

No. 92475-9

No. 45823-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD LEE,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE..... 4

D. ARGUMENT..... 9

 1. Mr. Lee’s Sixth Amendment right to a speedy trial was violated when his trial was delayed for over four years as a result of the State’s negligence. 9

 a. Mr. Lee has a Sixth Amendment right to a speedy trial that can be raised for the first time on review. 9

 b. Under the *Barker* test, Mr. Lee’s constitutional right to a speedy trial was violated. 10

 i. Length of the Delay 11

 ii. Reason for the Delay 12

 iii. Mr. Lee’s Assertion of his Right 13

 iv. Prejudice to Mr. Lee 13

 c. Dismissal is required. 16

 2. The court violated Mr. Lee’s Sixth Amendment right to confront witnesses when it precluded him from cross-examining J.W. about the false claim of rape she made to the police in June 2008. 16

 a. Mr. Lee had a constitutional right to cross-examine J.W. about her false report to police that she had been raped. 16

 b. Because there was no lawful justification for restricting Mr. Lee’s cross-examination of J.W., the trial court violated his constitutional rights to confront witnesses. 19

c.	Evidence that J.W. falsely accused another individual of rape was admissible under ER 608(b).....	23
d.	Because the court’s error was not harmless, Mr. Lee is entitled to a new trial.....	25
3.	At sentencing, the trial court exceeded its authority granted by RCW 9.94A.701.....	26
a.	The trial court’s authority to sentence a felony offender is derived from the SRA.....	27
b.	RCW 9.94A.701 requires the trial court to set a term of community custody so that the offender’s sentence does not exceed the statutory maximum for the crime.....	29
4.	The community custody condition requiring Mr. Lee to submit to a penile plethysmograph at the discretion of a corrections officer must be stricken because it violates Mr. Lee’s constitutional right to be free from bodily intrusions.	32
5.	The legal costs imposed against Mr. Lee must be stricken and the case remanded because the court failed to consider Mr. Lee’s resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).....	34
a.	The court ordered Mr. Lee to pay \$2041.69 in discretionary legal costs without actually considering whether he had the ability to pay them.	34
b.	An illegal sentence may be challenged for the first time on appeal, and is ripe for review upon imposition of the sentence.	36
c.	Mr. Lee’s case must be remanded because the record does not show the trial court would have found the evidence established he had the ability to pay \$2,041.69 in discretionary legal fees.....	37
E.	CONCLUSION	39

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Personal Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009).....	28
<u>In re Postsentence Review of Leach</u> , 161 Wn.2d 180, 163 P.3d 782 (2007).....	27, 28
<u>State v. Ammons</u> , 105 Wn.2d 175, 718 P.2d 796 (1986).....	27
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	37
<u>State v. Boyd</u> , 174 Wn.2d 470, 275 P.3d 321 (2012).....	29, 30, 31
<u>State v. Chambers</u> , 176 Wn.2d 573, 293 P.3d 1185 (2013)	37
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	16, 17, 18, 20, 23
<u>State v. Demos</u> , 94 Wn.2d 733, 619 P.2d 968 (1980)	20
<u>State v. Ford</u> , 137 Wn.2d 427, 973 P.2d 452 (1999).....	36
<u>State v. Garcia</u> , 179 Wn.2d 828, 318 P.3d 266 (2014).....	18, 26
<u>State v. Gordon</u> , 172 Wn.2d 671, 260 P.3d 884 (2011)	10
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	17, 22, 23
<u>State v. Iniguez</u> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	9, 10, 11, 12, 13, 15
<u>State v. Jones</u> , 172 Wn.2d 236, 257 P.3d 616 (2011).....	31
<u>State v. Krall</u> , 125 Wn.2d 146, 881 P.2d 1040 (1994)	29
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	37
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998)	33, 34

Washington Court of Appeals Decisions

<u>In re Marriage of Parker</u> , 91 Wn. App. 219, 957 P.3d 256 (1998).....	32
<u>In re Marriage of Ricketts</u> , 111 Wn. App. 168, 43 P.3d 1258 (2002)..	32
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	35, 38
<u>State v. Blazina</u> , 174 Wn. App. 906, 301 P.3d 492 (2013)	36
<u>State v. Corrado</u> , 94 Wn. App. 228, 972 P.2d 515 (1999)	11
<u>State v. Harris</u> , 97 Wn. App. 865, 989 P.2d 553 (1999)	20
<u>State v. Land</u> , 172 Wn. App. 593, 295 P.3d 782 (2013)	30, 33, 34
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	36
<u>State v. McDaniel</u> , 83 Wn. App. 179, 920 P.2d 1218 (1996).....	21, 22, 23, 24, 25, 26
<u>State v. McSorley</u> , 128 Wn. App. 598, 116 P.3d 431 (2005).....	18, 24
<u>State v. Williams</u> , 9 Wn. App. 622, 513 P.2d 854 (1973).....	20
<u>State v. Winborne</u> , 167 Wn. App. 320, 273 P.3d 454 (2012).....	30
<u>State v. York</u> , 28 Wn. App. 33, 621 P.2d 784 (1980)	24, 25
<u>State v. Ziegenfuss</u> , 118 Wn. App. 110, 74 P.3d 1205 (2003).....	37

United States Supreme Court Decisions

<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).....	2, 9, 10, 11, 12, 13, 16
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).....	25
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	16

