

NO. 48072-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LOMAX,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Lomax a fair trial by requiring him to wear shackles.

2. The trial court improperly considered no alternative to shackling Mr. Lomax.

3. The trial court erred in declining to allow Mr. Lomax to impeach Mariah McCarty with her prior juvenile crimes of dishonesty.

4. The prosecutor committed misconduct in closing argument by vouching for the credibility of its key witness Mariah McCarty.

5. Cumulative error denied Mr. Lomax his state and federal constitutional right to a fair trial.

6. The trial court erred when it ordered Mr. Lomax pay a \$100 DNA collection fee.

7. The trial court erred under RCW 43.43.754 when it ordered Mr. Lomax provide another DNA sample.

8. The judgment and sentence contains scrivener's errors on the date of the crime and the maximum term for the crime.

9. Given Mr. Lomax's indigency, this Court should not impose appellate costs if the State substantially prevails.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee a defendant the right to appear in trial free from bonds and shackles absent extraordinary circumstances. Here the trial court, in apparent deference to corrections officers, failed to make an extraordinary circumstances analysis and instead simply required Mr. Lomax be shackled. Did the court's decision to shackle Mr. Lomax deprive Lomax a fair trial?

2. State key witness Maria McCarty, just 18 years old, had accumulated three juvenile convictions for taking a motor vehicle without the owner's permission. Mr. Lomax moved in limine to use the three convictions to impeach Ms. McCarty's testimony. In denying Mr. Lomax's request, did the trial court abuse its discretion and deny Mr. Lomax his right of confrontation?

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4. Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors together created an enduring prejudice, denying the defendant a fair trial.

Considering the many errors assigned above, was Mr. Lomax's right to due process violated, requiring reversal and a new trial?

5. Whether the mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability, or likely ability, to pay the fee?

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8. Mr. Lomax is entitled to a judgment and sentence without scrivener's errors. His judgment and sentence misstates the date of the crime and the maximum term of the sentence. Should Mr. Lomax's case be remanded to correct the judgment and sentence?

9. Given that the trial court found Mr. Lomax indigent and his indigency is presumed to continue throughout review, should this court disallow appellate costs if the State substantially prevails on appeal?

C. STATEMENT OF THE CASE

The Hoquiam Castle is a three-story 10,000 square foot residence built in the early 1900s. RP¹ I 142-43. In recent years, it operated as a bed and breakfast. RP I 143. In the fall of 2013, it served as a residence for Donna Grow and her grandson, Robert Christopher (“Chris”) Adamson. RP I 144; RP II 190. Mrs. Grow slept in the “Queen’s Room”² on the second floor. Mr. Adamson slept in the only third floor bedroom. RP I 150; RP II 193.

Although the Castle was no longer open to the public as a bed and breakfast, Mrs. Grow still provided tours of the Castle to interested persons. RP I 143. Tours occurred most commonly on weekends in the summer and fall. RP I 143, 164-65; RP II 200. She did not keep records of when the tours occurred or who went on the tours. RP I 143; RP II 200. Mrs. Grow donated the tour revenue to her church. RP I 143.

Mr. Adamson and Mrs. Grow each had their evening routine. Before retiring to bed, Mr. Adamson would make sure the doors and windows were secure and locked for the night. RP II 199. Mrs. Grow, 82,

¹ The verbatim was prepared by three court reporters. Those volumes prepared by Johnston and Dalthorp are referenced as “RP Johnston” and “RP Dalthorp.” Court reporter Prante prepared the bulk of the verbatim in three volumes. Those are referenced as RP I, RP II, and RP III as applicable to the specific page number.

² Each of the Castle’s bedrooms are named in a manner consistent with a royalty theme.

would watch television in her bedroom before dosing off. RP I 171; RP II 203.

Around 5:30 a.m. on the morning of September 20, 2013, Mrs. Grow woke to a stranger in her bedroom. RP I 145; RP II 211. The stranger, a man described only as wearing blue jeans and a white t-shirt, told her not to move. RP I 145, 147. Mrs. Grow did not heed the suggestion. Instead, she got out of bed, yelled, and threw a lamp at the man. RP I 145-47. The man struck Mrs. Grow several times and fled. RP I 145, 147.

Mrs. Grow ran into the hallway looking to activate an alarm all the while screaming for help from Mr. Adamson. RP I 145. He called 911 as he raced down the stairs to check on Mrs. Grow. RP II 193. The police arrived within a few minutes. RP II 211. Mrs. Grow noticed drawers on her jewelry cupboard open and jewelry and passports missing. RP I 152.

