Supreme Court No. 93063-5

(Court of Appeals No. 46754-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

ROBERT WADE NAILLON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Naillon, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Naillon appealed from his Cowlitz County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with Washington's own guarantees, are violated where a trial court bars a defendant from presenting even minimally relevant evidence. Where the trial denied Mr. Naillon's motion for an independent expert, did the court violate his right to due process under the United States and Washington Constitutions, requiring review pursuant to RAP 13.4(b)(1), (2)?

2. The Fourteenth Amendment, as well as CrR 3.1(f), entitle indigent defendants to the appointment of experts at public expense. In addition, the right to the effective assistance of counsel includes the necessary hiring and payment of experts. Did the trial court err where it refused to permit the essential independent testing requested by Mr. Naillon? And did the court, in denying his request for an independent

laboratory test, thus deprive him of the effective assistance of counsel, requiring review pursuant to RAP 13.4(b)(1) and (2)?

3. Before imposing legal financial obligations, a sentencing court must make an inquiry as to a defendant's ability to pay. This Court may address the failure to conduct this inquiry for the first time on appeal. The trial court imposed discretionary financial obligations of over $4000 against an indigent defendant without inquiring as to his ability to pay. Following this Court's lead, should the matter be remanded for a proper determination as to Mr. Naillon's ability to pay? RAP 13.4(b)(1), (2), (4).

4. This Court must consider each of the issues raised in Mr. Naillon's personal restraint petition, as each requires review under RAP 13.4(b)(1) or (2).

D. STATEMENT OF THE CASE

On June 17, 2014, Robert Naillon helped some friends move from their home to a storage unit. RP 268. He then walked to the Mormon church on 30th Street in Longview, still holding a bag containing some of the belongings given to him by his friends. Id.

In the church parking lot, Mr. Naillon saw a familiar car; he thought the rare Cadillac might belong to his mother, since she was a Mormon Church member and drove a similar car. RP 267-68. Mr. Naillon explored the unlocked car a bit, leaving when a bystander noticed him. RP 207. He

took nothing from the car, but a bystander called the Longview police department, who soon responded to the area. RP 206-08, 227-28. Mr. Naillon walked over to a nearby alley; he did not run or leave the area. RP 207, 271-72.

Officers detained Mr. Naillon, and once he was identified by the eye-witness, officers arrested and searched Mr. Naillon. RP 232, 273-74. Officers recovered a glass pipe containing a small amount of crystalline residue from Mr. Naillon's back pocket. Following testing at the state crime lab, the residue ultimately was determined to contain a small amount of purported methamphetamine. RP 251. Mr. Naillon was charged with vehicle prowling in the second and degree and violation of the Uniform Controlled Substances Act (VUCSA). CP 23-25.

During pre-trial hearings, Mr. Naillon claimed that the item in his pocket must have been an "incense burner," and he repeatedly requested independent testing of the item. RP 12, 19, 26-27, 48-52, 65-66, 85-86, 146-47. At one such hearing, on August 19, 2014, the Honorable Michael Evans explained that Mr. Naillon's request for independent testing was "a fairly common request and that's commonly granted." RP 65-66. The matter was continued and was then transferred to a different judge -- the Honorable Marilyn Haan -- who denied the motion for an independent

laboratory test without explanation on September 2, 2014. RP 148.[1] Judge Haan did not hear argument on the motion and made no findings, but simply stated, "I have reviewed the motion and I find absolutely no legal basis that allows you a second test to occur here. So that request is denied." RP 148.

Following a jury trial, Mr. Naillon was found guilty of vehicle prowling and VUCSA. CP 48-49. Although the trial court did not inquire as to Mr. Naillon's ability to pay, the court assessed over $4000 in legal financial obligations (LFO's), despite his indigency. CP 69-79.

Mr. Naillon appealed, arguing the same issues raised here.

On March 8, 2016, the Court of Appeals affirmed his convictions. Slip Op. at 13. The Court also denied Mr. Naillon's personal restraint petition.

Mr. Naillon seeks review. RAP 13.4(b)(1), (2), (4).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, WITH OTHER DECISIONS OF THE COURT OF APPEALS, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(b)(1), (2), (4).

[1] Judge Evans stated that he personally knew the owner of the Cadillac and could not be fair. RP 68.

