

No. 31237-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED
March 18, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

CHARLES SLOCUM

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Judge Vic Vanderschoor

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 280-1207
Fax (509) 299-2701
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT1

B. ASSIGNMENTS OF ERROR3

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

D. STATEMENT OF THE CASE.....4

E. ARGUMENT.....7

Issue 1: Whether the court erred by admitting evidence of prior bad acts where there was insufficient similarity to show a common scheme or plan and the evidence was unduly prejudicial.....7

 a. Evidence of the prior bad acts was presumptively inadmissible.....7

 b. There were not “substantial similarities” between the offenses to admit the prior bad acts as a “common scheme or plan.”.....9

 c. The evidence should have been excluded as unduly prejudicial.....13

 d. Mr. Slocum was prejudiced by the improper admission of prior bad act evidence, and the error was not “harmless.”.....14

Issue 2: Whether defense counsel was ineffective for failing to object when the State bolstered W.N.’s testimony with irrelevant, prejudicial and needless cumulative evidence.....16

Issue 3: Whether the court erred by refusing to allow the defendant to introduce his prior statement to officers that he had not touched W.N. inappropriately when he was accused of recent fabrication.....24

Issue 4: Whether the court erred by finding, without any supporting evidence, that the defendant had the present or future ability to pay legal financial obligations (LFOs).....29

F. CONCLUSION.....33

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999).....16, 17

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992).....29-31

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).....8-14, 28

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).....8

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000)24

State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).....8-10, 12

State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984).....15

State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989).....24

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).....9, 10, 12

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....17

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).....19

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004).....18

State v. Welchel, 115 Wn.2d 708, 801 P.2d 948 (1990).....19

Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983).....19

Washington Courts of Appeals

City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).....19

Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007).....10, 14, 15

In re Detention of Coe, 160 Wn. App. 809, 250 P.3d 1056 (2011).....8

<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 186 P.3d 1117 (2008), <i>review denied</i> , 165 Wn.2d 1049 (2009).....	26, 27, 29
<i>Schryvers v. Coulee Cmty. Hosp.</i> , 138 Wn. App. 648, 158 P.3d 113 (2007).....	31
<i>State v. Baker</i> , 89 Wn. App. 726, 950 P.2d 486 (1997).....	14
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116 (1991).....	31, 32
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	30-33
<i>State v. Carlson</i> , 80 Wn. App. 116, 906 P.2d 999 (1995).....	20, 23, 24
<i>State v. Cochran</i> , 102 Wn. App. 480, 8 P.3d 313 (2000).....	25
<i>State v. Crook</i> , 146 Wn. App. 24, 189 P.3d 811 (2008), <i>review denied</i> , 165 Wn.2d 1044 (2009).....	31
<i>State v. Dunn</i> , 125 Wn. App. 582, 105 P.3d 1022 (2005).....	19
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999).....	19
<i>State v. Hakimi</i> , 124 Wn. App. 15, 98 P.3d 809 (2004).....	21
<i>State v. Harris</i> , 97 Wn. App. 865, 989 P.2d 553 (1999).....	25
<i>State v. Harper</i> , 35 Wn. App. 855, 670 P.2d 296 (1983).....	18
<i>State v. Kipp</i> , 171 Wn. App. 14, 286 P.3d 68 (2012).....	9
<i>State v. Krause</i> , 82 Wn. App. 688, 919 P.2d 123 (1996), <i>review denied</i> , 131 Wn.2d 1007 (1997).....	14
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999).....	31
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012)	17
<i>State v. Mezquia</i> , 129 Wn. App. 118, 118 P.3d 378 (2005), <i>review denied</i> , 163 Wn.2d 1046 (2008).....	15
<i>State v. Sheets</i> , 128 Wn. App. 149, 115 P.3d 1004 (2005),	

<i>review denied</i> , 156 Wn.2d 1014 (2006).....	25
<i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009).....	30, 31
<i>State v. Thach</i> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	19, 20
<i>State v. Warren</i> , 134 Wn. App. 44, 138 P.3d 1081 (2006).....	20
<i>State v. We</i> , 138 Wn. App. 716, 158 P.3d 1238 (2007), <i>review denied</i> , 163 Wn.2d 1008 (2008).....	19, 20
<i>State v. Wilson</i> , 144 Wn. App. 166, 181 P.3d 887 (2008).....	9

Federal Authorities

<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)....	29
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	17

Washington Constitution, Statutes & Court Rules

5D WAPRAC ER 704.....	19
ER 401	<i>passim</i>
ER 402.....	8, 25
ER 403.	<i>passim</i>
ER 404(b).....	<i>passim</i>
ER 608.....	19
ER 701	20
ER 801.....	25-28, 33
ER 802.....	26
RCW 9.94A.760(2).....	29, 30

RCW 10.01.160.....29-31

Secondary Resources

4 John H. Wigmore, *Evidence* § 1124 (Chadbourn rev. 1972).....18

Pardo v. State, 596 So.2d 665 (Fla.,1992).....17, 18

Stephen J. Ceci and Richard D. Friedman, *The Suggestability of
Children: Scientific Research and Legal Implications*,
86 Cornell L. Rev. 33, 41 (2000).....18

A. SUMMARY OF ARGUMENT

Charles Slocum's 15-year-old grand-daughter, W.N., alleged that he had been touching her inappropriately since she was approximately three-years-old. There was no physical or corroborative evidence to support the girl's accusations, which Mr. Slocum vehemently denied. And Mr. Slocum was nearly 80-years-old with no criminal history, he had physical ailments that eliminated any sexual desires and he was in the hospital undergoing surgery during at least one of the allegations.