<u>Doggett v. United States</u> , 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d. 540 (1992).....	10, 13, 14
<u>Washington v. Glucksberg</u> , 521 U.S. 702, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997).....	32

Washington Statutes

RCW 9.94A.030	30
RCW 9.94A.171	30
RCW 9.94A.505	27, 28
RCW 9.94A.507	29
RCW 9.94A.510	28
RCW 9.94A.535	27
RCW 9.94A.589	27
RCW 9.94A.701	26, 28, 29, 30
RCW 9A.20.021	26, 29
RCW 9A.44.020	19
RCW 9A.44.060	26
RCW 10.01.160	34, 35, 36, 37

Washington Rules

ER 608	21, 23, 24, 25
RAP 2.5	10

Constitutional Provisions

Const. art. I, § 22 9
U.S. Const. amend. VI..... 9
U.S. Const. amend. XIV 32

Other Authorities

LAWS OF 1996, ch. 275, §1 31

A. ASSIGNMENTS OF ERROR

1. Mr. Lee's Sixth Amendment and article I, section 22, right to a speedy trial was violated when the State's negligence delayed the prosecution of his case for almost three and a half years, resulting in a trial over four years after his initial arrest.

2. The trial court denied Mr. Lee his Sixth Amendment and article I, section 22, right to confront witnesses after it precluded him from cross-examining the alleged victim about the fact she previously made a false allegation of rape to the police.

3. The trial court exceeded its authority under RCW 9.94A.701(9) when it sentenced Mr. Lee to 34 months of incarceration and 34 months of community custody, exceeding the 60-month statutory maximum.

4. The trial court erred and violated Mr. Lee's Fourteenth Amendment right to due process by imposing a condition of community custody ordering Mr. Lee to "submit to... a plethysmograph [sic] as directed by Corrections Officer."

5. The trial court violated RCW 10.01.160(3) when it imposed \$2,041.69 in discretionary legal fees against Mr. Lee without determining he had the ability, or likely future ability, to pay them.

6. The trial court erred when it adopted finding 2.5 in the judgment and sentence, indicating that it found Mr. Lee “has the ability or likely future ability to pay the legal financial obligations imposed herein.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and article I, section 22, guarantee an accused the right to a speedy trial. In Barker v. Wingo,¹ the United States Supreme Court established a balancing test for determining whether a defendant’s speedy trial right was violated, which takes into account the length of the delay, the reason for the delay, the defendant’s assertion of his right to a speedy trial, and the prejudice to the defendant. Where Mr. Lee’s trial was delayed for over four years because the State let the case “fall through the cracks,” Mr. Lee’s defense was impaired because an important witness passed away during that time, and Mr. Lee did not have the opportunity to assert his rights before the prejudice occurred, was Mr. Lee’s constitutional right to a speedy trial violated?

2. Mr. Lee had a constitutional right, pursuant to the Sixth Amendment and article I, section 22, to cross-examine his accuser.

¹ 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

This right is limited only in that any evidence Mr. Lee sought to admit must be relevant, and his right to introduce the evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Where evidence that the alleged victim had previously falsely accused an individual of rape was highly relevant and did not disrupt the fairness of the trial process, did the trial court's limits on the scope of the cross-examination violate Mr. Lee's right to confront witnesses?

3. Pursuant to RCW 9.94A.701(9), when imposing a term of community custody against a defendant convicted of third degree rape of a child, the trial court must reduce the term of community custody as needed to avoid a sentence in excess of the statutory maximum. The trial court imposed a concurrent sentence requiring Mr. Lee to serve 34 months in confinement and 34 months on community custody, which is 8 months greater than the statutory maximum. Given that the court unlawfully exceeded its statutory authority under RCW 9.94A.701(9), must the case be remanded to amend the term of community custody or resentence Mr. Lee?

4. The Due Process Clause of the Fourteenth Amendment guarantees freedom from unwanted bodily intrusions. Accordingly,

this Court has held that although a sentencing court may order penile plethysmograph testing incident to crime-related treatment, it may not impose it as a monitoring tool subject to the discretion of a community corrections officer. Should the community custody condition ordering Mr. Lee to “submit to ... a plethysmograph [sic] as directed by Corrections Officer” be stricken as unconstitutional?

5. Pursuant to RCW 10.01.160(3), a court may not impose legal costs unless it finds the defendant is or will be able to pay them. The trial court imposed \$2,041.69 in discretionary legal fees without considering Mr. Lee’s financial resources or the nature of the burden the fees would impose. Must this order be stricken and Mr. Lee’s case be remanded because the trial court failed to comply with the statute when imposing these discretionary costs?

C. STATEMENT OF THE CASE

Donald Lee was arrested on allegations of third degree rape on October 9, 2009. CP 1. The trial court found probable cause to detain Mr. Lee and later set bail at \$50,000. RP 2; CP 1-2. Arraignment was set for several days later, but no information was filed. RP 1; CP 4-5. The State authorized his release from custody on October 13, 2009. CP 5.

The City of Kelso initially investigated the allegations against Mr. Lee, but transferred the case to the Cowlitz County Sheriff's Office after determining it was out of Kelso's jurisdiction. RP 187. Although the sheriff's office received a report from the Kelso police department in March 2009, the case "fell through the cracks." RP 200-01. The State did not file an information against Mr. Lee until four years later, in March 2013, after a deputy newly assigned to the detective unit rediscovered the case. CP 6; RP 199. The information charged Mr. Lee with five counts of rape of a child in the third degree, and alleged an aggravating factor that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. CP 6-8. Mr. Lee's trial commenced on December 18, 2013. RP 13.