1. The trial court's denial of Mr. Naillon's request for an independent expert denied him of due process, the right to present a defense, and the right to the effective assistance of counsel.

The trial court should have granted Mr. Naillon's request for an independent defense expert to test the alleged controlled substance. Such an expert was essential to his defense, and the denial of independent laboratory testing violated Mr. Naillon's right to a fair trial and impermissibly impeded his ability to present a defense. U.S. Const. Amends. VI, XIV; Art. I, § 3.

A person accused of a crime is entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is axiomatic that an accused person who cannot afford to hire private counsel has the right to have appointed counsel represent him at all stages of proceedings. E.g., Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 435, 108 S. Ct. 1895, 100 L.Ed.2d 440 (1988); Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The Court of Appeals has held that the State must provide indigent defendants "with the basic tools of an adequate defense ... when those tools are available for a price to other prisoners." State v. Cuthbert, 154

Wn. App. 318, 329, 225 P.3d 407 (2010) (quoting Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971)). The Cuthbert Court specifically discussed the "constitutional right to the assistance of an expert as provided in CrR 3.1." 154 Wn. App. at 330 (internal quotations omitted); see also State v. Poulsen, 45 Wn. App. 706, 709, 726 P.2d 1036 (1986) (error not to allow defendant to call own expert witness to establish psychiatric defense). In Poulsen, an indigent defendant moved for a publicly-funded expert to establish a diminished capacity defense. 45 Wn. App. at 710. Division Two of the Court of Appeals held that denying Mr. Poulsen the funds for such an expert witness violated the principles of due process and equal justice. Id. "Justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Id. (quoting Ake v. Oklahoma, 470 U.S. at 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)).

Likewise, in City of Mount Vernon v. Cochran, an indigent defendant sought to call an independent expert witness to challenge the reliability of the BAC (blood-alcohol concentration) testing protocol. 70 Wn. App. 517, 518-19, 855 P.2d 1180 (1993). Because Mr. Cochran sought to pay this expert from public funds, the City objected, arguing Mr. Cochran had not shown: 1) the defense expert was necessary to an

adequate defense: or that 2) the defense expert's testimony was generally accepted in the scientific community. Id. at 519.[2] The Cochran Court upheld the lower court's decision to authorize public funds for the defense expert, noting the Superior Court had relied in part on the "belief that a defendant with the independent means to hire [an expert] would have done so. This is an appropriate factor to consider in making the discretionary determination of necessity under CrRLJ 3.1(f)." Id. at 526.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

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[2] The Cochran Court also found no abuse of discretion in the Superior Court's ruling that included the finding that "most of what he [defense expert] proposes is preposterous, ... The other side of the coin is that ... I do think that his testimony may be helpful, and I don't think it requires the showing of absolute necessity." 70 Wn. App. at 520 (authorizing appointment of defense expert with showing of "reasonable necessity").

In this case, Mr. Naillon argued repeatedly and specifically that he did not know or believe that the incense burner recovered from him contained any controlled substance. RP 12, 19, 26-27, 48-52, 65-66, 85-86, 146-47. Mr. Naillon's counsel called laboratories and prepared an order requesting funds for an expert to test the alleged controlled substance. RP 65, 85-86. Lastly, Mr. Naillon presented a defense of unwitting possession – he argued that even if he had known the incense burner was in his pocket, he did not know it contained trace amounts of any controlled substance -- which was consistent with his request for re-testing of the alleged residue by a defense expert. RP 315; CP 41.

The trial court's summary denial of Mr. Naillon's motion for an independent expert deprived his counsel of the ability to present an effective defense, calling for reversal by the Court of Appeals on due process and ineffective assistance grounds. Poulson, 45 Wn. App. at 710; Cochran, 70 Wn. App. at 519; see Ake, 470 U.S. at 76.

Because the appellate court's decision is in conflict with decisions of this Court, as well as with its own decisions, this Court should grant review. RAP 13.4(b)(1), (2).

2. The Court of Appeals decision on the independent expert issue requires review.

The Court of Appeals erroneously stated that Mr. Naillon did not present argument supporting the violation of his due process or effective assistance of counsel rights. Slip opinion at 6 n.2. Mr. Naillon indeed presented argument on these issues, both of which he has asked this Court to review. Brief of Appellant at 10-13. This Court should reach these issues on review, or remand to the Court of Appeals so that the Court may properly consider the due process and counsel violations.