Under these circumstances, there is at least a reasonable probability that this trial was materially affected when the trial court improperly and prejudicially admitted W.N.'s mother's and aunt's allegations that Mr. Slocum had touched them inappropriately too many years prior. This "prior bad acts" testimony should not have been admitted as evidence of a common scheme or plan, because the acts were not sufficiently similar to the underlying charge. Moreover, this evidence should have been excluded as unduly prejudicial. The error in admitting this evidence, given the evidence in this case, was not harmless.

Next, defense counsel was ineffective for failing to object when the State called countless witnesses to testify about the story of abuse W.N. had shared with them. This evidence was irrelevant, it was highly prejudicial and, even if some of this evidence was admissible simply as

background purposes, the needless presentation of cumulative background evidence unfairly prejudiced Mr. Slocum in this trial. W.N.'s story did not become more truthful with the number of times she shared it, and there is a great likelihood that the jury became impassioned or at least confused as to the actual strength of the State's case with this improper accumulation of evidence that bolstered W.N.'s live testimony.

The trial court further erred by refusing to allow Mr. Slocum to support his theory of the case with his taped statements to law enforcement wherein he denied inappropriately touching W.N. The trial court mistakenly analyzed whether this evidence was admissible as an admission of a party opponent, correctly finding under that rule that it was not such an admission. But the court erroneously failed to admit this same evidence as a prior consistent statement under ER 801(d)(1)(ii) to rebut the State's charge that Mr. Slocum had recently fabricated his story.

Finally, the trial court erred by finding that Mr. Slocum had the present or future ability to pay LFOs. Where the trial court makes such a finding, it must only do so after proper consideration of the defendant's financial circumstances and the burden LFOs will place on the defendant. And the finding that Mr. Slocum had the ability to pay must have evidentiary support in the record, which this finding did not. Thus, the finding that Mr. Slocum has the ability to pay LFOs must be stricken.

Mr. Slocum's convictions of first-degree child molestation and third-degree child rape should be reversed so that this matter can proceed with a new and fair trial. At a minimum, the case should be remanded for resentencing to strike the erroneous LFO finding.

B. ASSIGNMENTS OF ERROR

1. The court erred by admitting evidence of Mr. Slocum's alleged prior bad acts, including through the testimony of Ms. Nash, Ms. Vaughn, Ms. Slocum and Mr. Nash.
2. The court erred by admitting testimony that was irrelevant, unnecessarily cumulative and prejudicial and improperly bolstered the State's most important witness.
3. The court erred by refusing to allow the defendant to introduce a prior consistent statement to support his theory of the case and defend the State's charge that he was fabricating his story.
4. The court erred by finding that Mr. Slocum had the present or future ability to pay LFOs without a proper inquiry into Mr. Slocum's financial circumstances and without any supporting evidence in the record.
5. The court erred by convicting and sentencing Mr. Slocum following an unfair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by admitting evidence of prior bad acts where there was insufficient similarity to show a common scheme or plan and the evidence was unduly prejudicial.

- a. Evidence of the prior bad acts was presumptively inadmissible.
- b. There were not "substantial similarities" between the offenses to admit the prior bad acts as a "common scheme or plan."
- c. The evidence should have been excluded as unduly prejudicial.

d. Mr. Slocum was prejudiced by the improper admission of prior bad act evidence, and the error was not “harmless.”

Issue 2: Whether defense counsel was ineffective for failing to object when the State bolstered W.N.’s testimony with irrelevant, prejudicial and needless cumulative evidence.

Issue 3: Whether the court erred by refusing to allow the defendant to introduce his prior statement to officers that he had not touched W.N. inappropriately when he was accused of recent fabrication of his story.

Issue 4: Whether the court erred by finding, without any supporting evidence, that the defendant had the present or future ability to pay legal financial obligations (LFOs).

D. STATEMENT OF THE CASE

In August 2011, Charles Slocum, who was almost 80-years-old and had no criminal history, was accused by his 15-year-old granddaughter W.N. (DOB 4-16-1996) of inappropriate touching. (9/13/12 RP 30, 33)

W.N. had a close relationship with her grandmother, Jane Slocum, who was married to the defendant, Mr. Slocum, for 32 years. (9/11/12 RP 75) W.N. often visited her grandmother while growing up, having many opportunities to do so since her family lived nearby in the Tri-Cities. (9/11/12 RP 27-28, 69, 71-72, 84-85) Ms. Slocum always watched W.N. closely and never suspected a problem between her husband and W.N. (9/11/12 RP 32, 72, 81-82; 9/13/12 RP 40)

