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Court of Appeals
Division III
State of Washington

Supreme Court No. 92685-9
Court of Appeals No. 32722-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ALEXANDER J. COMO, JR.,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed November 24, 2015, affirming his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW.

1. Was Mr. Como's confession to the police involuntary and thus inadmissible because it was made as a result of an implied promise by the detective that Mr. Como would not get into any trouble so long as the sexual intercourse with the 13-year-old victim was consensual?

2. 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?

IV. STATEMENT OF THE CASE.

Alexander Como was convicted of second degree rape of a child for having sexual intercourse with C.D., a 13-year-old girl. CP 1, 17, 22. Mr. Como, who was 25 at the time, went to the Walla Walla Police

Department on February 8, 2014, and asked to speak with Detective Marcus Goodwater. CP 3. Mr. Como discussed his concerns about an 18-year-old male being involved in a romantic relationship with C.D. CP 3; RP 78. The detective suspected Mr. Como himself had been involved in a sexual relationship with the young girl prior to this interview and inquired about that relationship. CP 3; RP 14. Mr. Como denied any sexual relationship with C.D. until the detective employed a ruse, at which point Mr. Como admitted to a consensual sexual relationship with C.D. CP 3-4; RP 12.

At the CrR 3.5 hearing the detective testified the ruse he used was claiming to have DNA evidence of sexual contact that he did not actually have. CP 4; RP 12. However, at trial the detective admitted on cross examination that during the interview and prior to Mr. Como's confession, the detective told Mr. Como he understood Mr. Como and C.D. had a romantic relationship, that the relationship was consensual, and that he, the detective, was not interested in getting Mr. Como into any trouble. RP 79-80. Detective Goodwater also referred to C.D. as a beautiful woman who wore revealing clothes. RP 79.

At sentencing the Court imposed discretionary costs of $2378.65 and mandatory costs of $800[1], for a total Legal Financial Obligation (LFO) of $3178.65. CP 60-61. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered 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 specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein

CP 60.

Mr. Como informed the Court that he had physical problems and was unable to work. RP 149, 153. The Court did not inquire further into Mr. Como's financial resources or consider the burden payment of LFOs would impose on him. RP 153. The Court ordered LFO payments of $50 per month to begin 90 days after his release from custody. CP 61.

This appeal followed. CP 77. The trial court signed and entered the Order of Indigency for this appeal. RP 153-54

[1] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 60-61.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)) and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

1. Mr. Como's confession to the police was involuntary and thus inadmissible because it was made as a result of an implied promise by the detective that Mr. Como would not get into any trouble so long as the sexual intercourse with the 13-year-old victim was consensual.

Mr. Como maintains that his confession was coerced in violation of his right not to incriminate himself. The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article I, section 9 of the Washington State Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection provided by the state provision is coextensive with that provided by the Fifth Amendment. *State v. Unga*, 165 Wash. 2d 95, 100, 196 P.3d 645 (2008).

Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary, rather, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.' " *Unga*, 165 Wash. 2d at 101 (citing *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist the pressure are important. *United States v. Brave Heart,* 397 F.3d 1035, 1040 (8th Cir.2005).

The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. *State v. Broadaway,* 133 Wash.2d 118, 132, 942 P.2d 363 (1997); *Arizona v. Fulminante,* 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Officials cannot extract a confession "by any sort of threats or violence, nor ... by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976).

Whether any promise has been made must be determined and, if one was made, the court must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise, i.e., there must be a direct causal relationship between the promise and the confession. *Unga*, 165 Wash. 2d at 101-02 (internal citations omitted). This causal connection is not merely "but for" causation; the court does "not ask whether the confession would have been made in the absence of the interrogation." *Unga*, 165 Wash. 2d at 102 (citing *Miller v. Fenton,* 796 F.2d 598, 604 (3d Cir.1986)). "If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action." *Id.* (citing *United States v. Guerrero,* 847 F.2d 1363, 1366 n. 1 (9th Cir.1988)).

