She was allowed to put before the jury another set of Martin's out-of-court allegations. RP 626-627.

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<sup>16</sup> Hearsay admitted through Dr. Eggen and Nurse Ruef likely qualified under the exception for statements made for purposes of medical diagnosis and treatment. ER 803(a)(4). See RP 507-522, 536-537.

The jury heard Martin's testimony, her excited utterances, and her statements for purpose of diagnosis and treatment. Jurors should not have been subjected to four additional repetitions of her account. The evidence was inadmissible hearsay and should have been excluded under ER 802. Even if admissible, it was cumulative under ER 403.

Counsel should have objected, and the hearsay should have been excluded. Jurors could not help but be influenced by repeated exposure to Martin's account of events through professionals.

No one told the jury that repetition is not a valid test of veracity. *See State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986).<sup>17</sup> Each repetition of Martin's account strengthened the jurors' perceptions of her credibility. This prejudiced Mr. Paschal by making conviction more likely.

Mr. Paschal was deprived of effective assistance by his attorney's failure to object to the repeated introduction of inadmissible hearsay. *Kyllo*, 166 Wn.2d at 862. His convictions must be reversed and the case remanded for a new trial. *Id.*

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<sup>17</sup> The sole exception arises when the proponent of a prior consistent statement shows "that the witness's prior consistent statement was made *before* the witness's motive to fabricate arose." *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004). Mr. Paschal never implied that external pressure arising since the police interviews provided Martin a motive to fabricate her testimony. Thus the evidence would not have been admissible under ER 801(d)(1)(ii).

- B. Defense counsel should have objected when the state offered irrelevant and inadmissible evidence designed to appeal to the jury's passion and prejudice.

Mr. Paschal's attorney allowed Sergeant Allais to testify that "this is probably the worst domestic assault I've seen." RP 449. Counsel allowed Nurse Ruef to testify that "this is the most severe case of domestic violence that I have seen." RP 538.

Defense counsel should have objected. The comparisons to other cases were irrelevant, because they did not make the existence of any material fact more or less probable. ER 401, ER 402. The comments likely inflamed the passions and prejudices of jurors, pushing the jury to convict regardless of the strength of the evidence, and thus should also have been excluded under ER 403.

Counsel's failure to object prejudiced Mr. Paschal. His convictions must be overturned. *Kyllo*, 166 Wn.2d at 862.

- C. Defense counsel shouldn't have allowed officers to opine that Martin's injuries were consistent with her very detailed account of events.

Prior to opening statements, the court specifically prohibited the officers from offering opinions on the source of Martin's injuries. RP 100-102. Despite this, defense counsel failed to raise objections when the state violated this pretrial ruling. RP 168, 341.

After repeating Martin's detailed hearsay account of the incident, Detective Luvera opined several times that Martin's injuries were consistent with her story. RP 341. She added an aura of expertise to her testimony by referring to her experience. RP 341. Similarly, Deputy Kennison was permitted to testify that Martin's injuries were "absolutely" consistent with her account. RP 168.

Neither officer limited their opinion to the injuries resulting from punching or striking.<sup>18</sup> RP 341, 168. Because of this, both appeared to be confirming that Mr. Paschal had sexually assaulted Martin and strangled or suffocated her.

Defense counsel should have objected to this testimony. First, the court had already prohibited the officers from providing any medical conclusions. RP 100-102. Second, neither officer purported to have any expertise allowing a claim that Martin's injuries supported her accusations of rape, strangulation, or suffocation.

Testimony providing an "explicit or nearly explicit" opinion on the credibility of an alleged victim invades the exclusive province of the jury and violates an accused person's right to a jury trial.<sup>19</sup> *State v. King*, 167

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<sup>18</sup> This is in contrast to medical personnel, who carefully limited their opinions to specific injuries and the corresponding parts of Martin's account. RP 200-202, 208-209, 519, 527, 628-634.

<sup>19</sup> U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22.