After W.N. turned 15-years-old, W.N. alleged that during visits to her grandparents' home since she was approximately four-years-old, Mr. Slocum rubbed her vagina and breasts on multiple occasions, both over and under her underwear. (9/11/12 RP 121-25) W.N. further alleged that during one of these touching incidences on or about April 3, 2011, Mr. Slocum inserted his finger into her vagina. (9/11/12 RP 128-29) During these incidences, W.N. said that Mr. Slocum asked her if it felt good. (9/11/12 RP 122, 125)

Mr. Slocum denied W.N.'s allegations of inappropriate touching. (9/13/12 RP 31-32) He had been impotent since 1994 due to health complications and no longer had any sexual desires. (9/11/12 RP 76-77; 9/13/12 RP 37) Also, during the week of April 3, 2011, Mr. Slocum was in the hospital undergoing knee surgery, so he was not at home on the date of W.N.'s latest allegation. (9/11/12 RP 73; 9/13/12 RP 25-26, 34) And, throughout W.N.'s childhood, W.N.'s grandmother and parents, Tonja Nash and Police Officer Calvin Nash, never suspected any inappropriate touching of W.N. had occurred, despite their close supervision. (See 9/11/12 RP 36-37, 81-82, 97-99)

In August 2011, W.N. made her initial allegations of the inappropriate touching (9/11/12 RP 126, 132), and in December 2011, W.N. alleged the additional incident from April 2011 (9/11/12 RP 133-

34). W.N. testified that she told two friends earlier in her childhood about the touching (9/11/12 RP 126, 131, 152-55), and then in August 2011, W.N. relayed the accusations to another friend (9/11/12 RP 22-24), a coach/teacher (9/11/12 RP 59-60), a school counselor (9/11/12 RP 60), her parents (9/11/12 RP 29-30, 91-93), a detective (9/11/12 RP 102-05; 9/13/12 RP 9-11, 15-16) and a child forensics interviewer (9/11/12 RP 115-17). All of these persons, along with Ms. Slocum (9/11/12 RP 74-75), testified on behalf of the State regarding W.N.'s accusations, though none had any independent knowledge of W.N.'s accusations. (*See id.*)

Over objection, the State also introduced evidence from W.N.'s mother, Ms. Nash, that when she was approximately 12-years-old, her stepfather Mr. Slocum had rubbed her breasts under her bra and on another occasion had rubbed her vagina over her clothes. (9/10/12 RP 23-24, 40-41; 9/11/12 RP 30-31, 66, 87) Ms. Nash apparently told her mother Ms. Slocum what happened, and no other touching incidences occurred between Ms. Nash and Mr. Slocum. (9/10/12 RP 25, 40, 45) Mr. Nash's sister, W.N.'s paternal aunt Holly Vaughn, then also testified over defense objection. Ms. Vaughn stated that, when she had visited her brother and his wife when she was approximately 12-years-old, they went to the Slocum home to go swimming, at which time Mr. Slocum allegedly touched Ms. Vaughn's breasts under her swimsuit when applying

sunscreen. (9/10/12 RP 50-51, 54-55; 9/11/12 RP 48-49; 9/13/12 RP 15-16)

The jury convicted Mr. Slocum as charged of first-degree child molestation (count I) and third-degree child rape (count II) with a special finding that he had violated a position of trust with W.N. in committing the crimes. (9/13/12 RP 80-81; CP 87-88, 175-78) Mr. Slocum received an exceptional sentence of 120 months on count I and 60 months on count II. (11/1/12 RP 10; CP 203-04) This appeal timely followed. (CP 220) Additional facts may be cited as pertinent to the particular issue on appeal.

E. ARGUMENT

Issue 1: Whether the court erred by admitting evidence of prior bad acts where there was insufficient similarity to show a common scheme or plan and the evidence was unduly prejudicial.

The court erred by admitting evidence of the defendant's prior bad acts. There was insufficient similarity between the current and prior acts to show a common scheme or plan and, regardless, the evidence was so unduly prejudicial that it should have been excluded. Mr. Slocum should receive a new trial before an untainted jury so that, if he is to be convicted, it is to be only based on the evidence of the charged accusations by W.N.

a. Evidence of the prior bad acts was presumptively inadmissible.

ER 404(b) categorically and presumptively excludes prior conviction propensity evidence unless it is otherwise found admissible

upon a proper showing. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) states:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

ER 404(b). In order to exercise its discretion and admit evidence of prior misconduct under ER 404(b), the trial court must:

“(1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose of the evidence; (3) decide whether the evidence is relevant to prove an element of the State's case; and (4) find that the probative value of the evidence outweighs its prejudice.

In re Detention of Coe, 160 Wn. App. 809, 818-19, 250 P.3d 1056 (2011) (citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)); ER 402; ER 403. ““This analysis must be conducted on the record.”” *Id.* (quoting *Foxhoven*, 161 Wn.2d at 175). “The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition.” *DeVincentis*, 150 Wn.2d at 17. “It is because of this burden that evidence of prior misconduct is presumptively inadmissible.” *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) (citing *DeVincentis*, 150 Wn.2d at 17).