An ambulance took Mrs. Grow to the hospital where she was diagnosed with black eyes and a bruised shoulder. RP I 151-52.

During their investigation, the Hoquiam police found no damage to the Castle. RP II 242, 248, 294. The front door was unlocked. RP II 196. A pillow and jacket from the house were in the driveway as were a trail of bobby pins. RP II 216, 359, 290. Mrs. Grow's purse was missing from downstairs. RP I 152. An open can of Budweiser Straw-ber-Rita

containing liquid was sitting on Mrs. Grow's television stand. RP II 244. Both Mrs. Grow and Mr. Adamson denied drinking that beverage or knowing where the can came from. RP I 159-60; RP II 202. For tour purposes, the Castle was kept in immaculate condition and guests were discouraged from eating or drinking while on the tour. RP I 161; RP II 241.

No suspects were immediately identified or arrested. RP II 312-17. The police contacted a man, Dwight Warden, walking in the area. RP II 312. He fit the description of the suspect – a man wearing blue jeans and a white shirt. RP II 312. But the police discounted Mr. Warden as a suspect because about a half-hour after the burglary, he was on video at Swanson's buying yogurt. RP II 314. Swanson's is about 10 blocks from the Castle. RP II 314.

Over the next few days, police focus turned to Mr. Lomax as the suspect. RP II 317. Mr. Lomax came to the Hoquiam Police Department and was interviewed by Hoquiam Detectives David Blundred and Shane Krohne. RP 251-52, 317. Mr. Lomax denied knowing anything about the Castle incident and gave the police a buccal swab for DNA analysis and comparison. RP II 252-53. The swab was submitted to the Washington State Crime Patrol Crime Lab for testing along with the Budweiser can.

RP II 252-53-56. Mr. Lomax's DNA was the only DNA on the drinking area of the Budweiser can. RP II 338-347.

Mariah McCarty, just 18, with the promise of transactional immunity, reluctantly testified that about a month prior to October 2013 she drove Mr. Lomax to the Castle. RP II 257-57; RP III 377, 380; Supplemental Designation of Clerk's Papers, Order Compelling and Accepting Grant of Immunity (sub. nom. 123); Supp. DCP, Motion and Declaration for Order Compelling Testimony CrR 6.14 (sub. nom. 122). He got out but she stayed in the car. When he returned to the car, he had jewelry. RP III 380-83. The court refused to allow Mr. Lomax to impeach Ms. McCarty's testimony with three prior juvenile convictions for taking a motor vehicle without permission. RP III 385.

Mr. Lomax did not testify. RP III 417-18. Through medical records, he made the jury aware that just two days prior to the Castle burglary, he was in a serious car accident and suffered a troubling knee injury. RP III 413-17; Supp. DCP, Lomax Trial Exhibit No. 70.

Lomax was convicted as charged with burglary in the first degree³ for having entered the Castle intending to commit a theft and while there assaulting Mrs. Grow. RP III 456; CP 1, 11.

³ RCW 9A.52.020

At sentencing, the State presented the court with sentencing paperwork showing Mr. Lomax was convicted of robbery in the second degree in Pierce County in 2006, and of robbery in the first degree in Grays Harbor County in 2009. RP Johnston 4-10; Supp. DCP, Sentencing Exhibits 1, 2, and 3. With no other sentence available, the court sentenced Mr. Lomax to life in prison as a persistent offender. RCW 9.94A.570. RP Johnston 9-10; CP 14.

The court struck discretionary legal financial obligations from Mr. Lomax's judgment and sentence but imposed the \$500 victim assessment and \$100 DNA fee. CP 14. The court also required Mr. Lomax to give a DNA sample to the crime lab for testing. CP 15. Mr. Lomax did not object. RP Johnston 4-10. The judgment and sentence lists the date of the offense as September 20, 2014 and specifies the maximum term as 25 years to life and/or a \$50,000 fine. CP 12, 13.

Mr. Lomax appeals all portions of his judgment and sentence. CP 19.

D. ARGUMENT

1. By requiring Mr. Lomax to wear shackles during closing argument, the trial court deprived him of his right to a fair trial.

a. A defendant has the right to appear in court free of restraints.

Criminal defendants have long been entitled to appear in court free from bonds and shackles absent extraordinary circumstances. U.S. Const. Amends VI, XIV; Const. art. 1, § 22; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *In re Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *State v. Williams*, 18 Wash. 47, 50 P. 580 (1897) (referring to the “ancient” right to appear in court free from shackles). Physical restraints denigrate the defendant’s constitutional right to a fair trial by reversing the presumption of innocence and prejudicing the jury against him. *Deck v. Missouri*, 544 U.S. 622, 630, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *Allen*, 397 U.S. at 344; *Davis*, 152 Wn.2d at 693-94.