The trial court below rejected, without explanation or findings, Mr. Naillon's motion to have the alleged controlled substance re-tested, and to present an independent expert witness on this subject, which was crucial to his defense. The trial court should have applied the standard set forth in State v. Jones, 168 Wn.2d at 720 -- specifically, that the proposed evidence regarding a defense expert was admissible, unless it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial" and that this prejudice outweighed Mr. Naillon's need for the evidence.

Neither the trial court, nor the State, met that standard. The trial court made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling – lacking findings or a

hearing -- deprived Mr. Naillon of his right under the Sixth Amendment and Article 1, section 22 to present a defense.

Because the Court of Appeals decision did not properly consider Mr. Naillon's arguments on appeal, and moreover, the Court of Appeals decision was in conflict with decisions of this Court and other decisions of the Court of Appeals, review should be granted. RAP 13.4(b)(1), (2).

3. This Court should review the LFO issue.

Courts may require an indigent defendant to reimburse the state for only certain authorized costs, and only if the defendant has the financial ability to do so. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) ("the state cannot collect money from defendants who cannot pay"); see also 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) ("The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them"). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty.

a. There is no evidence to support the trial court's finding that Mr. Naillon had the present or future ability to pay $4000 in legal financial obligations.

"The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the

particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; RCW 10.01.160(3) (the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose) (emphasis added).

Here, the court entered no finding on the Judgment and Sentence as to whether Mr. Naillon had the ability to pay LFOs. CP 2-10. In Blazina, this Court found even a boilerplate assessment of a defendant's ability to pay LFOs to be insufficient consideration. 182 Wn.2d at 831.

There was no evidence Mr. Naillon was employed or would be employable following his release from prison. He was represented by a court-appointed attorney during trial, and the trial court found he remained sufficiently indigent to require appointed counsel on appeal. Yet inexplicably, the court failed to enter any findings on the Judgment and Sentence regarding the ability or likely future ability to pay the discretionary legal financial obligations imposed by the court. CP 5-7. The discretionary LFOs in this matter include, but are not limited to: a $2000 fine, $250

toward the drug enforcement fund of Cowlitz County, $350 in court costs, and $825 for Mr. Naillon's public defender. CP 55.[3]

b. Because the Court failed to exercise its discretion in the imposition of LFOs, this Court should remand or vacate the excessive LFOs.

Since the Blazina decision, the mandate to trial courts has been clarified: judicial discretion must be exercised when the issue of LFOs is considered, and the trial court must consider a defendant's "current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. As this Court noted in the Blazina decision, Washington has been part of the "national conversation" on the equal justice concerns raised by LFO's, as the amount of fines and fees imposed upon conviction vary greatly by "gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced."[4]

The court's imposition of legal financial obligations without giving any consideration to a person's ability to pay exacerbates the problems that

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[3] https://www.google.com/search?q=john+oliver+public+defenders&ie=utf-8&oe=utf-8 (last accessed Apr. 5, 2016) (John Oliver on LFO's for public defenders: "You can't tell people something's free, and then charge them for it...This is the American judicial system, not 'Candy Crush'...").

[4] See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008); Blazina, 182 Wn.2d at 836.

those released from confinement face, and often leads to increased recidivism.

> It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

This Court also discussed its concern about LFOs inhibiting re-entry for past offenders, noting that LFOs accrue interest at a rate of 12 percent, so that even an individual "who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Blazina, 182 Wn.2d at 836 (citing State Minority and Justice Commission at 22).

The court's imposition of substantial legal financial obligations, despite the lack of findings on ability to pay, coupled with the obvious hardship of reentering society after spending time in prison, constitutes significant punishment (particularly here, with over $4000 in LFOs), that violates the right to equal protection of the law, is contrary to statute and

case law, and must be reconsidered on remand, giving attention to Mr. Naillon's financial circumstances.

The Court of Appeals' failure to exercise its discretion is an abuse of discretion, requiring review. Blazina, 182 Wn.2d at 831; RAP 13.4(b)(1).

4. Each assignment of error raised in Mr. Naillon's personal restraint petition requires this Court's review pursuant to RAP 13.4(b).

Mr. Naillon requests that this Court review each issue raised in his personal restraint petition, No. 46810-7-II. Mr. Naillon preserves each of the issues raised in his PRP and respectfully requests review by this Court. RAP 13.4(b)(1), (2).