The trial court’s interpretation of an evidentiary rule is reviewed de novo. *DeVincentis*, 150 Wn.2d at 17. Once the rule is correctly

interpreted, the trial court's ruling under ER 404(b) is reviewed for abuse of discretion. *State v. Kipp*, 171 Wn. App. 14, 20, 286 P.3d 68 (2012) (internal citations omitted). "A trial court abuses its discretion if its decision is 'manifestly unreasonable or rests on untenable grounds.'" *Id.* In close cases, the balance must be tipped in favor of the defendant. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

b. There were not "substantial similarities" between the offenses to admit the prior bad acts as a "common scheme or plan."

The trial court determined that Mr. Slocum's prior bad acts would be admitted as evidence of a "common scheme or plan" to molest children. 9/11/12 RP 15; *See e.g., Kipp*, 171 Wn. App. at 20. Such evidence is relevant when the existence of the crime is at issue.

DeVincentis, 150 Wn.2d at 21. The evidence may be admitted "where 'an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.'" *Gresham*, 173 Wn.2d at 421-22 (quoting *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995)). To admit evidence for this purpose, the "prior misconduct and the charged crime must demonstrate 'such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which' the two are simply 'individual manifestations.'" *Id.* (quoting *Lough*, 125 Wn.2d at 860). "Mere 'similarity in results' is insufficient." *Id.* There must

instead be “substantial similarity between the prior bad acts and the charged crime.” *Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 434, 167 P.3d 1193 (2007) (quoting *DeVincentis*, 150 Wn.2d at 21)).

For example, in *State v. Lough* the defendant created the opportunity to rape his prior and current victims by drugging them and rendering them unconscious. 125 Wn.2d at 850-51. The prior act evidence was admissible because it “evidences a larger design to use [the defendant’s] special expertise with drugs to render [his victims] unable to refuse to consent to sexual intercourse. A rational trier of fact could find that the Defendant was the mastermind of an overarching plan.” *Id.* at 861.

Similarly, the defendant in *State v. Gresham* created an opportunity for fondling his child victims when he took a trip with them and committed the inappropriate touching when the other adults were asleep on the trip. *Gresham*, 173 Wn.2d at 422. The incidences were described as “individual manifestations’ of the same plan.” *Id.* (quoting *Lough*, 125 Wn.2d at 860).

And in *DeVincentis*, the defendant used the same scheme or plan of grooming his victims over periods of time by regularly and casually going about his house naked or in minimal clothing while they were

visiting in order to lessen the victims' surprise or level of discomfort upon seeing the defendant naked when the incidences eventually advanced to inappropriate touching. 150 Wn.2d at 15. The Court stated, "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." *Id.* at 17-18.

Here, the court misconstrued the pertinent ER 404(b) analysis and focused on the fact that the prior bad acts involved molesting a child, as did this underlying charge. But there must be more than mere commonality among the primary elements of the crime; mere similarity in results is insufficient. Otherwise, every crime of the same type would involve a common scheme or plan, such that ER 404(b)'s presumptive exclusion of such evidence would lose all meaning. The trial court indicated that Mr. Slocum's prior bad acts evidenced a common scheme or plan to molest children. But this is common to each and every child molestation case. There must be more in factual similarities rather than mere similarity of pure legal elements to show how the prior acts are "substantially similar" to the underlying offense. The trial court misconstrued the legal standard and its decision should be reversed upon this Court's de novo review.

Even assuming *arguendo* that the trial court was mindful of the correct legal standard, its decision was nonetheless manifestly

unreasonable based on the lack of similarity between the prior bad acts and the current underlying offense. Unlike the defendants in the cases cited above, Mr. Slocum did not employ a common scheme to perpetrate the offenses, such as drugging his victims or grooming them in a substantially similar way. *C.f.*, *DeVincentis*, 150 Wn.2d at 15; *Lough*, 125 Wn.2d at 850-51. He also did not create similar opportunities for committing the crimes, like in *Gresham* where the defendant waited for the other adults to be asleep before sexually abusing the children who were on a trip with him. 173 Wn.2d at 422.

Mr. Slocum did not commit the alleged prior bad acts in a manner that was substantially similar to the allegations set forth by W.N. W.N. stated that her grandfather began inappropriately touching her at age three, and this abuse continued regularly until she was a teenager. She testified that Mr. Slocum touched her both under and over her underwear on her vagina and breasts, and she eventually accused him of also using his finger to penetrate her vagina. Whereas, Ms. Nash and Ms. Vaughn did not testify to any similar, ongoing abuse. Both testified specifically to relatively brief and isolated events that did not continue over a period of time, despite an opportunity that would have existed for continued abuse. The two women never testified to any penetration like W.N. did, and they

were much older when the prior bad acts were supposed to have occurred compared to W.N., who alleged that the touching began at age three.

There were insufficient factual similarities between the prior and current offenses. Ultimately, the trial court relied on the fact that both the past and present allegations involved Mr. Slocum molesting children. This does not meet the “substantial burden” that must be carried for admitting this highly prejudicial evidence. The trial court either erred by applying the incorrect standard, or it abused its discretion by making a decision that was manifestly unreasonable in light of the facts that were presented. The ER 404(b) evidence should have been excluded, especially since it was presumptively inadmissible, for failure to establish that the prior and current offenses were substantially similar.

c. The evidence should have been excluded as unduly prejudicial.

