No. 32683-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RAY L. BETANCOURTH,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable David Elofson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Betancourth's suppression motion and admitting into evidence his statements made to law enforcement on September 21, 2012, and October 9, 2012.

2. The trial court erred in finding, "The defendant was not under arrest and was free to leave at any time." Finding of Fact 1.4, CP 105.

3. The trial court erred in finding, "On October 9, 2012 . . . The defendant was not under arrest and was free to leave." Finding of Fact 1.6, CP 105.

4. The trial court erred in finding, "The defendant testified that he got along fine with [Detectives] Brownell and Dunsmore, but claims that he was nervous and felt intimidated by [Sergeant] Logan. The court does not find this claim credible. As he testified the defendant presented as being very confident in a potentially stressful situation." Finding of Fact 1.7, CP 105.

5. The trial court erred in finding, "No threats or promises were made to induce the defendant to speak to the officers. The statements made by him on October 9, 2012 were voluntary." Finding of Fact 1.8, CP 105.

6. The trial court erred in finding, "Miranda warnings were not required during either of September 21, 2012 or October 9, 2012 conversations which the Toppenish officers had with the defendant, as no reasonable person in his position would believe that the[y] were under arrest on either occasion." Conclusion of Law 2.1, CP 106.

7. The trial court erred in finding, "The statement made by the defendant to the police was voluntary, and not the product of any coercion." Conclusion of Law 2.2, CP 106.

8. The prosecution committed misconduct by appealing to the passion and prejudice of the jury during closing argument.

9. Defense counsel was ineffective for failure to object to the State's misconduct because it inflamed the passion and prejudice of the jury.

10. The record does not support the finding Mr. Betancourth has the current or future ability to pay the imposed legal financial obligations.

11. The trial court erred when it ordered Mr. Betancourth to pay a $100 DNA-collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were Mr. Betancourth's statements to law enforcement inadmissible because they were obtained as a result of custodial interrogation without Miranda warnings?

2. Was Mr. Betancourth denied his right to a fair trial when the prosecutor improperly appealed to the jury's passion and prejudice in closing argument?

3. Was Mr. Betancourth denied his constitutional right to effective assistance of counsel when his attorney failed to object to the prosecutor's improper closing argument which inflamed the passion and prejudice of the jury?

4. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

5. Does the mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

C. STATEMENT OF THE CASE

On September 19, 2012, an altercation occurred between two groups of teenagers in Toppenish, Washington, during which J.M.R.[1], a member of one group, was shot. RP 919, 1159. The other group included Ray Betancourth, David Chavez and Marcos Cardenas. RP 907–08, 917–18. Mr. Betancourth was not the shooter. RP 919. Marcos Cardenas was the one who pulled the trigger. Id. Both Mr. Betancourth and David Chavez testified they did not know Cardenas had a gun or intended to use it. RP 918, 1247. Mr. Betancourth was 18 years old at the time of the incident. CP 105; 190.

Two days later, on September 21, 2012, law enforcement questioned Mr. Betancourth about the homicide at the Toppenish police station. RP 36, 43, CP 105. Mr. Betancourth wanted his father there for the interview, but the lead detective would not allow Mr. Betancourth's father to be present. CP 105, RP 43–44. The detective took Mr. Betancourth to the back of the police station to question him in a small trailer. RP 44, 55–56. The trailer was described as "probably the world's smallest single-wide trailer" of about 9 by 20 feet long. RP 55, 58. The trailer was also divided into different rooms. RP 56. Two other officers

[1] Initials will be used where appropriate to protect minors' identities.

were present during the interview. RP 44. Mr. Betancourth was questioned for 20-30 minutes by the three officers about the homicide of J.M.R. and whether he was involved. RP 45, CP 105. Mr. Betancourth denied any involvement. RP 36. He was not given Miranda warnings and the interview was not recorded. RP 46; Finding of Fact 1.5, CP 105.