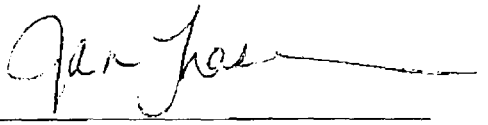
Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, with other decisions of the Court of Appeals, and because it involves an issue of substantial public importance, review should be granted. RAP 13.4(b)(1), (2), (4).

F. CONCLUSION

For the above reasons, Mr. Naillon requests the Court of Appeals decision be reviewed, as it is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. The LFO issue also raises an issue of substantial public importance. RAP 13.4(b)(1), (2), (4).

DATED this 6th day of April, 2016.

Respectfully submitted,



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT WADE NAILLON, Appellant.	No. 46754-2-II Consolidated with:
In re the Personal Restraint Petition of: ROBERT WADE NAILLON, Petitioner.	No. 46810-7-II UNPUBLISHED OPINION

LEE, J. — Robert Wade Naillon appeals his convictions for unlawful possession of a controlled substance (methamphetamine) and vehicle prowling in the second degree, arguing that the trial court (1) violated his right to present a defense by denying his motion for a second test of a glass pipe, (2) violated his right to a fair trial by requiring a court officer to stand by an exit door while he testified, and (3) erred in imposing discretionary legal financial obligations (LFOs) without determining his ability to pay. In a consolidated personal restraint petition (PRP), Naillon adds that the field testing procedure for the glass pipe was improper, that his speedy trial rights were violated, and that he received ineffective assistance of counsel.

We hold that (1) a retesting of the pipe was not necessary to Naillon's unwitting possession defense, (2) the trial court did not abuse its discretion by adhering to standard procedure and posting an officer near the exit door during Naillon's testimony, and (3) Naillon waived his LFO challenge by not objecting to the imposition of LFOs during sentencing. We further hold that a

proper chain of custody for the pipe was established, that Naillon was tried within the speedy trial period, and his counsel's performance was neither deficient nor prejudicial. We affirm Naillon's judgment and sentence, and deny the PRP.

FACTS

After Alissa Shipley and her daughter saw Naillon enter a Cadillac parked in a church parking lot on June 17, 2014, Shipley called the police. She then contacted Naillon, who told her that the Cadillac belonged to his brother. Shipley saw that Naillon had a watch in his hand. When she told him to put anything that did not belong to him back in the car, Naillon put the watch inside the car and walked across the street.

Longview Police Officer Shawn Close arrived and contacted Naillon. Naillon initially denied being inside the Cadillac but then said he thought the car was his mother's and that he was looking inside to find a watch to check the time. After Shipley's daughter identified Naillon as the man she saw inside the Cadillac, and after the Cadillac's owner said that Naillon did not have permission to be in his car, Officer Close arrested Naillon for vehicle prowling in the second degree.

Officer Close searched Naillon incident to his arrest and found a glass pipe in his back pocket. Officer Close recognized the pipe as an item commonly used to smoke methamphetamine. The pipe contained the residue of a crystalline substance that Officer Close believed was methamphetamine. A field test of the pipe conducted at the police station showed the pipe contained methamphetamine, which was later confirmed by testing at the Washington State Patrol Crime Lab.

The State charged Naillon with unlawful possession of a controlled substance (methamphetamine) and vehicle prowling in the second degree.[1] During his arraignment on July 1, Naillon requested the pipe be sent to the state crime lab as soon as possible for testing. At a July 25 hearing, Naillon stated that he wanted his own test done after the state lab returned the pipe. The trial court suggested that he speak with his attorney about a possible defense expert.

On August 5, Naillon's attorney moved to withdraw, and Naillon complained that his attorney was refusing to obtain a second test for the pipe. Defense counsel confirmed that he would not request a second test for strategic reasons. Naillon did not object to his attorney's withdrawal.

On August 7, the trial court granted the motion to withdraw, and Naillon again requested a second test of the pipe. The trial court deferred all motions to an August 19 hearing. On August 19, Naillon's new attorney stated that he would be requesting funds for a second test of the pipe after contacting several labs to determine the cost.

After the trial court denied the defense motion to suppress the glass pipe on September 2, defense counsel moved for a second testing of the pipe. In making the motion, counsel stated that the defense at trial would be one of unwitting possession, and he explained to Naillon that "[u]nwitting possession means you didn't know what it was." 1 Report of Proceedings (RP) at 146. Naillon agreed that this would be his defense.