The evidence should have also been excluded because its probative value, if any, was outweighed by its prejudicial effect. *DeVincentis*, 150 Wn.2d at 23; ER 403. Pursuant to ER 403:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

ER 403. In balancing the probative value of prior bad acts against the prejudicial effect, the trial court weighs various factors, such as age of the

victim, the need for the evidence, the secrecy surrounding sex abuse offenses, the vulnerability of the victims, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation, and the general lack of confidence in the jury's ability to assess the credibility of child witnesses. *Doe*, 141 Wn. App. at 436 (citing *DeVincentis*, 150 Wn.2d at 23).

It is particularly important in child molestation cases to tread lightly when it comes to admitting prior conviction evidence. "When the allegation is child molestation, evidence of prior similar acts creates a likelihood that the jury will convict based solely upon character." *State v. Baker*, 89 Wn. App. 726, 736, 950 P.2d 486 (1997) (citing *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007, 932 P.2d 644 (1997)).

Here, Ms. Nash's and Ms. Vaughn's testimony of past molestations by Mr. Slocum was incredibly prejudicial and should have been excluded pursuant to ER 403. There was a particular danger, especially because W.N.'s allegation was of molestation, that evidence of the prior acts created a likelihood that the jury would convict on character alone. Mr. Slocum had a right to be tried solely for the offense with which he was charged. But, by introducing the evidence of the uncharged conduct, he was unfairly prejudiced in his defense of W.N.'s accusations.

d. Mr. Slocum was prejudiced by the improper admission of prior bad act evidence, and the error was not “harmless.”

Finally, “if an error is found, the reviewing court must then determine, within reasonable probability, whether the outcome of the trial would have been different but for the error.” *State v. Mezquia*, 129 Wn. App. 118, 131, 118 P.3d 378 (2005), *review denied*, 163 Wn.2d 1046 (2008) (citing *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)); *Doe*, 141 Wn. App. at 437.

This case was based on the credibility of one 15-year-old, who alleged that her grandfather had touched her inappropriately since she was about three- or four-years-old. But there was no physical or corroborative evidence to support her accusations; none of W.N.’s caregivers suspected any such abuse, despite watching her closely over the years and her father even having law enforcement training as a police officer; the defendant had been physically impotent and had had no sexual desires for approximately the past 15 years; and Mr. Slocum was hospitalized during at least one time period when he supposedly touched W.N. inappropriately. There was certainly cause for reasonable doubt in this case, but when the jury heard testimony that Mr. Slocum had touched his step-daughter and W.N.’s aunt inappropriately when they were each about 12-years-old many years before, this testimony served as the “nail in the defendant’s coffin.”

Given the relatively weak evidence against Mr. Slocum in this case, there is a great likelihood that he was convicted based on the prior bad acts. Had the testimony of the two adult women been excluded, it is at least “probable” that the outcome of this trial would have been very different. The only fair resolution of this case is to reverse for a new trial without the unduly prejudicial evidence of the prior bad acts.

Issue 2: Whether defense counsel was ineffective for failing to object when the State bolstered W.N.’s testimony with irrelevant, prejudicial and needless cumulative evidence.

W.N.’s allegations did not become more credible with the number of times she repeated her story outside of court. Defense counsel was ineffective for failing to object to the parade of witnesses who testified regarding W.N.’s accusations when they had no independent knowledge of the same. This irrelevant and prejudicial testimony improperly bolstered the single most important witness against Mr. Slocum. Moreover, the evidence was unduly prejudicial and confused the jury with the needless presentation of cumulative evidence. A new trial is warranted.

As a threshold matter, to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137

Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401. Even relevant evidence may be inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403.¹ “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.” *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012) (internal citation omitted).

Prior out-of-court statements that are cumulative of a witness's live testimony are not probative of whether the witness is telling the truth. A witness' accusations are “not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.” *Pardo v. State*, 596

¹ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

So.2d 665, 668 (Fla. 1992) (citing 4 John H. Wigmore, *Evidence* § 1124 (Chadbourn rev. 1972)). Without such safeguarding rules,

“a witness’s testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers... psychologists,... specialists, ...and the like... By having the child testify and then by routing the child’s words through respected adult witnesses...there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.”

Id. (internal quotations omitted) (emphases added). In other words, mere repetition of a child’s out-of-court statements along with her trial testimony is not a measure of accuracy. Stephen J. Ceci and Richard D. Friedman, *The Suggestability of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 41 (2000). *See also State v. Thomas*, 150 Wn.2d 821, 867, 83 P.3d 970 (2004) (quoting *State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983) (“‘repetition [of the witness’ statement to persons outside court] is not generally a valid test for veracity.’”))

Care must also be taken to ensure that a child’s prior out-of-court statements do not merely constitute vouching for the child’s accusations or

cumulative evidence of live testimony. *See State v. Dunn*, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005); *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983) (“In general, the testimony of a witness cannot be bolstered by showing that the witness has made prior, out-of-court statements similar to and in harmony with his or her present testimony on the stand.”)