A second interrogation occurred on October 9, 2012. Mr. Betancourth was once again taken to the back of the police station and into the small trailer where he was questioned by the same three officers about the homicide. RP 51–55; CP 105. The sergeant—a six-foot man much larger than Mr. Betancourth—was standing, yelling at the defendant, and using foul language. RP 72–74. This behavior frightened Mr. Betancourth. RP 73–74. Mr. Betancourth did not feel free to leave: ". . . [W]hen [the sergeant] started getting aggressive . . . I did not feel like it would have been perfectly okay if I just stood up and walked out of the room. I did not feel like that." RP 72. Mr. Betancourth believed he would only be free to leave once he contacted his attorney, which he eventually did. RP 73. Only then was he able to leave the interview. Id.

During this second interview Mr. Betancourth initially denied involvement. RP 51. Only after the sergeant started yelling and getting

aggressive, did Mr. Betancourth make a statement acknowledging involvement in the shooting. RP 99, 1179, 1246.

Miranda warnings were not given during this second interview. CP 105; RP 46. Nor was the interview recorded. RP 46, 52.

Mr. Betancourth moved to suppress the statements. RP 29–30. The trial court denied the motion, finding Miranda warnings were not necessary because no reasonable person in Mr. Betancourth's position would believe he was under arrest, that the statements were voluntary, and the statements were not the result of coercion. Conclusion of Law Nos. 2.1 and 2.2, CP 106.

Mr. Betancourth testified at trial. RP 1197. He stated he did not know Cardenas (the shooter) had a gun. RP 1247. He further stated he had gone back to his truck to turn off the motor when the shooting occurred. RP 1220-21. On cross-examination, the State undermined Mr. Betancourth's credibility by repeatedly asking him why he lied to police about his involvement during the interrogations. RP 1248–49, 1262-63, 1265-66. The prosecutor also mentioned Mr. Betancourth's lying to the police during closing argument. RP 1439–41, 1456. The prosecutor further stated:

> If this were a case where his credibility was important, what reasonable juror is going to believe anything he has to [s]ay?

> I mean, under his version he's a witness to this shooting. A homicide. He doesn't report it. They—He's asked about it twice; he lies about it over and over and over again. Why? Well, it's to his advantage.

RP 1440. During rebuttal the State added if Mr. Betancourth felt so guilty about the homicide of J.M.R. then "why doesn't he try to make it right by going to the police, or at least telling the police the truth when they ask." RP 1488.

The prosecutor mentioned the phrase "beat the shit out of," or some variation of that phrase, at least 22 times during closing argument and rebuttal. RP 1435–37, 1445–49, 1480, 1485. The State later cleaned up its language and began using the letter "S" to refer to "shit", but still repeated the phrase an additional 12 times. RP 1452, 1454, 1487, 1490, 1492–95.

Mr. Betancourth was convicted by a jury of second degree felony murder and first degree assault with two special verdict firearm enhancements. CP 190–95.

At sentencing the Court imposed discretionary costs of $850 and mandatory costs of $6,500.77[2], for a total Legal Financial Obligation

[2] $500 Victim Assessment, $200 criminal filing, $100 DNA fee, and $5,700.77 restitution. CP 193.

(LFO) of $7,350.77. CP 193. The Judgment and Sentence contained the following language:

> ¶ 2.7 Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 191. The Court also found Mr. Betancourth had the means to pay the costs of incarceration and ordered him to pay those costs. CP 193, ¶ 4.D.4. The Court also found Mr. Betancourth had the means to pay the costs of any medical care incurred by Yakima County on his behalf, and ordered him to pay those costs. CP 193, ¶ 4.D.5.

The Court inquired into Mr. Betancourth's financial resources in regards to this appeal, but did not consider the burden payment of LFOs would impose on him. 8/5/14 RP 28, 30. The Court ordered Mr. Betancourth to begin paying the costs and assessments within 180 days after restitution is paid at a monthly amount to be determined by the Yakima County Clerk. CP 194, ¶ 4.D.7.

This appeal followed. CP 198. The trial court found Mr. Betancourth indigent for this appeal. 8/5/14 RP 30.