[1] An additional charge of possession of stolen property, based on items in Naillon's possession, was dismissed before trial.

Defense counsel then informed the court that he did not know of any statutory right to an independent test but that Naillon insisted he was entitled to a second test. The trial court denied the motion after concluding that there was no legal basis for a second test.

At trial, Shipley, three police officers, and the Cadillac's owner testified to the facts cited above. During his testimony, Officer Close described how he tested the pipe at the police station and logged it into evidence before it was sent to the state crime lab. He explained that there was no requirement that the field testing be done in Naillon's presence. The forensic scientist who tested the pipe at the state crime lab testified that its residue contained methamphetamine.

After the State rested, defense counsel stated that Naillon would testify. The following exchange then occurred between a court officer, the trial court, and Naillon:

> COURT OFFICER: Your Honor, if he's going to testify, one of us is going to—
> [TRIAL COURT]: We need to have him seated. Well, I'll take the jury out and have you take him up, seat him—
> COURT OFFICER: Well, one of us will be standing up there.
> [TRIAL COURT]: Yeah. Yeah.
> . . . .
> DEFENDANT: I have to have somebody near me while I'm up there?
> [DEFENSE COUNSEL]: That would be up to the judge, not me.
> DEFENDANT: Ma'am, I feel that that's going to—
> [TRIAL COURT]: Mr. Naillon, stop. I'm not talking to you at the moment.
> DEFENDANT: Well—
> [TRIAL COURT]: So what I would do is—when he is called—actually when it's planned for him to be called--are you going to put him on next?
> [DEFENSE COUNSEL]: Yes. You want to go first, don't you?
> DEFENDANT: It's up to you but I—I don't see how I should have a guard up there by me, I mean it's just--
> COURT OFFICER: Because there's an exit door there.
> [TRIAL COURT]: Okay. The guard is going to be there.
> DEFENDANT: I've never been a flight risk. I've never been a flight risk.
> . . . .
> COURT OFFICER: It's—it's just our procedure, Rob.

2A RP at 263-64.

Naillon then testified that he did not know that anything containing methamphetamine was in his pocket and that the pipe was an incense burner. He denied that anyone else put the pipe in his pocket, stating instead that "it magically appeared." 2A RP at 292.

The defense investigator, who was a retired police captain, testified that while glass pipes may be sold as incense burners, they frequently contain drugs. When shown the pipe recovered from Naillon's pocket, he testified that he would have assumed it was a methamphetamine pipe.

The trial court instructed the jury on unwitting possession, but the jury found Naillon guilty as charged. The trial court imposed 18 months' confinement on the drug charge and 364 days' confinement on the prowling charge. Pursuant to a preprinted provision finding that Naillon had the ability to pay, the trial court imposed mandatory and discretionary LFOs totaling $4,125. Naillon appeals his convictions and the discretionary LFOs imposed.

ANALYSIS

A. REQUEST FOR SECOND TEST

Naillon argues that the trial court violated his right to present a defense by denying his motion to have the glass pipe retested. We disagree.

In Washington, CrR 3.1 authorizes payment for expert services when necessary to an adequate defense. CrR 3.1(f)(1); *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995). "'CrR 3.1(f) incorporates the constitutional right of an indigent defendant to the assistance of expert witnesses.'" *State v. Cuthbert*, 154 Wn. App. 318, 330, 225 P.3d 407 (2010) (quoting *State v. Poulsen*, 45 Wn. App. 706, 709, 726 P.2d 1036 (1986)), *review denied*, 169 Wn.2d 1006 (2010).

Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court, and the trial court's exercise of discretion will not be overturned absent a clear showing of substantial prejudice. *Young*, 125 Wn.2d at 691; *see also City of Mt. Vernon v. Cochran*, 70 Wn. App. 517, 524, 855 P.2d 1180 (1993) (appointment of expert for indigent defendant is discretionary, and there is no "black letter" rule to apply in determining whether expert must be appointed), *review denied*, 123 Wn.2d 1003 (1994).