The overarching principle is that credibility of a witness and ultimate guilt determinations are questions for the jury. *State v. Welch*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). To that end, opinion testimony by one witness regarding another witness’ credibility, opinions on guilt, or expressions of personal belief invade the fact-finding province of the jury. *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005); ER 608; 5D WAPRAC ER 704; *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). “To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider ‘the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.’” *State v. We*, 138 Wn. App. 716, 723, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). *See e.g., State v. Farr-Lenzini*,

93 Wn. App. 453, 970 P.2d 313 (1999), superseded by statute on other grounds, RCW 46.61.024, (Court held inadmissible opinion testimony where trooper testified to ultimate guilt determinations without providing an adequate factual basis for personal knowledge).

Further, ER 701 provides that,

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge...”

ER 701; *State v. Carlson*, 80 Wn. App. 116, 123-24, 906 P.2d 999 (1995) (since doctor lacked personal knowledge of whether the child had been sexually abused, her opinion was not admissible as the opinion of a lay witness).

Finally, since “testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal.” *Thach*, 126 Wn. App. at 312 (internal citations omitted). Ultimately, whether a defendant seeks review of this error as one of constitutional magnitude, or as one gleaned from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that inadmissible opinion testimony occurred and (2) that the outcome of the trial would have been different if the improper opinions had been excluded. *We*, 138 Wn. App. at 722-23 (citing *State v. Warren*, 134 Wn.

App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel).

Here, there were numerous reasons to exclude the testimony of at least a good portion of the witnesses who were providing background information only. They had no independent knowledge of W.N.'s accusations and their testimony should have been excluded on grounds of irrelevance, undue prejudice, unnecessary presentation of mere cumulative background evidence, and improper bolstering of W.N.'s accusations. Defense counsel should have objected to this testimony and was ineffective for failing to do so.

For example, the testimony of Anna Hansen was irrelevant as to any ultimate determination on guilt.² (9/11/12 RP 22-24) Her testimony added nothing of substance to this case and did not make the ultimate facts to be proven more or less probable. Miss Hansen testified that W.N. was her friend and that W.N. told Miss Hansen about her accusations against Mr. Slocum. Similarly, W.N. testified over objection that she told two other friends that Mr. Slocum had touched her inappropriately. (9/11/12 RP 152-55) But these friends could not know if the accusations were true.

² The State did not question its witnesses, other than W.N., on any of the specific details of W.N.'s accusations, so their testimony did not prove or disprove the actual elements of the charged crimes. These witnesses simply provided testimony that W.N. told them that the abuse had occurred, presumably to demonstrate how and why an investigation was pursued.

And W.N.'s story did not become more credible simply because she repeated it to her friends. Yet that is the impression the jury would have received – that W.N. must be telling the truth at trial since she had told the same accusations to numerous friends outside court. Miss Hansen's testimony and W.N.'s testimony that she told her accusations to two other friends outside court was irrelevant to any ultimate issues of guilt and should have been excluded upon proper objection. Alternatively, even if the State introduced this evidence for background purposes only, or *res gestae*, counsel should have objected to the needless presentation of the numerous and cumulative evidence that did not go to any ultimate determinations on guilt.

Similarly, W.N.'s teacher, Leslie Guereca, provided irrelevant or prejudicial cumulative testimony that W.N. had informed her and a counselor as well of Mr. Slocum's alleged touching. (9/11/12 RP 59-60) She and Miss Hansen both testified that W.N. was crying and upset when speaking to them. But this was, again, not relevant to proving whether any touching had in fact occurred. Rather, it was more likely to simply create an emotional response in the jury toward W.N., limiting their ability to rationally assess the actual facts in this case. W.N.'s allegations against Mr. Slocum were not more truthful merely because they were repeatedly shared outside of court.

Likewise, W.N.'s grandmother, parents and aunt all testified that they knew of the accusations made by W.N. against Mr. Slocum. (9/11/12 RP 29-30, 49, 74-75, 91-93) And they testified to how hard this all has been on W.N. and the rest of the family. (*Id.*) But this testimony too was more likely to create an impassioned response from the jury than to prove or disprove whether Mr. Slocum had in fact touched W.N. inappropriately. There was no reason to have witness after witness testify that W.N. had repeated her accusations to them. There is a real risk in this case that the reliability of W.N.'s accusations would seem greater simply because she had repeated her allegations to multiple persons outside of court.

Detective Boyer and Child Interviewer Mari Murstig next took the stand. (9/11/12 RP 102-05, 115-17; 9/13/12 RP 9-11, 15-16) Detective Boyer testified that W.N. told him her repeated "disclosures," and Ms. Murstig emphasized that when W.N. shared her allegations with her, W.N. promised to tell the truth. Both of these witnesses impugned an aura of reliability to W.N.'s accusations that would not have otherwise existed. Ms. Murstig essentially testified that she thought W.N. was being truthful given the parameters they set up for truthfulness in her forensic interview. This testimony invaded the fact-finding province of the jury and, like in *State v. Carlson*, it constituted improper bolstering of the State's sole

witness without any first-hand knowledge of the facts to be proven in this case. *Carlson*, 80 Wn. App. at 123-24.