According to the complaining witness, J.W., she received a phone call from a man during the summer of 2008, when she was fifteen years old. RP 53. She did not recognize the man's voice, but he asked her provocative questions and asked her to meet him in person. RP 56-7. He identified himself as "Rick," gave her his phone number, and asked her to call him later that day or the following day. RP 57-8.

She called him back and they spoke for close to 30 minutes, during which time J.W. agreed to meet him in person. RP 58-59.

J.W. met “Rick,” who she later identified as Mr. Lee, in the parking lot of Tam O’Shanter Park. RP 60, 91. She testified that he drove a black Camaro or Thunderbird. RP 61. According to J.W., she told Mr. Lee she was 15 years old and he said he was 32 or 33 years old. RP 63. J.W. testified Mr. Lee expressed concern he might get in trouble, but “pushed [her] up against the hood of his car and – and felt [her].” RP 65. She did not object. Id.

J.W. began meeting Mr. Lee on a regular basis after her summer school class. RP 65. She testified she attended summer school from June to September, and he would pick her up from school “every day.” RP 71, 78. The evidence showed Mr. Lee had some access to a black Camaro that summer, though not on a daily basis. RP 167, 181. Some days J.W. and Mr. Lee just sat and talked, but they also had oral and vaginal sex a number of times. RP 66, 80. She estimated having sex with Mr. Lee more than ten times, but fewer than 30 times. RP 82. She described having sex multiple times at Riverside Park, including two instances of vaginal sex that she testified about in greater detail. RP 68-70, 74, 75. She also described having sex at Mr. Lee’s

girlfriend's home in Castle Rock and performing oral sex while he drove. RP 71-72, 75.

J.W. testified "Rick" had one tattoo on his chest or shoulder and one tattoo on his arm. RP 72. However, the evidence at trial showed Mr. Lee did not have a tattoo. RP 272. She also testified that she had visited Mr. Lee's mother's apartment, which was only a block away from her own home. RP 116, 119. She said that she asked for "Rick" and Mr. Lee's mother went and got Mr. Lee in response. RP 117. She did not recall, however, that the apartment was decorated in a Betty Boop theme with purple furniture. RP 117. Mr. Lee's mother passed away prior to trial, so the defense was unable to present evidence from Mr. Lee's mother to refute J.W.'s account. RP 256.

J.W. testified she often wrote notes to Mr. Lee, but that he wrote her only one note in return, a copy of which the State admitted at trial. RP 84, 86. Mr. Lee stipulated that he drafted the note, which did not address J.W. by name, but testified that J.W. was not the intended recipient. RP 269, 340.

Mr. Lee testified he did not know J.W. and had spoken with her only once, when she approached him while he was outside working on

his mother's car and asked if he was married to his ex-wife. RP 260-61. He spoke with her for less than five minutes. RP 261.

Prior to trial, the defense moved to elicit testimony from J.W. that in June of 2008, she had reported to law enforcement that she had been raped, but later retracted her statement and admitted the sex was consensual. RP 20; CP 15-17. The trial court permitted Mr. Lee to cross-examine J.W. only as to the fact that she had made a false allegation, but denied Mr. Lee's request to question J.W. about what the false statement alleged. RP 34.

The jury convicted Mr. Lee of two counts of third degree rape of a child. CP 51, 53. It found him not guilty of the remaining counts, and did not find the aggravating factor. CP 52, 54-60. Mr. Lee was sentenced to 34 months in prison on count I, with 26 months of community custody, and 26 months in prison on count II, with 34 months of community custody. CP 67. The trial court imposed a number of community custody conditions, including requiring Mr. Lee to submit to a plethysmograph as directed by his Community Corrections Officer or treatment provider. CP 69. It also imposed \$2641.69 in legal costs, which included \$2,041.69 of discretionary costs. CP 65.

D. ARGUMENT

1. Mr. Lee's Sixth Amendment right to a speedy trial was violated when his trial was delayed for over four years as a result of the State's negligence.

- a. Mr. Lee has a Sixth Amendment right to a speedy trial that can be raised for the first time on review.

An accused person is guaranteed the right to a speedy trial by both the federal and state constitutions. Barker v. Wingo, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right “is as fundamental as any of the rights secured by the Sixth Amendment.” State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting Barker, 407 U.S. at 515 n.2). If a defendant's constitutional right to a speedy trial is violated, his case must be dismissed with prejudice. Iniguez, 167 Wn.2d at 282.

In Barker, the United States Supreme Court refused to “quantif[y] the right “into a specified number of days or months” or to condition the right on a defendant's explicit request for a speedy trial. 407 U.S. at 522-25. Instead, it established a “balancing test, in which the conduct of both the prosecution and the defendant are weighed.” 407 U.S. at 529. In applying Barker, the question is “whether the government or the criminal defendant is more to blame for the delay.”

Doggett v. United States, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d. 540 (1992).