Beyond that, using restraints is also an affront to the dignity accorded to an American courtroom. *Deck*, 544 U.S. at 631; *Allen*, 297 at 344. The court in *Deck* held

The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal

punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial “affront[s]” the “dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Allen, supra*, at 344, 90 S.Ct. 1057; see also *Trial of Christopher Layer*, 16 How. St. Tr., at 99 (statement of Mr. Hungerford) (“[T]o have a man plead for his life” in shackles before “a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present,” undermines the “dignity of the Court”).

Deck, 544 U.S. at 631-32.

In addition, restraining a defendant restricts his ability to assist counsel during trial, interferes with the right to testify in one’s own behalf, and may even confuse or embarrass the defendant sufficiently to impair his ability to reason. *Deck*, 544 U.S. at 631; *Allen*, 397 U.S. at 345; *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (and cases cited therein), *cert. denied*, 528 U.S. 922 (1999); *Williams*, 18 Wash. at 50-51. Because of the constitutional rights at stake, a court cannot require a defendant be restrained in court except in extraordinary circumstances. *Finch*, 137 Wn.2d at 846; *Williams*, 18 Wash. at 51.

The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom.

Davis, 152 Wn.2d at 695. Restraints must be a “last resort,” when less restrictive alternatives are not possible. *Allen*, 397 U.S. at 344. The determination must be based on facts in the record. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). The trial court, and not corrections officers, must decide whether a defendant is or is not shackled. *Finch*, 137 Wn.2d at 853.

b. The trial court required Mr. Lomax wear shackles without considering the need for restraints and instead deferred entirely to the apparent wishes of corrections staff.

Here the trial court deferred entirely to concerns apparently raised by corrections staff. Only after Mr. Lomax objected to being shackled did the court explain it “was informed [by an unspecified person] that Mr. Lomax had made statements to corrections staff that given the opportunity to flee that he intended to do so.” RP III 411-12. In response, the court told the court administrator he wanted the corrections officers to shackle Mr. Lomax for the remainder of the trial. RP III 411-12. Up to that point, just before the jury heard from the only defense witness, Mr. Lomax did not have to wear shackles and had not tried to escape or harm anyone. As the court noted at the start of the trial, a corrections officer sat behind Mr. Lomax throughout trial. RP Dalthorp 10.

The court did not address why the existing security arrangements were insufficient. The court did not even learn of the security concerns through corrections officers but rather through a court administrator. The court did not identify observing any behavior by Mr. Lomax necessitating any restraint. The court never inquired directly of the corrections staff. And the court made no findings detailing any factual basis justifying the extraordinary measures. RP III 411. The court accepted as a foregone conclusion the need for restraints. The court did not engage in any meaningful analysis of the need for restraints based upon actions by Mr. Lomax. The decision to shackle in the courtroom must be made by the trial judge and not by corrections officers or others. *Finch*, 137 Wn.2d at 853. The trial court erred in failing to thoroughly investigate and then subsequently order Mr. Lomax to wear restraints.

c. The improper restraint of Mr. Lomax deprived him a fair trial and requires reversal of his conviction.

Because it infringes on several constitutional rights, improper shackling of a defendant is presumptively prejudicial and requires reversal unless the State can demonstrate beyond a reasonable doubt “the [shackling] error complained of did not contribute to the verdict obtained.” *Deck*, 544 U.S. at 635 (bracketed text in original) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Typically, where physical restraints have been used, the prejudice inquiry has focused on whether jurors could see the restraints. *State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1 (2002) (any error in restraining defendant harmless because stun belt invisible to jurors). Focusing upon the visibility of restraints addresses only one of the constitutional violations that restraints pose – upsetting the presumption of innocence. Using restraints also deprived a defendant the ability to meaningfully present a defense, and “is itself something of an affront to the very dignity and decorum of judicial proceedings.” *Allen*, 397 U.S. at 344. Whether or not restraints are visible is of limited value in measuring the harm caused to the decorum and dignity of the proceedings. And visibility is wholly relevant in assessing the impact of a defendant’s ability to assist in his defense.

Further, focusing on the visibility of the restraints does not account for the differing effects being restrained has on the person. Weighing the prejudice caused by the restraint solely in terms of its visibility to a jury ignores the actual effect and prejudice caused by restraint.⁴ The psychological effect is impossible to measure. The decision in *Riggins v. Nevada*, 504 U.S. 127, 137, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), explains this point.

⁴ Here the court and Mr. Lomax’s counsel did not agree on whether Mr. Lomax’s shackled ankles could be seen by jurors.