“A child's allegations of sexual abuse can have a powerful emotional impact on a jury.” *State v. Jones*, 112 Wn.2d 488, 495, 772 P.2d 496 (1989). Perhaps one or two of these witnesses’ testimonies about W.N.’s allegations could have been disregarded as harmless, or admitted simply as case background information. But, if such background evidence, or *res gestae* evidence, was proper, it was improper to call eight witnesses to testify for such purposes. The testimony in this case crossed the line from being questionably relevant as background information, to instead confusing the jury on the actual strength of the State’s case with the “needless presentation of cumulative evidence.” ER 403. The cumulative effect of the irrelevant testimony – or at the very least the repetitive background testimony that prejudiced the defendant (ER 403) – warrants reversal. *See also State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, “a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.”)

Issue 3: Whether the court erred by refusing to allow the defendant to introduce his prior statement to officers that he had not touched W.N. inappropriately when he was accused of recent fabrication of his story.

The court erred by refusing to allow Mr. Slocum to present his taped statements to law enforcement in which he stated that he had not

touched W.N. inappropriately. This evidence was relevant and admissible in support of the defendant's theory of the case. And it was not inadmissible as self-serving hearsay because it was instead a prior consistent statement of a declarant offered to rebut an allegation of recent fabrication under ER 801(d)(1).

“As a general rule, evidence tending to establish the defendant's theory of the case, or to qualify or disprove the State's theory, is normally relevant and admissible.” *State v. Sheets*, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005), *review denied*, 156 Wn.2d 1014 (2006) (citing *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (“Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.”) To that end, the defendant must demonstrate the relevance of the evidence for it to be admitted. *Harris*, 97 Wn. App. at 872; ER 402. “Evidence is relevant and thus probative if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000) (quoting ER 401)).

Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is generally not admissible except pursuant to a specific

hearsay exception. ER 801(c); ER 802. However, a prior statement by a witness is not hearsay if:

“[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is...
(ii) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive...”

ER 801(d)(1); *Saldivar v. Momah*, 145 Wn. App. 365, 401, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009).

In *Saldivar*, a patient brought a civil action against her doctor, alleging sexual abuse by the physician. *Saldivar*, 145 Wn. App. 365. The trial court had excluded prior consistent statements of the patient in which she informed her father, husband and friend of her allegations. *Id.* at 401. On appeal, the Court held that it was improper to exclude this testimony because it had been offered to rebut the other party’s allegation of recent fabrication and was, thus, admissible as non-hearsay pursuant to ER 801(d)(1)(ii). *Id.* The Court noted that the patient maintained the burden of proving that this evidentiary error was prejudicial – that is, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred...” *Id.* But ultimately, prejudice was shown there since the prior statements were relevant to prove the patient’s accusations and enhance her credibility. *Id.* The Court held, “it is likely that excluding this evidence had a material prejudicial

effect on the trial's outcome which rested on... credib[ility].” *Saldivar*, 145 Wn. App. at 401.

Here, Mr. Slocum had a right to present his theory of the case, which was that the accusations by W.N. were untrue. Mr. Slocum's statement to officers that he did not touch W.N. inappropriately was highly relevant to disprove the accusation of the same and went specifically to the issue of the defendant's credibility.

Mr. Slocum had initially pleaded guilty in this case to receive the benefit of a SSOSA. But then, after that plea was withdrawn, he maintained that no inappropriate touching ever occurred. The State, on the other hand, alleged during its cross examination and closing argument that the defendant was not telling the truth. In other words, after this case proceeded to trial, the State made either the expressed, or at least implied charge, that the defendant was no longer telling the truth in response to W.N.'s accusations.

Mr. Slocum intended to offer his taped interview with police from August 2011 to rebut the allegation that he was now fabricating his story (9/13/12 RP 7), but the trial court refused to allow this evidence because it was not an “admission by a party opponent.” See ER 801(d)(2). The trial court applied the incorrect evidentiary rule to this issue. This issue was not controlled by ER 801(d)(2) (admissions by party opponent), but

instead by ER 801(d)(1) (prior consistent statement by witness offered to rebut allegation of recent fabrication) (emphases added).³

The trial court in this case did not make an evidentiary ruling under the correct applicable law – ER 801(d)(1). Therefore, Mr. Slocum requests that this Court review the issue de novo. Upon that review, Mr. Slocum’s prior consistent statements should have been admitted under ER 801(d)(1)(ii). Like W.N.’s prior consistent statements to her friends that the trial court did admit under this same evidentiary rule (9/11/12 RP 152-55), Mr. Slocum’s statements to police were likewise admissible to rebut the State’s charge that he had fabricated his story, particularly after he was no longer going to receive the benefit of the SSOSA sentence.

It would seem that the State was permitted to introduce W.N.’s prior consistent statements, but when it came to the defendant presenting his theory of the case, the court stacked the odds against Mr. Slocum and excluded the same type of ER 801(d)(1) evidence. The trial court was responsible for safeguarding these proceedings and ensuring that the defendant received a fair trial. But instead, Mr. Slocum was denied the opportunity to support his theory of the case with very relevant and admissible evidence. Given that the outcome in this case rested on the jury’s determination of credibility, and that Mr. Slocum’s prior consistent

³ *DeVincentis*, 150 Wn.2d at 17 (trial court’s application and interpretation of the correct evidentiary rule is reviewed de novo, and once the correct rule has been applied, the trial court’s evidentiary ruling is reviewed for abuse of discretion).

statements went directly to his credibility along with disproving the charges in this case, Mr. Slocum has established the prejudice necessary to reverse just like in *Saldivar*, 145 Wn. App. at 401. Mr. Slocum respectfully requests that this Court reverse his convictions and remand for a fair trial.