In requesting a second test of the glass pipe at public expense, defense counsel stated that Naillon intended to pursue a defense of unwitting possession at trial. An unwitting possession instruction is appropriate when the defendant admits possessing contraband but argues that he was ignorant of that possession or of its illegal nature. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). By employing such a defense, Naillon admitted possessing a pipe containing methamphetamine, but he argued that he did not know he had the pipe nor did he know that the pipe contained methamphetamine. A second test of the pipe would not have advanced either argument. *See State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d 219 (2005) (denial of expert's services upheld where facts did not show expert would have materially assisted defense counsel). The trial court did not abuse its discretion in concluding that an independent test of the glass pipe was not necessary to Naillon's defense.[2]

[2] Naillon also contends that the trial court violated his due process rights and deprived him of effective counsel when it denied his request for an independent test of the glass pipe. But Naillon does not present any argument in support of these contentions. Therefore, we do not consider these contentions. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

B. PRESENCE OF COURT OFFICER

Naillon contends that the trial court violated his due process right to a fair trial by placing a court officer near an exit door when he testified without finding that the officer's placement was necessary. We disagree.

The presumption of innocence is a basic component of a fair trial under our criminal justice system. *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). To preserve the presumption of innocence, the defendant is "'entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.'" *Id.* at 861-62 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

We review trial management decisions for abuse of discretion. *Jaime*, 168 Wn.2d at 865. "'A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.'" *Id.* (quoting *State v. Hartzog*, 96 Wn.2d 383, 401, 635 P.2d 694 (1981)). But "'close judicial scrutiny' is required to ensure that inherently prejudicial measures are necessary to further an essential state interest," such as preventing injury to those in the courtroom, disorderly conduct, or escape. *Finch*, 137 Wn.2d at 846 (quoting *Estelle v. Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)).

Courtroom security measures such as shackling, gagging, or handcuffing can unnecessarily mark the defendant as guilty or dangerous. *Holbrook v. Flynn*, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); *Finch*, 137 Wn.2d at 845. Before a trial court may properly impose such potentially prejudicial measures, it must make a factual determination of necessity, on the

record, taking into consideration factors that include the seriousness of the charge, the defendant's own safety and that of others in the courtroom, and the adequacy of alternative remedies. *Finch*, 137 Wn.2d at 848. The trial court must balance the need for such measures against the risk of undermining the right of the accused to a fair trial. *Id.* at 849-50.

But when security measures are not inherently prejudicial, the trial court is not required to make a record of a compelling safety or security threat. *See Holbrook*, 475 U.S. at 566-67 (reversing circuit court's conclusion that trial court had to identify safety threats to justify presence of troopers in courtroom).

In *Holbrook*, the United States Supreme Court ruled that, unlike physical restraints, uniformed security guards in a courtroom do not inherently prejudice a defendant's right to a fair trial. 475 U.S. at 569. "Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.* The Court added that "'reason, principle, and common human experience' counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial." *Id.* (quoting *Estelle*, 425 U.S. at 504).

We decline to hold that the trial court was obligated to make a factual determination of necessity to justify the presence of a single court officer by an exit door, and we see no abuse of discretion in this trial management decision. Furthermore, we observe that the record shows only that a court officer stood near an exit door while Naillon testified. The record does not show where the officer stood before Naillon testified, whether the jury could see the officer while Naillon testified, or the extent to which the officer was armed. Thus, even if error occurred in assessing

the need for the court officer to stand near the door, that error was harmless, as the record does not show that the officer's presence affected the jury or resulted in actual prejudice. *See State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) (any error in shackling defendant was harmless where he did not show prejudice from the unseen restraints), *cert. denied*, 525 U.S. 1157 (1999).

C. LFOs

Naillon argues further that the trial court erred by imposing discretionary LFOs based on an unsupported finding that he had the ability to pay.[3] Naillon asserts that he may challenge the assessment of these obligations for the first time on appeal.

Naillon's judgment and sentence states that the trial court considered his ability to pay the LFOs imposed. Naillon did not challenge this language or his LFOs during sentencing. Our decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827 (2015), issued before Naillon's sentencing, provided notice that the failure to object to LFOs during sentencing waives a claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). We decline to exercise such discretion here.

[3] Naillon does not challenge his mandatory LFOs, which included a $500 victim assessment, a $200 filing fee, and a $100 deoxyribonucleic acid (DNA) fee. *See State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (legislature has divested courts of discretion to consider defendant's ability to pay when imposing mandatory LFOs).