Wn.2d 324, 332, 219 P.3d 642 (2009); *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007). *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009). In this case, each officer's opinion—that Martin's injuries were consistent with her lengthy and detailed account—comprised a “nearly explicit” opinion that she was credible. *Id.*

No witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331. Furthermore, a law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries “a special aura of reliability.” *Id.* The improper opinion testimony here carried such an aura of reliability. *Id.*

The inadmissible opinion testimony bolstered Martin's account. It also confirmed for jurors that Mr. Paschal not only hit her, but also that he raped, strangled, and suffocated her. These specific allegations went directly to the charges for which the court ultimately sentenced Mr. Paschal.

Mr. Paschal admitted that he punched Martin and that he blocked her from leaving. He adamantly denied raping her, strangling her, choking her, or suffocating her. Without the improper opinion testimony, jurors might well have had a reasonable doubt regarding the alleged rape, strangulation, and suffocation. But because the officers were allowed to

opine that her story was consistent with her injuries, the jury had little choice but to accept her version over Mr. Paschal's

Defense counsel should have prevented the two officers from putting their thumbs on the scale of justice. Mr. Paschal was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. His convictions must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel had no reasonable strategic basis to waive objection to the inadmissible evidence.

Without a valid tactical reason, failure to object to improper inadmissible evidence constitutes deficient performance. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). Here, counsel had no strategic reason to allow the state to introduce the inadmissible evidence outlined above. Any strategic or tactical reason for counsel's failure to object was objectively unreasonable.

Because of counsel's numerous failures to object, the jury heard details of Martin's account repeated four times more than they would have otherwise. No instructions limited their consideration of this evidence, thus they were free to consider it for any purpose. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

The same is true for the testimony that this was "the worst" or "most severe" domestic violence assault seen by an experienced officer

and an emergency room nurse. Such testimony was designed to inflame passion and prejudice, and should not have been admitted.

Similarly, defense counsel sought and won a ruling excluding medical opinions from law enforcement officers. RP 100-102. Counsel had no strategic reason to allow the testimony when the state introduced it later in the trial.

The unwarranted repetition of Martin's account, the improper testimony comparing this case to others, and the unsupported opinions from the officers prejudiced Mr. Paschal. His attorney had no legitimate strategic reason to allow the testimony, and should have objected.

Counsel's deficient performance prejudiced Mr. Paschal, because there is a reasonable probability that it affected the verdict. *Kyllo*, 166 Wn.2d at 862. Mr. Paschal's convictions must be reversed and the case remanded for a new trial.

**IV. THE ASSAULT SHOULD HAVE MERGED INTO THE FIRST-DEGREE RAPE CONVICTION; SEPARATE CONVICTIONS FOR EACH OFFENSE INFRINGED MR. PASCHAL'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.**

The convictions for first-degree rape and first-degree assault should have merged. The assault necessarily elevated the rape to first-degree rape, and the same evidence proved both offenses.

By convicting Mr. Paschal of first-degree rape, the jury found that he inflicted serious physical injury. CP 96. The court's instructions did not require them to find that he *accomplished* the rape by inflicting the injury. Nor did the instructions require jurors to conclude that he inflicted the injury "during the course of" or "in furtherance of" the rape. CP 96.

Mr. Paschal inflicted the serious physical injury when he assaulted Martin. Accordingly, the assault, resulting in serious physical injury, was a part of the rape. It should not have resulted in a separate conviction and sentence.<sup>20</sup>

The state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. Whether two offenses are the same is "ultimately 'a question of statutory interpretation and legislative intent.'" *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). Courts first determine "if the applicable statutes expressly permit punishment for the same act or transaction." *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). If there is no express statutory provision permitting (or disallowing)

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<sup>20</sup> The issue of whether two convictions merge for double jeopardy purposes is reviewed *de novo*. *State v. Chesnokov*, 175 Wn. App. 345, 349, 305 P.3d 1103 (2013).

punishment for the same act, the crimes are analyzed under the “same evidence” test. *Id.*

Under the “same evidence” test, multiple convictions violate double jeopardy if the evidence necessary to convict on one offense is sufficient to convict on the other. *In re Orange*, 152 Wn. 2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The test does not rest on a comparison of the legal elements of each offense. *Hughes*, 166 Wn.2d at 684. Convictions for two crimes can violate double jeopardy even if the two offenses do not have the same elements. *Id.*; *Orange*, 152 Wn.2d at 820.