In *Riggins*, prior to trial a defendant objected to the continued administration of psychotropic drugs because such drugs would alter how the jury perceived him. 50 U.S. at 130-31. The trial court overruled his objections. *Id.* The Supreme Court reversed his conviction finding that forced medication in that circumstance deprived him of due process. *Id.* at 135-37. Addressing the questions of prejudice, the Court said

Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. See *post*, at 1823. Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams*, 425 U.S. 501, 504–505, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976), or of binding and gagging an accused during trial, see *Allen, supra*, 397 U.S., at 344, 90 S.Ct. at 1061, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

Riggins, 504 U.S. at 137. Not only did the Court recognize the futility of attempting to divine prejudice from the record, it did so by relying on shackling cases. In doing so, the court plainly envisioned a prejudice analysis far more searching than simply determining whether the restraint was visible.

The State cannot demonstrate beyond a reasonable doubt that requiring Mr. Lomax be shackled did not affect his ability to defend against the charge. The State cannot prove the shackling did not impact his

demeanor and the jury's perceptions. This Court should reverse his conviction.

2. The trial court abused its discretion and violated Mr. Lomax's right to impeach the critical prosecution witness by excluding evidence of Mariah McCarty's prior juvenile convictions for crimes of dishonesty.

a. The trial court excluded the State's key witness's prior juvenile convictions for crimes of dishonesty.

Mr. Lomax, relying on ER 609, moved in limine to impeach the credibility of key witness Mariah McCarty with three prior juvenile convictions for taking a motor vehicle without the owner's permission. The trial court denied the request without explanation. RP III at 385.

b. The trial court's ruling was an abuse of discretion under ER 609 and violated Mr. Lomax's right of confrontation.

(i) The trial court abused its discretion under ER 609 in refusing to admit Mariah McCarty's juvenile convictions.

Juvenile adjudications are generally not admissible for impeachment unless the conditions of ER 609(d) are satisfied. *State v. Gerard*, 36 Wn. App. 7, 11-12, 671 P.2d 286 (1983). A trial court's decision to admit or exclude the evidence of a juvenile adjudication under ER 609(d) is reviewed for abuse of discretion if the trial court properly interprets the rule. *State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006).

ER 609(d) provides for admission of juvenile adjudications where the adjudication would be admissible under the rules governing adult convictions offered for impeachment, and if admission is necessary for a fair determination of the cause:

Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

ER 609(d). Ms. McCarty's three convictions satisfy both criteria for admission.

First, Ms. McCarty's adjudications would have been admissible for impeachment purposes as adult convictions. Under ER 609(a)(2), prior convictions for crimes of dishonesty or false statements must be admitted into evidence when offered by a party for impeachment of the witness's credibility. ER 609(a)(2). ER 609(a)(2) provides that "evidence that the witness had been convicted of a crime shall be admitted [for purposes of impeaching the witness' credibility] if the crime ... involved dishonesty or false statement." Ms. McCarty's three convictions for taking a motor vehicle without the owner's permission are per se probative of dishonest

or false statements under ER 609(a)(2). *State v. Trepanier*, 71 Wn. App. 372, 381, 858 P.2d 511 (1993).

Second, under ER 609(d), the prior adjudications not only met the requirements for admission as adult convictions, but admission was necessary for a fair determination of Mr. Lomax's guilt or innocence. Without the admission, the jury could not properly assess Ms. McCarty's honesty as a witness. And Mr. Lomax did not have other evidence from which to argue Ms. McCarty may not have been a truthful witness – a fact that should weigh in favor of determining that he needed the impeachment evidence for a fair assessment by the jury. *State v. Barnes*, 54 Wn. App. 536, 538-39, 774 P.2d 547 (1989) (court should consider what other impeachment evidence is available to the defense in the form of other prior convictions and prior misconduct).

For all these reasons, the trial court's ruling under ER 609 was an abuse of discretion. *State v. ex. rel., Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (discretion is abused when exercised in a manifestly unreasonable manner or on untenable grounds).

- (ii) The trial court violated Mr. Lomax's right to confrontation.