D. PRP

Naillon argues in his PRP that the trial court erred by denying his request for a second test of the glass pipe, the chain of custody for the pipe was not established because he did not observe the officer's field test of the pipe, his speedy trial rights were violated, and he received ineffective assistance of counsel. We have already addressed Naillon's request for a second test of the pipe and turn to his other issues.

To be entitled to relief, a petitioner must show constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *See In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which his claim of unlawful restraint is based as well as the evidence reasonably available to support the factual allegations. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988). When the petition rests on conclusory allegations, we must decline to determine its validity. *Cook*, 114 Wn.2d at 813-14.

1. Chain of Custody

Naillon contends that the chain of custody for the glass pipe was not properly established because the officer did not conduct the field test or bag and seal it afterward in his presence. In support of this contention Naillon points out that he was deprived of access to the prison law library because his kiosk blew up and rendered him unconscious.[4] Naillon's contention fails.

[4] During a pretrial hearing, defense counsel stated that Naillon wanted the court to know that he had been electrocuted while doing legal research at the jail. Counsel investigated but could not confirm this claim.

Officer Close testified at trial that there is no authority requiring a field test to be conducted in the defendant's presence, and Naillon cites no such authority here. Officer Close also testified about the manner in which he tested the pipe and packaged it for delivery to the state crime lab for additional testing. He further testified that both the packaging and the pipe were in substantially the same condition at trial as they were when he entered them into evidence. The record establishes an unbroken chain of custody for the pipe. *See State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) (before object connected with crime may be admitted into evidence, it must be identified and shown to be in substantially the same condition as when the crime was committed), *review denied*, 136 Wn.2d 1021 (1998). Naillon's allegation regarding the law library is supported only by his own assertions, and he does not explain why that allegation entitles him to relief. Naillon's chain of custody challenge fails.

2. Speedy Trial

Naillon also asserts that his speedy trial rights were violated, but the record demonstrates otherwise.[5] Naillon's original trial date was August 11, 2014, which was within 60 days of his July 1 arraignment and therefore within the speedy trial period. *See* CrR 3.3(b)(1)(i), (c)(1). When the trial court granted his attorney's motion to withdraw on August 7, the 60-day period began anew. CrR 3.3(c)(2)(vii). Naillon's trial began on September 2, which was well within the new speedy trial period. There was no violation of Naillon's speedy trial rights, and his challenge fails.

[5] In support of his speedy trial challenge, Naillon again points out that he was denied access to the jail law library because the kiosk blew up and electrocuted him. But Naillon does not explain how his lack of access to the law library supports his speedy trial challenge.

3. Ineffective Assistance of Counsel

Finally, Naillon maintains that he received ineffective assistance of counsel because his attorney did not (1) provide him with discovery until two days before trial, (2) visit him for sufficient periods of time or adequately prepare for trial, or (3) give effective arguments or cross examinations, including an argument supporting the retesting of the glass pipe. We disagree.

To prove a claim of ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficiency was prejudicial. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Prejudice results when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *Id.* We strongly presume that defense counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We need not address both prongs of the ineffective assistance of counsel test if the defendant makes an insufficient showing on one prong. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244, *review denied*, 115 Wn.2d 1010 (1990). Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Naillon does not cite any authority to support his argument that he is entitled to all discovery materials. And, Naillon fails to identify what discovery he claims defense counsel failed to provide him until a couple of days before trial. Therefore, Naillon's argument is not sufficient for us to address his claim that defense counsel was ineffective because defense counsel "never gave [Naillon] *a* discovery until 2 days before trial." PRP at 5 (emphasis added); RAP 16.7(a)(2). Nevertheless, Naillon fails to show prejudice.

Also, the record does not support Naillon's general assertions that his attorney was unprepared and gave inadequate arguments or cross examinations. His attorney correctly asserted that a second test of the pipe was not required, and we see no deficiency in this regard. While Naillon points to the fact that he was deprived of access to the law library to support his ineffective assistance of counsel challenge, Naillon does not explain how his lack of access to the law library supports his claim of ineffective assistance of counsel. We reject Naillon's assertion that he received ineffective assistance of counsel.

We affirm the judgment and sentence, and deny the personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

LEE, J.

We concur:

WORSWICK, P.J.

MELNICK, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 46754-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Sean Brittain, DPA
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 6, 2016

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