D. ARGUMENT

1. Mr. Betancourth's statements to law enforcement were inadmissible because they were obtained as a result of custodial interrogation without *Miranda* warnings.[3]

In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a suppression motion are reviewed under the substantial evidence standard. State v. Schlieker, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. Conclusions of law made by a trial court for a suppression hearing are reviewed de novo. State v. Cardenas, 146 Wn.2d 400, 407, 47 P.3d 127 (2002).

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in Miranda v. Arizona, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16

[3] Assignments of Error 1–7.

L.Ed.2d 694 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9; State v. Warness, 77 Wn. App. 636, 639 n. 2, 893 P.2d 665 (1995) (citing State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The Miranda rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Sargent, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given Miranda warnings, his statements during police interrogation are presumed to be involuntary. Sargent, 111 Wn.2d at 647-48, 762 P.2d 1127.

Interrogation. Miranda interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." State v. Pejsa, 75 Wn. App. 139, 147, 876 P.2d 963 (1994)

(quoting Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Here, both interviews were interrogations. During the first interview the lead detective asked the defendant about his involvement in the homicide of J.M.R. RP 36, 45-48. The detective acknowledged the purpose of questioning Mr. Betancourth was to obtain information regarding the incident and to place Mr. Betancourth at the crime scene. RP 45–48. Several questions were asked about Mr. Betancourth's family truck and its involvement in the incident and whether Mr. Betancourth was driving it at the time. RP 47–48. The detective noted the defendant was "strongly becoming a person of interest." RP 48. Since the questions were designed to elicit incriminating responses from Mr. Betancourth, this interview was an interrogation.

In the second interview the officers confronted Mr. Betancourth with additional incriminating information from their ongoing investigation. RP 49-51. The questions were again designed to elicit inculpatory responses from Mr. Betancourth. Therefore, the trial court's oral ruling indicating it would "have to find that it was a non-custodial interrogation – or interview [and] that the statements [the defendant] made were voluntary," was incorrect. RP 84. (The written conclusions of law do not

enumerate whether the "interrogation prong" was met. Conclusion of Law 2.1–2.2, CP 106; CP 104–06.) This interview was indeed an interrogation.

Custodial. The custody requirement to invoke Miranda is also at issue in this appeal. In Miranda, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444, 86 S.Ct. 1602.

Miranda focuses on custodial interrogations because of their secrecy. When an interrogator is alone with a suspect, police may employ a number of subtle psychological pressures. A suspect's will is much more likely to be overcome in an atmosphere controlled by the police. State v. Mahoney, 80 Wn. App. 495, 497, 909 P.2d 949 (1996) (citing Pejsa, 75 Wn. App. at 147, 876 P.2d 963). Isolation is the key aspect of a custodial setting. Pejsa, 75 Wn. App. at 147, 876 P.2d 963. In such an environment, "the police have immediate control over the suspect—they can restrain him and subject him to their questioning and apply whatever psychological techniques they think will be most effective." Id. (quoting United States v. Mesa, 638 F.2d 582, 585-586 (3d Cir.1980)). Moreover,

isolation of the suspect "is essential to prevent distraction and to deprive him of any outside support." Miranda, 384 U.S. at 455.

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test—whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Id. at 440. Washington has adopted this test. *See* State v. Short, 113 Wn.2d 35, 40, 775 P.2d 458 (1988). When a reasonable person would believe his freedom was curtailed, Miranda warnings must be given. Id.

Moreover, where a child suspect is involved, a child's age is an appropriate consideration of the Miranda custody analysis, so long as a child's age was objectively apparent to a reasonable officer. J.D.B. v. N. Carolina, —— U.S. ——, 131 S. Ct. 2394, 2404, 180 L. Ed. 2d 310 (2011). A child's age is more than a chronological fact. Id. at 2403 (other citations and quotations omitted). "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (the death penalty is cruel and unusual punishment for individuals under the age of 18). Generally, children are less mature and less responsible, often

cannot recognize or avoid detrimental choices, and are more vulnerable or susceptible to outside pressures than adults. J.B.D., 131 S. Ct. at 2403. In the context of police interrogation, "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' " Id. at 2403 (citing Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (plurality opinion)).