Issue 4: Whether the court erred by finding, without any supporting evidence, that the defendant had the present or future ability to pay legal financial obligations (LFOs).

The trial court erred by entering a finding that was entirely unsupported by any evidence in the record. The court found:

“The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.”

CP 201. The trial court then imposed LFOs in the amount of \$4,122.25 plus interest, with payments up to \$50 per month. (CP 201-03, 216)

RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs...” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). But costs may only be collected if the defendant has the financial ability to pay. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To require

otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. “The 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). In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3) (emphasis added).

Similarly, RCW 9.94A.760(1) provides that, upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” However, both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Curry*, 118 Wn.2d at 915-16. “Before the State can collect LFOs from [a defendant], there must be a determination that [he] has the ability to pay these LFOs, taking into account [his] resources and the nature of the financial burden on [him].” *See e.g., State v. Bertrand*, 165 Wn. App. 393, 403-05, 267 P.3d 511 (2011).

The initial determination in a judgment and sentence that a defendant has or will have the ability to pay is “somewhat ‘speculative’” to say the least. *State v. Smits*, 152 Wn. App. 514, 517, 216 P.3d 1097 (2009). Therefore, the better “time to examine a defendant’s ability to pay is when the government seeks to collect the obligation...” *Smits*, 152 Wn.

App. at 517 (emphasis added); *State v. Mahone*, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999); *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991); *Bertrand*, 165 Wn. App. at 405; *State v. Crook*, 146 Wn. App. 24, 26-28, 189 P.3d 811 (2008), *review denied*, 165 Wn.2d 1044 (2009).

In *State v. Curry*, the Court concluded that, while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay. 118 Wn.2d at 916 (“[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.”) The court did also maintain that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” *Curry*, 118 Wn.2d at 915-16.

Although a trial court is not required to make an express finding of ability to pay LFOs at the time of sentencing, where the court does make such a finding, this Court reviews that finding under a clearly erroneous standard for substantial evidence in the record. *Bertrand*, 165 Wn. App. 403-04; *Baldwin*, 63 Wn. App. at 312. “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007). The record must be sufficient for [the appellate

court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs...’ ” *Bertrand*, 165 Wn. App. at 404 citing *Baldwin*, 63 Wn. App. at 312 (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 404.

Here, the court was not required to make express and formal findings regarding Mr. Slocum’s ability to pay LFOs. But it did so anyway. Thus, this Court must review the trial court’s findings for substantial evidence in the record. A finding without support in the record is clearly erroneous and must be stricken. The record in this case is completely devoid of any evidence that would suggest Mr. Slocum has the present or future ability to pay LFOs, or that the trial court even made the required consideration into Mr. Slocum’s financial circumstances. Conversely, the evidence showed that Mr. Slocum is almost 80 years old, he is recently divorced from his wife of 33 years, there was no indication that he maintained any assets from that marriage or has any other financial resources, Mr. Slocum continues to be “indigent” according to orders assessed in the trial court, he has many debilitating health conditions and he faces a minimum of 10 years in prison. Thus, it is doubtful that, upon proper inquiry, the trial court would have made its same finding that Mr. Slocum had the present or future ability to pay LFOs.

In sum, the record here does not show that the trial court took into account Mr. Slocum's financial resources and the nature of the burden of imposing LFOs prior to finding that the defendant had the ability to pay these costs. Moreover, the record contains no evidence to support the trial court's findings that the defendant had the present or future ability to pay LFOs. The findings are therefore clearly erroneous and must be stricken from the judgment and sentence. *Bertrand*, 165 Wn. App. 393.

F. **CONCLUSION**

The court erred by admitting prior bad acts evidence in this case. Furthermore, defense counsel was ineffective for failing to object to the needless presentation of cumulative background evidence that effectively bolstered W.N.'s testimony and created an opportunity for a jury verdict based on passion rather than factual support. Next, the court erred by refusing to allow Mr. Slocum to present his taped statements to law enforcement, because this evidence of a prior consistent statement was admissible pursuant to ER 801(d)(1)(ii). Finally, the court erred by entering unsupported findings that Mr. Slocum had the present or future ability to pay LFOs. Mr. Slocum, through counsel, respectfully requests that his convictions be reversed and the matter remanded for a new trial, and that the LFO finding be stricken as "clearly erroneous."

Respectfully submitted this 18th day of March, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 31237-2-III
vs.)
CHARLES SLOCUM) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 18, 2013, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Charles Ben Slocum, DOC #354711 [Appellant]
11919 W Sprague Avenue
PO Box 1899
Airway Heights, WA 99001-1899

Having obtained prior permission, I also served the same on Andrew Miller at prosecuting@co.benton.wa.us by e-mail with the e-filing service feature for Division III.

Dated this 18th day of March, 2013.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
PO Box 19203
Spokane, WA 99219
Phone: (509) 280-1207
Fax: (509) 299-2701
Wa.Appeals@gmail.com