Importantly, whether or not the trial court's ER 609(b) ruling on the three prior taking a motor vehicle without permission convictions was

an abuse of discretion, excluding the convictions was a violation of Mr. Lomax's right to confront, cross-examine, and validly impeach this critical State's eyewitness against him. Even if a trial court's ruling is within the discretion granted to courts under ER 609, evidentiary rules must sometimes give way to a criminal defendant's right to confront the witnesses against him. *State v. McDaniel*, 83 Wn. App. 179, 188 n.5, 920 P.2d 1218 (1996). Because of the trial court's ruling, Mr. Lomax could not impeach the key State's witness with her prior convictions for crimes of dishonesty, which would have resulted in a different outcome.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and State constitutions. U.S. Const., Amend VI; Wash. Const., Art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). In the constitutional sense, "confrontation" means more than mere physical confrontation. *Davis*, 415 U.S. at 315. The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). The purpose is to test the perceptions, memory, and critical here, the credibility of witnesses. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). Confrontation therefore

helps assure the accuracy of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. *Id.* Therefore, the defendant's right to confront must be jealously guarded. *State v. Kilgore*, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001).

The Washington Courts employ the analysis outlined in *State v. Hudlow* to determine whether excluding impeachment evidence of a prosecution witness's prior convictions violates the defendant's right of confrontation. *See e.g., State v. Martinez*, 38 Wn. App. 421, 423-24, 685 P.2d 650 (1984); *Hudlow*, 99 Wn.2d at 16.

Critically, under the *Hudlow* test, the threshold to admit evidence is low – even minimally relevant evidence is admissible. *Hudlow*, 99 Wn.2d at 16. Relevant evidence may be deemed inadmissible only if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Id.*

The *Hudlow* test requires a three-pronged approach. First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process. Finally, the State's interest in excluding the prejudicial evidence must be balanced against the

defendant's need for the information sought, and only if the State's interest outweighs the defendant's need for the evidence can otherwise relevant information be withheld. *See State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002) (also noting use of the *Hudlow* test to analyze the confrontation right to introduce convictions under ER 609(b)). The *Hudlow* Court further stated when the evidence sought by the defense is of high probative value, "it appears no state interest can be compelling enough to preclude its introduction." *Hudlow*, 99 Wn.2d at 16.

Impeachment of the type sought by Mr. Lomax was critical to a fair trial, as it would have provided explanation to the jury for Ms. McCarty's haltingly reluctant testimony even though the State promised her full transactional immunity for her testimony. Supp. DCP, Motion and Declaration for Order Compelling Testimony CrR 6.14 (sub. nom. 122); Supp. DCP Order Compelling Testimony and Accepting Grant of Immunity (sub. nom. 123); RP III 383, 386, 391-93. Ms. McCarty claimed she and Mr. Lomax hung out together in the fall of 2013. RP III 377, 379. About a month before they were arrested in October, she drove Mr. Lomax to the Castle. It was dark out. She parked near a wall, Mr. Lomax got out. She fell asleep. When Mr. Lomax returned to the car he had jewelry. RP III 379-83.

Ms. McCarty's testimony put Mr. Lomax near the Castle at night in September 2013 and returning to the car with jewelry. Given that she was the only person who put Mr. Lomax near the Castle and coming back to the car with jewelry, her testimony was critical to the State's case. It made their case stronger. Without Ms. McCarty's testimony, the jury was left to speculate how a can with Mr. Lomax's DNA on the lid made its way into an area often open to the public. That speculation made the State's case much weaker. Mr. Lomax was entitled to use Ms. McCarty's history of committing crimes of dishonesty to impeach her testimony and push back using a weakness in the State's case, i.e., Ms. McCarty's history of dishonest criminal acts.

The burden should have been on the State to show how the evidence of a criminal adjudication was so prejudicial as to disrupt the fairness of the fact-finding process at Mr. Lomax's trial. *Hudlow*, 99 Wn.2d at 16. The impeachment evidence would not have "confuse[ed] the issues, misle[d] the jury, or cause[d] the jury to decide the case on any improper or emotion basis." *Hudlow*, at 13-14. Impeachment of Ms. McCarty, to aid in the truth-finding process, would have had no prejudicial effect on the State's case.

(c) *The error in excluding the impeachment evidence requires reversal under either a non-constitutional or a constitutional error standard.*

Error in excluding impeachment evidence offered by the defendant is constitutional error. *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998). It is presumed to require reversal, and the State must prove the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn. 2d 412, 425, 70 P.2d 1182 (1985).

No other evidence in this case was adequate to show that Mr. Lomax was guilty. The testimony of the other eyewitnesses – Mrs. Grow – added nothing to the State’s case that would buffer the prejudice effect of the court’s erroneous ER 609 impeachment ruling. She could not identify the intruder as anyone other than a man wearing blue jeans. RP I 147, 148. The police identified another person, Dwight Warden, in the neighborhood wearing blue jeans and a white t-shirt. RP II 266, 313-314.