Here, Mr. Betancourth was only 18 and-a-half years old at the time of the incident and interrogations. Since he had no criminal history (CP 191), any previous contact he had with law enforcement could only be minimal. Moreover, the interviewing detective knew Mr. Betancourth was only 18 years old at the time of the interrogation. RP 44. Therefore, Mr. Betancourth's age must be taken into account in determining whether the interrogation was custodial. RP 44; CP 105, 190.

September 21, 2012 Interrogation. In the first interrogation the defendant was intentionally isolated from his father by the lead detective. RP 43; CP 105. Although Mr. Betancourth's father requested to be present during the interview, and the trial court found Mr. Betancourth wanted his father present, the detective would not allow it. Finding of Fact 1.3, CP 105; RP 43–44. Moreover, the lead detective took Mr. Betancourth to the back of the police station, where he was questioned by

three trained law enforcement officers in a small trailer. RP 44–45. Testimony indicates one of the officers, a sergeant, was six-feet tall and much bigger than the defendant. RP 72.

In a similar case, the Washington State Supreme Court held the defendant's statements should have been suppressed. State v. Daniels, 160 Wn.2d 256, 266, 156 P.3d 905 (2007) *opinion adhered to on reconsideration*, 165 Wn.2d 627, 200 P.3d 711 (2009). In Daniels, a seventeen-year-old was questioned by two detectives for an hour and a half at the precinct in a small room. Id. at 266-67. No Miranda warnings were given until the end of the defendant's interrogation and the detectives refused to allow her father to accompany her. Id. at 267. The Court held the defendant was the subject of a custodial interrogation because a reasonable person would not have felt free to leave. Id.

Similarly, in this case a reasonable person in Mr. Betancourth's position would not have felt free to leave. The detective deliberately isolated Mr. Betancourth by not allowing Mr. Betancourth's father to be present. CP 105, RP 43–44. Isolating Mr. Betancourth and preventing him from obtaining support from his father, placed him in a situation where it was easy for law enforcement to exert psychological pressures on him to talk. *See* Pejsa, 75 Wn. App. at 147. Considering Mr. Betancourth was

only 18 at the time of questioning, a reasonable person in the same position would not feel free to leave. Therefore, contrary to the trial court's finding, Mr. Betancourth's freedom to leave had been curtailed to a degree associated with formal arrest. Finding of Fact 1.4, CP 105.

October 9, 2012 Interrogation. During the second interview Mr. Betancourth was isolated again, this time from his mother, as the lead detective stayed behind to talk to Mr. Betancourth's mother for a few minutes while the other detective took him to the same single-wide trailer as before. RP 37, 40. Despite the trial court's finding to the contrary, no one remembered whether Mr. Betancourth was told he was free to leave. Finding of Fact No. 1.6, CP 105; RP 52, 68, 70. Mr. Betancourth testified he also did not remember being told he was free leave. RP 68, 70. Mr. Betancourth was again questioned by the three police officers. RP 52; CP 105. The sergeant—a six-foot man much larger than Mr. Betancourth—was standing, yelling and cussing at Mr. Betancourth making him feel scared. RP 72–74. Although the trial court erroneously found no threat or coercion was used against Mr. Betancourth, it was only in this menacing atmosphere that he finally capitulated and made a statement. Finding of Fact No. 1.8, CP 105. The fact that Mr. Betancourth may have appeared confident to the trial court during testimony does not mean he was

confident when the sergeant was yelling and swearing at him. Finding of Fact 1.7, CP 105. Therefore, contrary to the findings, Mr. Betancourth did not feel he was free to leave until he had contacted his attorney. Finding of Fact 1.6, CP 105; RP 64, 72–74.