Instead, the inquiry focuses on the evidence the state produced to prove each offense. *Orange*, 152 Wn.2d at 818-820. If the evidence necessary to convict the accused person on one offense also proves guilt on the other, the double jeopardy clause prohibits convictions for both. *Orange*, 152 Wn.2d at 816; *see also In re Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010).

Conduct involved in the perpetration of a rape merges with that crime, unless the conduct had an independent purpose or effect. *State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979) (Johnson I). An assault that is “merely incidental” to rape merges with a charge of first-degree rape. *State v. Hudlow*, 36 Wn. App. 630, 632, 676 P.2d 553

(1984).

In this case, Martin testified that Mr. Paschal beat her, suffocated her, and strangled her, all while saying that he intended to rape her. RP 245-280. This conduct was all incidental to the rape; it had no independent purpose or effect.<sup>21</sup> Instead, it created the “serious physical injury” elevating the rape to a first-degree charge. *See* RCW 9A.44.040(c). The two offenses merge. *See State v. Williams*, 156 Wn. App. 482, 495, 234 P.3d 1174 (2010) (Williams I).

This is especially true given the court’s instructions. The “to convict” instruction for the rape charge required proof that Mr. Paschal inflicted serious physical injury. CP 96. The jury concluded that he did so when he assaulted Martin. They were not required to find that the serious physical injury occurred during the course of or in furtherance of the rape. Thus, the evidence proving assault also established the serious physical injury necessary for the rape conviction.

Under the facts of this case, the trial court should not have entered convictions for both first-degree rape and first-degree assault. *Francis*, 170 Wn.2d at 525. One conviction must be vacated and the case remanded for a new sentencing hearing. *Id.*

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<sup>21</sup> The trial court found that all of the assault charges merged into the first-degree assault for which Mr. Paschal was sentenced. RP 914.

V. THE COURT FAILED TO PROPERLY DETERMINE MR. PASCHAL'S OFFENDER SCORES AND STANDARD RANGES.

- A. The court should not have applied the special scoring rules for serious violent offenses without finding the rape and assault separate and distinct criminal acts.

When imposing sentence for multiple serious violent offenses, the judge must determine whether the offenses arise from “separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). If so, special scoring rules apply and the court will ordinarily impose consecutive sentences.<sup>22</sup> RCW 9.94A.589(1)(b). Offenses are separate and distinct if they do not constitute the same criminal conduct under the definition set forth in RCW 9.94A.589(1)(a); *State v. Klopper*, 179 Wn. App. 343, 356, 317 P.3d 1088 *review denied*, 180 Wn.2d 1017, 327 P.3d 55 (2014).

The state bears the burden of proving that offenses are “separate and distinct.” *See State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). This is so because a separate-and-distinct finding

favors the state...[I]n general, “[t]he burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor.”

*Id.* (quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)).<sup>23</sup>

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<sup>22</sup> Notwithstanding this statute, the court may impose concurrent sentences as an exceptional sentence. *State v. Graham*, 181 Wn. 2d 878, 887, 337 P.3d 319 (2014).

<sup>23</sup> By contrast, a same-criminal-conduct finding triggers more lenient treatment under RCW 9.94A.589(1)(a); the defendant therefore must persuade the court that two or more offenses comprise the same criminal conduct. *Graciano*, 176 Wn.2d at 539.

Here, the court did not make a finding that the rape and assault were separate and distinct crimes. RP 900-926, 928-933; CP 167. Absent such a finding, the court erred by sentencing Mr. Paschal under the provisions of RCW 9.94A.589(1)(b).