In sum, the evidence was inadequate to withstand the prejudicial effect of the court’s refusal to allow the defense to utilize the only tool at its disposal to raise reasonable doubt premised on untruthfulness, by demonstrating Ms. McCarty’s record of crimes of dishonesty. Although she was not the complainant, she was a critical witness in a trial that depended on both the accuracy and the truth of the identification of the defendant. Ms. McCarty provided the critical testimony asserting that Mr.

Lomax was the person she dropped off at the Castle. The state cannot prove in this case that the improper exclusion of competent evidence that would have impeached Ms. McCarty's honesty was harmless beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425.

3. Lomax's right to a fair trial was violated by prosecutorial misconduct during closing argument.

a. Mr. Lomax has a right to due process.

The due process clause of the Fourteenth Amendment protects the rights of every criminal defendant to a fair trial before an impartial jury. U.S. Const. Amends. V, XIV; Const. Art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. *Blakely v. Washington*, 542 U.S. 296,

301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties that limit their advocacy.

A prosecutor's improper argument may deny a defend his right to a fair trial, as guaranteed by the Sixth Amendment and by Article I, Section 22 of the Washington Constitution. *State v. Monday*, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In *State v. Huson*, the Supreme Court noted the importance of impartiality by the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969) (citation omitted); see also, *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments

were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury. *Reed*, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comment rose to the level of misconduct requiring a new trial. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor’s misconduct in closing argument denied Mr. Lomax a fair trial.

During closing argument, Mr. Lomax did not object to the prosecutor’s improper vouching for the credibility of its key witness Ms. McCarty. The prosecutor assured the jury, “she’s not making this up” referring to the favorable testimony she provided for the state for immunity from prosecutor as an accomplice to this class A felony. RP III 428. It is improper for a prosecutor to vouch for a witness's credibility. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891, 896 (2010).

Because of the flagrant nature of the prosecutor’s remark, the issue may be raised for the first time on appeal. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); RAP 2.5(a). An abuse of discretion standard applies to allegations of prosecutorial misconduct. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Improper statements in closing argument are reviewed in the context of the entire argument, the

issues in the case, the evidence, and the jury instructions. *State v. Osman*, 192 Wn. App. 355, 366, 366 P.3d 956 (2016).

Ms. McCarty's testimony was crucial to the State's case. Without it, the State could not put Mr. Lomax at the Castle. The Budweiser can with Mr. Lomax's DNA on it suggested only that Mr. Lomax's lips were on the can in the past. People toured through the house frequently and it is possible a tour occurred that day. RP II 200. While Mrs. Grow discouraged persons from eating or drinking during the tour, her guests walked behind her. RP I 161, 167. She could not watch their every move. It would have been easy for a guest to carry in a can that earlier Mr. Lomax drank from.

d. Reversal is required.

There is a substantial likelihood the prosecutor vouching for the credibility of his key witness affected the jury's verdict. This court should reverse Mr. Lomax's conviction.

4. Cumulative error created an enduring prejudice, denying Lomax the fundamental right to a fair trial.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the combined error denied the defendant a fair trial. U.S. Const. Amend. XIV; Const. Art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct.

1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel’s errors in finding cumulative error); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)(“the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Each of the errors set forth above, standing alone, merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury’s verdict. Even if this court does not find that any single error merits reversal, the court should conclude that cumulative error rendered Mr. Lomax’s trial fundamentally unfair.

5. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 collection fee.⁵

Both the Washington and United States Constitutions mandate that no person shall be deprived of life, liberty, or property without due process

⁵ Counsel is aware this and the next issue were decided by this court on May 10 in a published decision. See *State v. Mathers*, __ P.3d __ (2016) WL 2865576. In anticipation of a Motion for Reconsideration, I am leaving my version of these issues unchanged.

of law. U.S. Const. Amends. V, XIV; Wash. Const. art. I § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Amunrud*, 158 Wn.2d at 218-19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 625-26 (1992)).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen*, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Nielsen*, 177 Wn. App. at 53-54. Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test “is not a toothless one.” *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389

(1976). As the Washington Supreme Court has explained, “the court’s role is to assure that even under the deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate state interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA collection fee. RCW 43.43.7541.⁶ This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541. This is a legitimate interest. But imposing this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

⁶ Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A.RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

It is unreasonable to require sentencing courts to impose the DNA collection fee upon all felony defendants regardless of whether they have the ability to or likely future ability to pay. The blanket requirement does not further the state's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the state to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue that the \$100 DNA collection fee is such a small amount that the defendant could likely pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of other legal financial obligations included in the sentence." RCW 43.43.7541. The fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. The statute makes this the least likely fee to be paid by an indigent defendant.