Here, Mr. Lee was arrested in October 2009 and held on bail. CP 1-1; RP 2. He was not arraigned until March 2013. CP 6; RP 4. Mr. Lee did not raise his Sixth Amendment right to a speedy trial to the trial court. However, a defendant is entitled to raise a manifest error involving a constitutional right for the first time on review. RAP 2.5(a)(3). Because the error delayed Mr. Lee's disposition of the charges against him, it had practical and identifiable consequences and is therefore a manifest error of constitutional magnitude. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). The necessary facts required to evaluate Mr. Lee's Sixth Amendment claim can be found in the trial record. This Court should consider Mr. Lee's claim on the merits.

b. Under the *Barker* test, Mr. Lee's constitutional right to a speedy trial was violated.

Under Barker, this Court is required to weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the extent to which the defendant asserted his speedy trial right; and (4) prejudice to the defendant as a result of the delay. Iniguez, 167 Wn.2d at 283-84.

“As a threshold to the Barker inquiry, a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial.” Iniguez, 167 Wn.2d at 283. This is a fact-specific inquiry. Id. Once the defendant has demonstrated the delay was presumptively prejudicial, the remainder of the Barker analysis is triggered. Id.

i. *Length of the Delay*

This factor “focuses on the extent to which the delay stretches past the bare minimum needed to trigger the Barker analysis.” Id. at 283-84. “The Sixth Amendment right to speedy trial attaches when a charge is filed or an arrest made, whichever occurs first.” State v. Corrado, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). “[W]hen no charge is pending, the actual restraint of an arrest triggers Sixth Amendment speedy trial protections.” Id.

In this case, the length of the delay was extraordinary. Mr. Lee was arrested and held on allegations of third degree rape on October 9, 2009. CP 1-2, RP 2. He was not arraigned until almost three and a half years later, on March 25, 2013, and subsequently went to trial on December 18, 2013, over four years after his arrest. RP 4. In addition to the time elapsed, the court should consider the circumstances of the

case, including whether the defendant was facing complex charges with multiple actors, or whether the State's case rested in large part on eyewitness testimony from multiple people. Iniguez, 167 Wn.2d at 292. While eyewitness testimony from multiple people was not required, this was also not a complex case requiring greater pretrial delay. See id.; Barker, 407 U.S. at 531 (“the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge”). The length of delay in this case triggers the balancing test.

ii. *Reason for the Delay*

“Closely related to length of delay is the reason the government assigns to justify the delay.” Barker, 407 U.S. at 531. Here, the State's reasoning is clear: when the Kelso police department transferred the case to the Cowlitz County Sherriff's Office, the case simply “fell through the cracks.” RP 200-01. Negligence is weighted less heavily against the State than the State's deliberate attempt to delay the trial. Barker, 407 U.S. at 531. However, ultimately the responsibility for the delay rests with the State, and should be factored into the balancing test accordingly. Id.

iii. *Mr. Lee's Assertion of his Right*

In Barker, the court noted that although the defendant has some responsibility to assert a speedy trial claim, the primary burden remains “on the courts and the prosecutors to assure that cases are brought to trial.” 407 U.S. at 529. In Mr. Lee’s case, the delay was not caused by the State’s repeated requests for a continuance, which would have given Mr. Lee the opportunity to agree or object. Cf. Iniguez, 167 Wn.2d at 295 (finding Iniguez objected to all continuance requests before moving for dismissal of the charges against him). Instead, the State simply forgot about the case for several years, and then chose to resume its prosecution of Mr. Lee after rediscovering the lost file. Mr. Lee had no opportunity to assert his right prior to suffering prejudice.

iv. *Prejudice to Mr. Lee*

“[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including ‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired.’” Doggett, 505 U.S. at 654 (quoting Barker, 407 U.S. at 532). The most serious of these forms of prejudice is the last, “because the inability of a

defendant adequately to prepare his case skews the fairness of the entire system.” Id.

In discussing the balancing of the prejudice factor when considering the other factors, Doggett held:

Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused’s defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused’s trial.

505 U.S. at 657. In Mr. Lee’s case, fault for the delay clearly lies with the State. Because the trial was delayed for years, both the weight assigned to that fault and the presumption of evidentiary prejudice against Mr. Lee increases accordingly.

While Mr. Lee was incarcerated for only a few days, this Court must consider the anxiety the State caused when it arrested Mr. Lee, held him on bail, and then released him prior to his arraignment. In addition, it must consider the most serious form of prejudice: the possibility of impairment to Mr. Lee’s defense by the passage of time. A showing of actual impairment is not required but where it is shown,

there will be a stronger case for a finding of a speedy trial violation. Iniguez, 167 Wn.2d at 295. Actual prejudice is evident here, as an important witness for Mr. Lee, his mother, had passed away by the time of trial. RP 256.

His mother's unavailability at trial was particularly prejudicial because J.W.'s testimony's was, in many ways, puzzling. She appeared to have some intimate knowledge of Mr. Lee's life, describing a visit to Mr. Lee's ex-girlfriend's house and his mother's apartment. RP 71, 82. At the same time, J.W. claimed he had tattoos, which he did not, and said he picked her up every day in a car he did not have access to on a daily basis. RP 61, 72, 161, 181, 272. She was also unable to describe prominent features of both the ex-girlfriend's and mother's homes. RP 111, 145-146. The jury's verdict indicates it did not fully accept J.W.'s testimony, as it found Mr. Lee guilty of only two of the five charges, and declined to find the aggravating factor. CP 51-60.