Harmless Error. Statements erroneously admitted in violation of the defendant's Miranda rights are not harmless unless the remaining evidence overwhelmingly supports a guilty verdict. *See* State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177, *rev. denied* 118 Wn.2d 1006, 822 P.2d 288 (1991); State v. Cervantes, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991). Here, the evidence does not overwhelmingly support the conviction without Mr. Betancourth's tainted statements.

During cross-examination and closing argument the prosecutor repeatedly referred to Mr. Betancourth's denials during the interrogations, essentially calling him a liar. RP 1439–41, 1456. Suppression of these statements would have taken away the prosecutor's ability to undermine Mr. Betancourth's credibility in this manner. Mr. Betancourth testified at trial he did not know Cardenas (the shooter) had a gun and that Mr. Betancourth had gone back to his truck to turn off the motor when the shooting occurred. RP 1220–21.

The jury might have believed Mr. Betancourth's testimony if his illegally obtained statements had not been admitted at trial. An affirmative defense instruction was given by the trial court indicating persuasive evidence existed as to this possibility.[4] Since the jury's verdict was largely dependent on which version of events it found credible, there is a reasonable possibility of a different outcome absent the illegally obtained statements. Therefore, the erroneous admission of Mr. Betancourth's statements was not harmless error.

The trial court erred in finding Miranda warnings were not necessary for either interview. Conclusion of Law Nos. 2.1 and 2.2, CP 106.

[4] The following affirmative defense instruction was given at trial: "It is a defense to a charge of Murder in the Second Degree based upon committing the crime of second degree assault that the defendant:
(1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
(2) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
(3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
(4) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.
The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge." CP 170.

2. The prosecutor's misconduct in closing arguments improperly appealed to the jury's passion and prejudice and a limiting instruction would not have cured the error.[5]

"Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (citing State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). "[B]ald appeals to passion and prejudice constitute misconduct." Id. at 747 (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). "Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, the prosecutor's duty is to ensure a verdict free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). A prosecutor may not urge a jury to convict based upon an appeal to the jury's sympathy for the victim or inflammatory imagery. *See* Id. at 849-52 (State's poem read during closing which described rape's emotional effect on its victims improperly appealed to the passion and prejudice of the jury).

[5] Assignment of Error 8.

The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577, 599 (1991).

Here, the prosecutor used the phrase "beat the shit out of" more than 20 times during closing argument without objection. RP 1435–37, 1445–49, 1480, 1485. The constant use and references of the phrase was inflammatory and solely intended to appeal to the jury's passion and prejudice. The State's conduct encouraged the jury to render a verdict based not upon the evidence but rather on the uniquely upsetting imagery the phrase "beat the shit out of" engendered. The repeated use of the phrase was unprofessional and clearly prejudicial. Although evidence showed such language was used in a text message prior to the incident[6], it does not justify or rectify the prosecutor's conduct.

Since the phrase was brought out during trial, mentioning the phrase a few times would not have been improper. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 431, 442 (2003) (trial counsel permitted latitude

[6] Mr. Betancourth suspected a minor named T.F. had broken the windows on his Honda Civic. RP 1202. Angry over the incident, he sent a text message to his girlfriend saying: "I want to beat the shit of them." RP 1203-05, 1257. This is the phrase the prosecutor focused on in closing.

to argue facts in evidence and reasonable inferences therefrom) (citations omitted). However, there is a point where the repeated use of flagrant language is no longer a part of argument, but rather morphs into an improper appeal to the jury's passion and prejudice. Claflin, 38 Wn. App. at 849-50 (a prosecutor has a duty to ensure a verdict "free of prejudice and based on reason"). That is precisely what occurred in this case.

The prosecutor's improper argument was so flagrant and ill-intentioned that it caused an enduring prejudice that would not have been neutralized by a limiting instruction. State v. Thorgerson, 172 Wn. 2d 438, 443, 258 P.3d 43, 46 (2011) (citations omitted). The phraseology emphasized by the prosecutor was likely to evoke a passionate reaction to seek justice. Under these circumstances there was a substantial likelihood that the jury verdict was based on emotions evoked by the prosecutor's repeated references to the phrase "beat the shit out of" rather than an impartial evaluation of the credibility of the witness' testimony and the evidence presented.