Furthermore, the evidence would not support a finding that the offenses were separate and distinct. "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Both offenses here involved Martin. Thus the "same victim" test is met. The two offenses also shared the same criminal intent, and they took place at the same time and place.

The phrase "same criminal intent" does not refer to a crime's *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.*

Here, the assault and rape charges were intimately related. Mr. Paschal assaulted Martin throughout the course of the sexual assault. His overall criminal objective remained the same as he perpetrated both offenses. Furthermore, the assault furthered the rape: according to Martin,

Mr. Paschal beat, suffocated, and strangled her in order to force himself on her. For all these reasons, the “same criminal intent” standard is met.

A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (Williams II); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). In this case, the evidence showed a continuing uninterrupted sequence of events. The two offenses all took place at the residence. Thus the same time and place requirements are also met.

The trial court’s failure to find the rape and assault separate and distinct precludes sentencing under RCW 9.94A.589(1)(b). Furthermore, the state failed to prove that the two offenses were separate and distinct: the evidence at trial shows instead that they took place at the same time and place, with the same overall criminal purpose, against the same victim.

B. The exceptional sentence must be vacated because it was based on a miscalculated standard range.

Under the court’s erroneous application of RCW 9.94A.589(1)(b) Mr. Paschal’s overall standard range was 213-283 months.<sup>24</sup> The court

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<sup>24</sup> This reflects a consecutive term consisting of 93-123 months for the assault charge and 120-160 months for the rape charge.

imposed an exceptional sentence of 360 months on each of the two serious violent offenses, and ran the two sentences concurrently. CP 189; RP 931-933.

An exceptional sentence based on a miscalculated standard range must be vacated. *State v. Parker*, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997).<sup>25</sup> The 360 month sentence here was based on a miscalculated standard range.

Mr. Paschal's sentence must be vacated and the case remanded for sentencing. *Id.*; *Phuong*, 174 Wn. App. at 546-548.

**VI. THE COURT SHOULD NOT HAVE ORDERED MR. PASCHAL TO PAY \$9,142 IN LEGAL FINANCIAL OBLIGATIONS.**

Mr. Paschal was not in a position to pay legal financial obligations, either at the time of sentencing or in the future. The record shows that the court appointed a public defender at the start of Mr. Paschal's case, and found him indigent at its conclusion. Order Appointing Attorney, Supp. CP; CP 188. 203. The court also imposed a 30-year sentence. CP 186-191.

Despite these findings, the court ordered Mr. Paschal to pay \$9,142 in legal financial obligations (LFOs). CP 191. The court relied on

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<sup>25</sup> The sole exception is where the record "expressly demonstrate[s] the sentencing court would have imposed the same exceptional sentence without regard to the length of the standard ranges." *Id.*

preprinted boilerplate to find that Mr. Paschal “is presently indigent but is anticipated to be able to pay financial obligations in the future.” CP 188.

The court did not conduct any particularized inquiry into Mr. Paschal’s financial situation at sentencing. *See* RP 900-939. The court erred by ordering Mr. Paschal 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*, --- Wn.2d ---, 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. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Paschal’s ability to pay LFOs. RP 900-939. The court announced its finding on Mr. Paschal’s ability to pay without soliciting any input from either side. Indeed, the court also found Mr. Paschal indigent and imposed

a 30-year sentence on the same day it required him to pay \$9,142 in LFOs.

RP 933; CP 186-191, 203.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Paschal's lengthy incarceration and indigent status would have weighed heavily against a finding that he had the ability to pay the amount imposed.

In fact, 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*, --- Wn.2d at ---, 344 P.3d at 683. The *Blazina* court recently chose to review the exact LFO-related issue raised in Mr. Paschal's 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. Paschal's LFO claim even though it was not raised below.<sup>26</sup>

The court erred by ordering Mr. Paschal to pay \$9,142 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn.2d at ---, 344 P.3d at 685. This case must be remanded for a new sentencing hearing. *Id.*

**VII. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. PASCHAL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

A. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012). Here, the trial court instructed the jury that

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<sup>26</sup> 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) *see also State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This includes errors based on a sentencing court's failure to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996). *See also, Parker*, 132 Wn.2d at 189 (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").

proof beyond a reasonable doubt means having “an abiding belief *in the truth of the charge.*” CP 75 (emphasis added).

Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 75.<sup>27</sup>

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 75.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited

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<sup>27</sup> Mr. Paschal does not challenge the phrase “abiding belief.” Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Paschal objects to the instruction’s focus on “the truth.” CP 75.

language reached the jury in the form of an instruction from the court. CP 75. Jurors were obligated to follow the instruction. CP 75.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.<sup>28</sup> *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Paschal his constitutional right to a jury trial.<sup>29</sup>

Mr. Paschal’s convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

- B. The instruction diverted the jury’s attention away from the reasonableness of any doubt, and erroneously focused it on whether jurors could provide a reason for any doubts.
  - 1. Jurors need not articulate a reason for doubt in order to acquit.

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<sup>28</sup> Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Id.*

<sup>29</sup> U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor*, 511 U.S. at 5-6).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends. VI; XIV; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759-60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Emery*, 174 Wn.2d at 759-60.<sup>30</sup>

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or

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<sup>30</sup>See also *State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn. 2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010) review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (Johnson II).

intimidating—before they may vote to acquit...” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc*, 138 F.3d 552 (5th Cir. 1998).<sup>31</sup> An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.<sup>32</sup>

2. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

The trial court instructed jurors that “A reasonable doubt is one for which a reason exists.” CP 75. This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” CP 75. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt. “Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous. . . being or remaining within the bounds of reason... Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia*, 443

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<sup>31</sup> The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

<sup>32</sup> In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); *Johnson v. Louisiana*, 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The “a” before “reason” in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 75. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”) Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is

reasonable.<sup>33</sup> For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3, if jurors couldn't put their doubts into words. CP 75.

As a matter of law, the jury is "firmly presumed" to have followed the court's reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Mr. Paschal couldn't be acquitted, even if jurors had a reasonable doubt.

The instruction "subtly shift[ed] the burden to the defense." *Emery*, 174 Wn.2d at 759-60. It also "create[d] a lower standard of proof than due process requires..." *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court's instruction violated Mr. Paschal's right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

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<sup>33</sup>See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

## CONCLUSION

Mr. Paschal's convictions must be reversed and the case remanded for a new trial. The convictions were improperly based on propensity evidence and on a judicial comment on the facts. Furthermore, the court's reasonable doubt instruction misstated the law, undermined the presumption of innocence, and mischaracterized the burden of proof. In addition, Mr. Paschal was deprived of the effective assistance of counsel when his attorney failed to object to inadmissible and prejudicial evidence that should have been excluded.

If the convictions are not reversed, the case must nonetheless be remanded for a new sentencing hearing. The rape and assault charges violate double jeopardy; one of the two convictions must be vacated.

If the court does not vacate one conviction, the case must be remanded because the trial court improperly applied the special scoring rules for serious violent offenses. The state failed to prove and the court failed to find that the rape and assault were separate and distinct.

Finally, even if Mr. Paschal's sentence is not vacated, the sentencing court erred by imposing \$9,142 in LFOs. The financial obligations must be vacated, and the case remanded for a hearing to determine whether Mr. Paschal will ever have the ability to pay, given his indigent status and lengthy incarceration.

Respectfully submitted on May 1, 2015,

**BACKLUND AND MISTRY**



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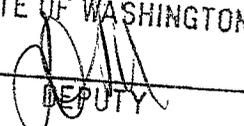
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BY  DEPUTY

CERTIFICATE OF MAILING

I certify that on today's date:

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

Charles Paschal, DOC #374765  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

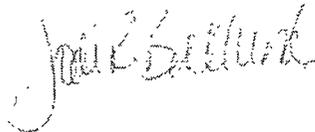
And:

Clark County Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666

I mailed the Appellant's Opening Brief to the Court of Appeals, Division II.

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 May 1, 2015.



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Jodi R. Backlund, WSBA No. 22917  
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