Because Mr. Lee's mother passed away prior to trial, he was unable to present her testimony to refute J.W.'s claim that she visited Mr. Lee at his mother's home. Particularly given the inconsistencies in J.W.'s testimony, his mother's absence at trial was highly prejudicial. The Court must presume prejudice to the defendant intensifies over

time. Mr. Lee's trial was delayed by over four years, and his inability to call his mother as a witness due to this delay demonstrates actual prejudice.

c. Dismissal is required.

A balancing of the Barker factors shows that Mr. Lee's trial was delayed for over four years due to the State's negligence, that prejudice occurred as a result, and that Mr. Lee had no ability to assert his right to a speedy trial until after the prejudice had occurred. Thus, the totality of the circumstances shows Mr. Lee's constitutional right to a speedy trial was violated. Iniguez, 167 Wn.2d at 295. His case must be dismissed with prejudice. Id. at 282.

2. The court violated Mr. Lee's Sixth Amendment right to confront witnesses when it precluded him from cross-examining J.W. about the false claim of rape she made to the police in June 2008.

a. Mr. Lee had a constitutional right to cross-examine J.W. about her false report to police that she had been raped.

The Sixth Amendment and article I, section 22, guarantee criminal defendants the right to confront and cross-examine adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Indeed, the primary and most important component of the confrontation clause is the right to conduct a meaningful cross examination of adverse witnesses. Darden, 145 Wn.2d at 620. It helps to ensure the accuracy of the fact-finding process by testing the perception, memory, and credibility of witnesses. Id. Whenever that right is denied, “the ultimate integrity of this fact-finding process is called into question.” Id. Thus, “the right to confront must be zealously guarded.” Id. (emphasis added).

Like any constitutional right, the right to confront witnesses is not absolute. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). In Hudlow, the court found that the right to confrontation is subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Id. In order to preclude the defense from introducing relevant evidence, the State must demonstrate a compelling state interest. Id.

The Supreme Court has found that the Hudlow test requires a three-prong 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 at trial. Finally, the State's interest to exclude 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 can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 622 (emphasis added).

This Court reviews a trial court's rulings restricting the scope of cross examination for a manifest abuse of discretion. Darden, 145 Wn.2d at 619. A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id. This Court has found:

[I]n a criminal case, to allow the defendant no cross-examination into an important area is an abuse of discretion. It is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case. Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.

State v. McSorley, 128 Wn. App. 598, 612-13, 116 P.3d 431 (2005).

The trial court errs when "there was no lawful justification for restricting the cross-examination." State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

- b. Because there was no lawful justification for restricting Mr. Lee's cross-examination of J.W., the trial court violated his constitutional rights to confront witnesses.

Prior to trial, Mr. Lee moved to introduce evidence that J.W. had previously accused a boy of rape, and then later admitted the statement she gave to police was false. CP 15-17; RP 20. Mr. Lee provided the trial court with a copy of a report from the Kelso police department which stated J.W. and her mother telephoned the police on June 11, 2008, and claimed J.W. had been raped approximately two weeks earlier. CP 17. However, according to this report, J.W. called again the following day and admitted the sex was consensual and she had lied to police about being raped. CP 17. After a hearing, the trial court permitted Mr. Lee to cross-examine J.W. on the fact she made a false accusation to the police about another person, but denied Mr. Lee the opportunity to elicit that the false accusation was rape. RP 33.

Before making the ruling, the trial court repeatedly expressed confusion about whether, and to what extent, RCW 9A.44.020, or the "rape shield statute," precluded this evidence, given that J.W. admitted she had consensual sex when she told the police she lied. RP 22, 28. While defense counsel's reference to RCW 9A.44.020 in his motion did not help matters, upon questioning he correctly informed the court

that the rape shield statute did not apply because the evidence at issue involved a prior false statement. RP 26.

This Court has found that under the rape shield statute, “[g]enerally evidence that a rape victim has accused others is not relevant and, therefore not admissible, unless the defendant can demonstrate that the accusation was false.” State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added); see also State v. Demos, 94 Wn.2d 733, 736, 619 P.2d 968 (1980) (noting that, although the question was not before the court, several courts in other jurisdictions “have held that rape shield laws do not exclude evidence of past false rape accusations”). Washington courts have found evidence was properly excluded only when it was unclear whether the allegation was actually false. See Demos, 94 Wn.2d at 736; Harris, 97 Wn. App. at 872; State v. Williams, 9 Wn. App. 622, 623, 513 P.2d 854 (1973). Here, there was no question that the evidence showed J.W. had admitted she made a false report of rape to a police officer. CP 17. Thus, the rape shield statute did not preclude admission of this evidence.

Instead, the appropriate inquiry was whether the evidence was relevant. Darden, 145 Wn.2d at 622. The State argued the evidence

was not relevant because “we are not dealing with a consensual act, we’re dealing [sic] rape of a child.” RP 25. However, the State’s reference to consent during a discussion of relevance only served as a distraction that unnecessarily confused the trial court. RP 28-29 (the trial judge stated, “[h]ere’s there no consent, at issue, with regard to the – the charges of rape in the third. So, you know, part of me says, under ER 608 it comes in, but under the rape shield statute, part of me says it should not come in. So I’m a little bit unsure.”).

Mr. Lee did not move to cross-examine J.W. about the false report of rape to show consent. He sought to admit the evidence to show that J.W. had previously filed a false police report accusing an individual of rape. Given that the State was asking the jurors to believe J.W.’s testimony that Mr. Lee had raped her, this evidence was relevant to show that such accusations from her are not credible. See State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996).