3. Defense counsel was ineffective for failure to object to the prosecutor's improper remarks in closing arguments which inflamed the jury's passion and prejudice.[7]

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

To establish that failure to object constituted ineffective assistance of counsel, a defendant must show "the failure to object fell below

[7] Assignment of Error 9.

prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]" and that the decision was not tactical. State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned decision-making[.]" In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, the prosecutor clearly committed misconduct by using the phrase "beat the shit out of" more than 20 times during closing argument without objection. There was no conceivable tactical reason for defense counsel's failing to object to the prosecutor inflaming the passions of the jury in this manner. Therefore, defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness.

Defense counsel's deficient representation also prejudiced Mr. Betancourth. There was a substantial likelihood the jury verdict was based on emotions evoked by the prosecutor's repeated references to the phrase "beat the shit out of," rather than an impartial evaluation of the credibility of the witness' testimony and the other evidence presented. Since there is a

reasonable probability the outcome would have been different absent the prosecutor's inflammatory remarks, the prejudice prong to establish ineffective assistance of counsel is also met.

4. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.[8]

a. *This court should exercise its discretion and accept review.*

Mr. Betancourth did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. State v. Blazina, __Wn.2d__, 344 P.3d 680, 683 (March 12, 2015). In Blazina the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." Blazina, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent

[8] Assignment of Error 10.

defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. Blazina, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the Blazina Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. Blazina,

344 P.3d at 685; *see also* Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) *rev'd in part sub nom.* Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Betancourth's case regardless of his failure to object. *See* Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation") (citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. Blazina, 344 P.3d at 685. Post-Blazina, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Betancourth respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and

accept review. Blazina, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument*.

There is insufficient evidence to support the trial court's finding that Mr. Betancourth has the present and future ability to pay legal financial obligations, the costs of incarceration, and the costs of any medical care incurred by Yakima County on his behalf. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. Fuller v. Oregon, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. Blazina, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." Id. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. Id.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. Id. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. Id. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a

needs-based, means-tested assistance program, such as Social Security or food stamps. Id. (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Id. Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. Id.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." Curry, 118 Wn.2d at 916. However, Curry recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16. The individualized inquiry must be made on the record. Blazina, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has “considered” Mr. Betancourth’s present or future ability to pay legal financial obligations. Similar boilerplate statements found Mr. Betancourth had the means to pay the costs of incarceration as well as the costs of any medical care incurred by Yakima County on his

behalf. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraphs 2.7, 4.D.4 and 4.D.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Betancourth's financial resources with regards to imposing LFOs on him. 8/5/14 RP 28. Despite finding him indigent for

this appeal, the Court ordered Mr. Betancourth to begin paying the costs and assessments within 180 days after restitution is paid in full at a monthly amount to be determined by the Yakima County Clerk. CP 194, ¶ 4.D.7.

The boilerplate finding that Mr. Betancourth has the present or future ability to pay LFOs, costs of incarceration, and any medical care incurred by Yakima County on his behalf is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Betancourth's current and future ability to pay before imposing LFOs or the other costs. Blazina, 344 P.3d at 685.

5. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.[9]

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

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

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

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919

(1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541[10]. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not

[10] RCW 43.43.7541 provides:

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

further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." Blazina, ___ Wn.2d ___, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

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

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works

against another important State interest – reducing recidivism. *See* Blazina, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Betancourth's indigent status, the order to pay the $100 DNA collection fee (CP 193) should be vacated.

E. CONCLUSION

For the reasons stated, the defendant's statements should be suppressed and the conviction reversed. In the alternative, the case should be remanded to make an individualized inquiry into Mr. Betancourth's current and future ability to pay before imposing LFOs, costs of incarceration and costs of any medical care incurred by Yakima County on his behalf. In addition, the order to pay the $100 DNA collection fee should be vacated.

Respectfully submitted May 4, 2015,

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I, David N. Gasch, do hereby certify under penalty of perjury that on May 4, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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