The defendant will be saddled with a 12% interest rate on his unpaid DNA collection fee, making the actual debt incurred even more

onerous in ways that reach far beyond his financial situation. Imposing mounting debt upon people who cannot pay works against another important state interest – reducing recidivism. See *Blazina*, 182 Wn.2d at 837 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA collection fee does not rationally relate to the state's interest in funding the collection, testing, and retention of an individual defendant's DNA. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Lomax's indigent status, the order to pay the \$100 DNA collection fee should be vacated.

6. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA collection fee multiple times, while others need only pay once.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. Amend XIV; Wash. Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). A valid law administered in a manner that unjustly

discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*, 121 Wn. App. at 704. Here, the relevant group is all defendants subject to the mandatory DNA collection fee under RCW 43.43.7541. Having been convicted of a felony, Mr. Lomax is similarly situated to other affected persons within the afflicted group. See RCW 43.43.754; RCW 43.43.7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) reasonable grounds distinguish between different classes of affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d. at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id.*

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in “assist[ing] federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons.” Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender’s biological sample is entered into the Washington State Patrol’s DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime must include a mandatory fee of \$100. RCW 43.43.754; RCW 43.43.7541.

The purpose of RCW 43.43.754 is to fund the collection, analysis and retention of an individual felony offender’s identifying DNA profile to include in a database of DNA records. Once a defendant’s DNA is collected, tested, and entered in the database, subsequent collections are unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further need for a biological sample to collect regarding defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual offender's identifying DNA profile.

Mr. Lomax's DNA was undoubtedly collected previously pursuant to statute. He has 10 felony convictions dating back to 1999. CP 12-13. Most, if not all, of these prior convictions each required collection of a biological sample for DNA identification. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002; Laws of 1994 c 271 § 1, eff. June 9, 1994. The \$100 DNA collection fee has been in place since at least 2002. Laws of 2002 c 289 § 2, eff. July 1, 2002. All seven of Mr. Lomax's prior felonies committed as an adult were 2002 or later. CP 12. There is no evidence suggesting DNA had not been collected as it was ordered in prior judgments and sentences. Supp. DCP, Sentencing Exhibits 1, 2, and 3.

RCW 43.43.7541 discriminates against defendants previously sentenced by requiring them to pay multiple DNA collection fees, while other defendants need only pay one DNA collection fee. The requirement that the fee be collected from such defendants upon each sentencing is not

rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA collection fee ordered must be vacated.

7. The trial court erred when it ordered Mr. Lomax to submit another DNA sample.

The trial court ordered Mr. Lomax to submit to DNA collection under RCW 43.43.754(1). CP 15.⁷ Yet, the record supports that Mr. Lomax’s DNA was already collected under that statute. Given the record, the trial court abused its discretion when it ordered Mr. Lomax to submit to yet another collection of his DNA.

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds” or made for “untenable reasons.” *Carroll v. Junker*, 79 Wn.2d at 26. “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological sample “must be collected” when an individual is convicted of a felony offense. However, RCW 43.43.754(2) expressly provides: “If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required.” The trial

⁷ See Judgment and Sentence Section 4.4.

court has discretion whether to order the collection of an offender's DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant's DNA to be collected under RCW 43.43.754(1) where the record adequately supports the defendant's DNA has already been collected. The Legislature recognized that collecting more than one DNA sample from an individual is unnecessary. RCW 43.43.754(2). It is an utter waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders. The plain fact is multiple DNA collections are wasteful and pointless.

The record supports that Mr. Lomax's DNA has been collected under RCW 43.34.754(1). Mr. Lomax provided a buccal swab for DNA testing. RP I 23. Mr. Lomax's uncontested criminal history includes seven prior adult felonies between 2000 and 2013, and three prior juvenile felonies between 1999 and 2000. CP 12-13; RP Johnston 4-9. The State collected DNA samples for offenses as early as 1990. Former RCW 43.43.754 (1989). If Lomax was declined the opportunity to provide a DNA sample on all 10 of his prior felonies, the collection system is broken.

The court's recent opinion in *Thornton* differs. *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015). On appeal, Thornton challenged

the imposition of a DNA collection fee contending the requirement had already been fulfilled because of her prior 2014 delivery of a controlled substance offense in her offender score. *Thornton*, 188 Wn. App. at 373-74. When the trial court asked if a DNA sample had already been collected on the 2014 case, the prosecutor responded in the negative. Thornton did not dispute the State's assertions. *Id.* at 374. Citing this, the court concluded RCW 43.43.754(2) did not apply and imposition of a \$100 collection fee was appropriate. *Id.* at 374.