In McDaniel, the defendant was convicted of two counts of assault after the trial court prevented him from cross-examining the alleged victim about the fact she had recently admitted to lying under oath in a civil proceeding about the recency of her drug use. 83 Wn. App. at 180. The trial court refused to allow the defendant to use this

information for impeachment purposes, finding it was inappropriate unless the evidence demonstrated the alleged victim was under the influence at the time of the alleged incident. Id. at 183.

This Court reversed. Id. at 188. Applying the Hudlow test, it found the evidence relevant, stating:

[The alleged victim] admittedly lied under oath for her own purposes in the related civil proceeding, and the question for the jury was whether she would lie under oath for her own purposes in the criminal proceeding. The subject matter of the prior false testimony is less important than the fact of that false testimony and the motivation for that false testimony. The fact of the lie and the motivation for the lie are highly relevant. Absent a compelling State interest in excluding the evidence that outweighs the fundamental constitutional right of confrontation, the defense was entitled to explore the possibility that, given [the alleged victim's] admitted willingness to lie under oath when it suited her purposes before, she may have been doing it again in the criminal prosecution, for whatever reasons might serve her purposes there.

Id. at 186-87 (emphasis added). It did not perform the balancing test because the trial court admitted other evidence of the alleged victim's drug use, nullifying any compelling interest held by the State. Id. at 187.

As in McDaniel, J.W.'s prior false report of rape was relevant because given J.W.'s admitted willingness to lie to the police about being raped, Mr. Lee was entitled to explore the possibility that she

may have once again falsely accused a man of rape. Thus, the burden was on the State to prove the second prong of the Hudlow test, and show that this evidence was so prejudicial that it would disrupt the fairness of the fact-finding process. Darden, 145 Wn.2d at 622.

The State could not meet this burden. Unlike in McDaniel, where the evidence revealed the alleged victim's drug abuse history, the impeachment evidence against J.W. simply suggested she had consensual sex with a peer. CP 17. Given that J.W.'s testimony at trial was that she had willingly and repeatedly engaged in sex with a stranger she met over the phone, the State could not demonstrate a compelling interest warranting exclusion of this evidence. It is not so prejudicial as to disrupt the fairness of the trial process, and certainly did not outweigh Mr. Lee's right to introduce it. See Hudlow, 99 Wn.2d at 15. Because there was no lawful justification for restricting the scope of Mr. Lee's cross-examination, the Court's finding to the contrary was an error that violated Mr. Lee's constitutional right.

c. Evidence that J.W. falsely accused another individual of rape was admissible under ER 608(b).

In making its ruling, the trial court also considered whether the evidence was admissible under ER 608(b). RP 29. Under the

circumstances presented here, a defendant's constitutional right to confront witnesses takes precedence over the rules of evidence.

McDaniel, 83 Wn. App. at 188 n.5. However, that J.W. had falsely accused another person of rape was admissible under ER 608(b).

ER 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

“Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.”

McSorley, 128 Wn. App. at 611 (citing State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980)). In York, the defendant was convicted of delivery of a controlled substance, primarily based upon the testimony of an undercover investigator who testified to buying from him. 28 Wn. App. at 34. The trial court denied the defendant's motion to elicit that the investigator had been fired from a previous position due to

“irregularities in his paperwork procedures.” Id. This Court reversed, finding that the investigator was the only witness to the sale and therefore his credibility was “the very essence of the defense.” Id. at 35-36. It found that, as a matter of fundamental fairness, the defendant “should have been allowed to bring out the only negative characteristics of the one most important witness against [the defendant].” Id. at 37.

As in York, J.W. was the most important witness against Mr. Lee and the jury’s verdict hinged on whether it found her credible. The fact that she had falsely accused another person of raping her was the only negative information about her. The evidence was admissible under ER 608(b) and the trial court’s limitation on the scope of Mr. Lee’s cross-examination was an abuse of discretion.

d. Because the court’s error was not harmless, Mr. Lee is entitled to a new trial.

“A violation of a defendant’s rights under the confrontation clause is constitutional error.” McDaniel, 83 Wn. App. at 187. Such error is presumed prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. Id.; Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). To

determine whether the limitations placed on the scope of the cross-examination was harmless, this Court must look to the “untainted” evidence, to determine whether that evidence was so overwhelming that it necessarily leads to a finding of guilt. Id. at 187-88; see also Garcia, 179 Wn.2d at 846.

In order to find Mr. Lee guilty, the jury was required to accept J.W.’s testimony. While the State presented limited additional testimony to support her claims, there were no other witnesses to the crime. The “untainted” evidence alone would not have allowed the jury to find Mr. Lee guilty and therefore the error was not harmless. Mr. Lee is entitled to have his convictions reversed, and his case remanded for a new trial. McDaniel, 83 Wn. App. at 188.

3. At sentencing, the trial court exceeded its authority granted by RCW 9.94A.701.

Mr. Lee was convicted of two counts of third degree rape of a child. CP 62. Third degree rape of a child is a class C felony that carries a maximum sentence of five years of incarceration. RCW 9A.44.060; RCW 9A.20.021. The jury did not find the aggravating factor, there was no other basis upon which to sentence Mr. Lee to an exceptional sentence, and the trial court did not indicate it was

imposing an exceptional sentence. CP 52, 54, 64; see RCW 9.94A.535. Pursuant to statute, the court was required to sentence Mr. Lee to a concurrent sentence, which it purported to do in the judgment and sentence. CP 67; RCW 9.94A.589(1)(a).

The trial court adopted the State's recommendation and sentenced Mr. Lee to 34 months of incarceration and 26 months of community custody on count 1, and 26 months of incarceration and 34 months of community custody on count 2. RP 429; CP 67. The sentence imposed on each count, when considered in isolation, did not exceed the five-year statutory maximum. However, combined, Mr. Lee's sentence totaled 68 months, or 8 months over the statutory maximum term.

- a. The trial court's authority to sentence a felony offender is derived from the SRA.

The Legislature sets the punishment for criminal offenses. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The superior court's power to sentence felony offenders derives from the Sentencing Reform Act (SRA). RCW 9.94A.505(1). RCW 9.94A.505 provides that the court "shall" impose a sentence "as

provided in the following sections and as applicable to the case.” RCW 9.94A.505(2)(a).

In Mr. Lee’s case, the court was required to impose a sentence within the standard range established in RCW 9.94A.510 and a term of community custody as set forth in RCW 9.94A.701. RCW 9.94A.505(2)(a)(i), (ii). The total sentence, however, could not exceed the statutory maximum term.

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5).²

This Court reviews the legality of a sentence de novo. In re Personal Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009). The review of Mr. Lee’s sentence requires this Court to construe the applicable sentencing statutes, which are also reviewed de novo. Leach, 161 Wn.2d at 184.

² RCW 9.94A.750 and .753 address restitution.

- b. RCW 9.94A.701 requires the trial court to set a term of community custody so that the offender's sentence does not exceed the statutory maximum for the crime.

RCW 9.94A.701 provides for a three-year term of community custody for the crime of third degree rape. RCW 9.94A.701(1)(a). The statute also requires the court to reduce the term of community custody when necessary to avoid a sentence that exceeds the maximum term.

RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The statute reads in relevant part:

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507;
...

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701. The term "shall" is presumptively a mandatory directive. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

In Boyd, the court reviewed a sentence of 54 months of confinement plus 12 months of community custody, with the notation

that the total term of confinement plus community custody could not exceed 60 months, which was the statutory maximum. Boyd, 174 Wn.2d at 472. Interpreting RCW 9.94A.701(9), the Boyd Court held that the sentence exceeded the maximum term, regardless of the notation, because “the trial court, not the Department of Corrections, was required to reduce Boyd’s term of community custody to avoid a sentence in excess of the maximum term.” Id. at 473; accord State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, rev. denied, 177 Wn.2d 1016 (2013); State v. Winborne, 167 Wn. App. 320, 329, 273 P.3d 454, rev. denied, 174 Wn.2d 1019 (2012).

In this case, the trial court effectively imposed a sentence of 34 months of incarceration with 34 months of community custody. RP 429; CP 67. Under RCW 9.94A.171(3)(b), “any period of community custody shall be tolled during any period of time the sex offender is in confinement for any reason.” Community custody is “that portion of an offender’s sentence of confinement... served in the community subject to the controls placed on the offender’s movement and activities by the department.” RCW 9.94A.030(5). Time spent serving a sentence of incarceration is necessarily time spent out of the community, and therefore cannot be credited toward the term of

community custody. State v. Jones, 172 Wn.2d 236, 244, 257 P.3d 616 (2011).

In Jones, the defendant was resentenced after a successful challenge to his offender score, resulting in a lower term of incarceration than what he had already served. Id. at 239. The court held the excess time he spent incarcerated could not be credited toward his community custody term, finding:

Any limitation on the plain language of the tolling provision allowing [the defendant] credit for excess time spent incarcerated, and in essence beginning his sentence of community custody while incarcerated, would contravene the ‘substantial public policy goal’ of ‘improving the supervision of convicted sex offenders in the community upon release from incarceration.’ Requiring [the defendant] to serve all of his sentence of community custody is consistent with the legislatively established public policy of this State.

Id. at 247 (quoting LAWS OF 1996, ch. 275, §)1).

Thus, because Mr. Lee’s period of community custody cannot begin until he completes his period of confinement, his sentence exceeds the maximum term permitted by 8 months. This sentence is unlawful pursuant to Boyd. 174 Wn.2d at 473. Mr. Lee’s case must be remanded to either amend the term of community custody or resentence Mr. Lee consistent with the statute. Boyd, 174 Wn.2d at 473.

4. The community custody condition requiring Mr. Lee to submit to a penile plethysmograph at the discretion of a corrections officer must be stricken because it violates Mr. Lee's constitutional right to be free from bodily intrusions.

The judgment and sentence provides that Mr. Lee must “[s]ubmit to, and at your expense, a polygraph examination and a plethysmograph [sic] as directed by Corrections Officer or treatment provider.” CP 69. The portion requiring Mr. Lee to undergo plethysmograph testing at the pleasure of his corrections officer must be stricken as unconstitutional.

Freedom from bodily intrusion is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Glucksberg, 521 U.S. at 721.

Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. In re Marriage of Ricketts, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); In re Marriage of Parker, 91 Wn. App.