Here, no one mentioned historic systemic problems in collecting and retaining DNA samples. The facts create a strong inference that Mr. Lomax's DNA was in the database and he fell within the parameters of RCW 43.43.754(2). Hence, it was manifestly unreasonable for the sentencing court to impose another DNA collection requirement. The DNA collection order should be reversed.

8. The trial court should correct the judgment and sentence to reflect the correct date of crime and maximum term.

Mr. Lomax's judgment and sentence contains two scrivener's errors. Both require correction.

Section 2.1 incorrectly lists the date of crime as September 20, 2014, when the actual date was September 20, 2013. CP 1; RP I 145.

Section 2.3 incorrectly lists the maximum term as 25 years to life and/or a \$50,000 fine. The maximum term is life without the possibility of release. RCW 9.94A.570.

This court should remand Mr. Lomax's case to correct the judgment and sentence. *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form.); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

9. Any request that costs be imposed on Mr. Lomax for this appeal should be denied because the trial court determined he cannot pay legal financial obligations.

This court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 386, 367 P.3d 612 (2016). The defendant's inability to pay appellate costs is an important consideration to consider in deciding whether to disallow costs. *Id.* at 391. Here, the trial court found Mr. Lomax indigent and unable to pay legal financial obligations. CP 14;

Supp. DCP, Order of Indigency (sub. nom 7); Supp. DCP, Order of Indigency (sub. nom. 147). This court should exercise its discretion and disallow appellate costs should the State substantially prevail.

The Rules of Appellate Procedure allow the State to request appellate costs if it substantially prevails. RAP 14.2 A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word “will” in the first sentence appears to remove discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision.*

Nolan, 141 Wn.2d at 626 (emphasis added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, “The court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added).

In *Sinclair*, the court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the court should exercise in appropriate cases. *Sinclair*, 192 Wn. App. at 391. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Id.* at 388. Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *Id.* at 389. Thus, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Id.* at 389-90. Under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Sinclair*, 192 Wn. App. at 386.

The Court should deny an award of appellate costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, 192 Wn. App. at 393. Imposing costs against indigent defendants raises problems well documented, such as increased difficulty in

reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Id.* at 391 (citing *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)). “It is entirely appropriate for an appellate court to be mindful of these concerns.” *Sinclair*, 192 Wn. App. at 391.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at state expense, finding Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the cost of appellate review.” *Sinclair*, 192 Wn. App. at 392. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he could pay appellate costs. *Id.* at 393. The Court ordered that appellate costs not be awarded. *Id.*

Similarly, here, Mr. Lomax is indigent and lacks an ability to pay. At sentencing, the trial court declined to impose discretionary legal financial obligations. CP 14. The court also entered an order authorizing Mr. Lomax to appeal in forma pauperis. Supp. DCP, Order of Indigency (sub. nom 147). This finding is supported by the record. Because the court imposed a persistent offender sentence, barring a change in the law or success on appeal, Mr. Lomax is serving a life sentence without the

possibility of release. RCW 9.94A.570. Even if he were released, Mr. Lomax, at just 29 years old, has a lengthy felony criminal history, which will hinder any future attempts to obtain gainful employment. CP 12-13. Given these factors, it is unrealistic to think Mr. Lomax can pay appellate costs.

This Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail.

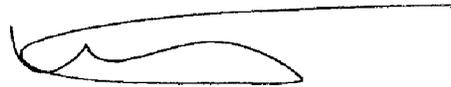
E. CONCLUSION

Mr. Lomax's conviction should be reversed because he was unconstitutionally shackled, the court erred in refusing to allow impeachment of the State's key witness with her juvenile crimes of dishonesty, and because the prosecutor improperly vouched for the key witness's credibility in closing argument. Even if none of the arguments standing alone require reversal, the cumulative bad affect requires reversal.

Alternatively, Mr. Lomax's case should be remanded to the trial court to strike the \$100 DNA fee, strike Mr. Lomax's obligation to provide another DNA sample, and to strike the scrivener's errors in the judgment and sentence.

If Mr. Lomax does not prevail on appeal, and the State requests appellate costs, this court should use its discretion to decline imposing all requested costs.

Respectfully submitted May 24, 2016.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LISA E. TABBUT/WSBA 21344
Attorney for Thomas Lomax

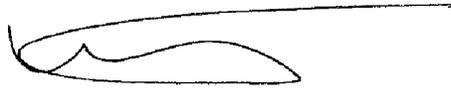
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Grays Harbor County Prosecutor's Office, at jwalker@co.grays-harbor.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Thomas Lomax/DOC#897441, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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

Signed May 24, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Thomas Lomax, Appellant

LISA E TABBUT LAW OFFICE

May 24, 2016 - 9:44 AM

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