219, 226, 957 P.3d 256 (1998) (test violated father’s constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures). Plethysmograph testing may be useful in the diagnosis and treatment of sex offenders, and therefore may be required as part of court-ordered sexual deviancy therapy, but it may not be imposed to monitor a defendant while on community custody. State v. Riles, 135 Wn.2d 326, 343-46, 957 P.2d 655 (1998). “[P]lethysmograph testing does not serve a monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” *Id.* at 345. This Court recently reaffirmed this principle:

Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

State v. Land, 172 Wn. App. at 605 (striking community custody condition similar to one at issue in Mr. Lee’s case).

Here, the court required Mr. Lee to submit to such testing as directed by his community corrections officer rather than only at the direction of his treatment provider. CP 69. The testing was ordered in the same sentence as the requirement that Mr. Lee comply with

polygraph testing, which is utilized by Department of Corrections to monitor compliance. Riles, 135 Wn.2d at 342-43.

The danger is that the testing requirement is not connected to Mr. Lee's diagnosis or treatment, but can be ordered by the corrections officer for any reason, including monitoring Mr. Lee's compliance with community custody conditions. This community custody condition violates Mr. Lee's constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Lee submit to plethysmograph testing as required by his corrections officer. Land, 172 Wn. App. at 605-06.

5. The legal costs imposed against Mr. Lee must be stricken and the case remanded because the court failed to consider Mr. Lee's resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).

- a. The court ordered Mr. Lee to pay \$2041.69 in discretionary legal costs without actually considering whether he had the ability to pay them.

Under RCW 10.01.160, a court may order a defendant to pay legal fees, but it "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." In determining the amount of the fees, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will

impose.” At sentencing, the trial court ordered Mr. Lee to pay \$2,641.69 in legal financial obligations, which included discretionary costs of \$773.69 for a court appointed attorney, a \$200 crime lab fee, and \$1,068 in court costs. CP 65.

Formal findings supporting the trial court’s decision to impose legal fees under RCW 10.01.160 are not required, but the record must minimally establish that the sentencing judge actually considered the defendant’s individual financial circumstances and made an individualized determination she has the ability, or likely future ability, to pay. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). In this case, boilerplate language in the Judgment and Sentence stated:

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 defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.³

CP 9. However, nothing in the record suggests that the court actually considered Mr. Lee’s financial circumstances before imposing the

³ The court cites to the statute governing restitution, rather than RCW 10.01.160, which requires the court consider the defendant’s ability to pay legal costs and fees. No restitution was awarded in this case. CP 65.

costs, or determined it was likely Mr. Lee would be able to pay the discretionary costs imposed in the future. Indeed, at sentencing, the trial court did not even mention it was imposing legal fees. RP 427-34.

- b. An illegal sentence may be challenged for the first time on appeal, and is ripe for review upon imposition of the sentence.

Mr. Lee did not object to the imposition of these fees. This Court indicated in State v. Blazina that it may decline to consider a challenge to costs raised for the first time on appeal, despite addressing this issue in past cases. 174 Wn. App. 906, 911, 301 P.3d 492 (2013), rev. granted 178 Wn.2d 1010 (2013). However, it is well established that an illegal or erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). The imposition of \$2,041.69 in discretionary fees was an unlawful sentencing order.

The court ordered that monthly payments of \$25 per month were to commence immediately. CP 66. While this Court has previously suggested legal costs may be challenged only after the State seeks to enforce the order, those cases did not address the validity of an order that failed to comply with RCW 10.01.160(3). See e.g. State v. Lundy, 176 Wn. App. 96, 107, 308 P.3d 755 (2013); State v.

Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003). A claim is fit for judicial determination “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). This order meets all of these requirements. The court’s failure to comply with RCW 10.01.160(3) is a legal issue fully supported by the record. Although Mr. Lee could later seek to modify the court’s order, that fact does not change the finality of the original sentencing order. Mr. Lee is entitled to review of the unlawful order of costs imposed by the trial court.

- c. Mr. Lee’s case must be remanded because the record does not show the trial court would have found the evidence established he had the ability to pay \$2,041.69 in discretionary legal fees.

Remand is the appropriate remedy when the trial court fails to comply with a sentencing statute unless the record clearly indicates the court would have imposed the same condition regardless. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). Here, the record does not show the evidence supported a finding that Mr. Lee had the ability, or likely future ability, to pay the legal fees. Instead, the lack of any

discussion of the legal fees at sentencing suggests the court imposed them as a matter of course, without giving any consideration to Mr. Lee's financial resources.

Mr. Lee is entitled to have the court's finding stricken because it is unsupported by the record. Bertrand, 165 Wn. App. at 404. In addition, his case should be remanded for the trial court to consider whether Mr. Lee does, in fact, have the ability or likely future ability to pay the legal costs.

E. CONCLUSION

Mr. Lee asks this Court to reverse his convictions and dismiss the charges with prejudice because his right to a speedy trial was violated. In the alternative, Mr. Lee asks that this court reverse and remand for a new trial because the court violated his right to confront witnesses. At a minimum, his case should be remanded to correct Mr. Lee's sentence, strike the condition of community custody ordering Mr. Lee to submit to a plethysmograph as directed by a corrections officer, and require the trial court to consider whether Mr. Lee has the ability, or future ability, to pay the discretionary legal financial obligations.

DATED this 4th day of September, 2014.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 45823-3-II
)	
DONALD LEE,)	
)	
APPELLANT.)	

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