A suspect's decision to confess must be a product of his or her own balancing of competing considerations for the confession to be voluntary. *Id.* (internal citation omitted); accord *United States v. Miller,* 984 F.2d 1028, 1031 (9th Cir.1993); *United States v. Durham,* 741 F.Supp. 498, 504 (D.Del.1990). "The question ... [is] whether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the

suspect] of his ability to make an unconstrained, autonomous decision to confess." *Id.* (citing *Miller,* 796 F.2d at 605); see *United States v. Baldwin,* 60 F.3d 363, 365 (7th Cir.1995) ("the proper test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculpate himself"), vacated on other grounds, 517 U.S. 1231, 116 S.Ct. 1873, 135 L.Ed.2d 169 (1996), adhered to on remand, 124 F.3d 205 (7th Cir.1997).

Misrepresenting the legal consequences of a suspect's statements to the point that the suspect could not make a knowing and intelligent decision, goes beyond misrepresenting evidence simply as a ruse. In *Moore v. Czerniak*, police informed the suspect that if he confessed to accidentally killing the victim, the charges against him would be dropped, or, more likely, reduced from murder to a lesser offense. *Moore v. Czerniak,* 574 F.3d 1092, 1103, n. 10 (9th Cir.2009)_rev'd and remanded on other grounds sub nom. *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011). The Ninth Circuit concluded this "implied promise" was "sufficiently compelling to overbear [the defendant's] will." 534 F.3d at1139, n. 10. (citing *Guerrero,* 847 F.2d at 1366; see *Haynes v. Washington,* 373 U.S. 503, 513-14, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

Here, the detective misrepresented the legal consequences of Mr. Como's statements to the point that he could not make a knowing and intelligent decision. The detective emphasized he understood Mr. Como and C.D. had a romantic relationship, that the relationship was consensual, and that he, the detective, was not interested in getting Mr. Como into any trouble. RP 79-80. Detective Goodwater also referred to C.D. as a beautiful woman who wore revealing clothes. RP 79. The implied promise to Mr. Como was, "You won't get in trouble for having sex with this beautiful woman as long as it was consensual." This promise is a complete misrepresentation of the legal consequences of having sex with a 13-year-old girl.

Mr. Como did not confess to having sexual relations with C.D. until after this misrepresentation, together with the detective claiming to have DNA evidence that he did not actually have.[2] Therefore, since the implied false promise of no legal repercussions for consensual sex was sufficiently compelling to overbear Mr. Como's will, his confession was involuntary and should have been suppressed. *Unga*, *Moore*, supra.

[2] The false DNA claim alone does not necessarily render the confession involuntary. See *State v. Burkins*, 94 Wash. App. 677, 696, 973 P.2d 15, 27 (1999).

2. 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.

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

Mr. Como 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*, 182 Wn.2d 827, 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 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." *Blazina*, 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. Como'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. Como 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. Como has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for the 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 defendnat 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 the the trial court has "considered" Mr. Como's present or future ability to pay legal financial obligations. 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 paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Como's financial resources and the potential burden of imposing LFOs on him. Mr. Como informed the Court that he had physical problems and was unable to work. RP 149, 153. Yet the Court did not inquire further into Mr. Como's financial resources or consider the burden payment of LFOs would impose on him. RP 153. Despite finding him indigent for this appeal, the Court ordered LFO payments of $50 per month to begin 90 days after his release from custody. CP 61; RP 153-54

Since the boilerplate finding that Mr. Como has the present or future ability to pay LFOs is simply not supported by the record, the matter

should be remanded for the sentencing court to make an individualized inquiry into Mr. Como 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted December 27, 2015,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 27, 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 the petition for review:

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CASE # 327221
State of Washington v. Alexander Joseph Como, Jr.
WALLA WALLA CO SUPERIOR COURT No. 131002172

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ALEXANDER JOSEPH COMO, JR., Appellant.	No. 32722-1-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Alexander Como, Jr., appeals his conviction for rape of a child in the second degree. The evidence supporting Mr. Como's conviction includes testimony from the child victim and his own confession. We analyze whether his confession was voluntary under well-established constitutional principles and whether to review an unpreserved legal financial obligation (LFO) challenge. Additionally, we analyze the various issues raised by Mr. Como in his statement of additional grounds for review (SAG). We determine that there was no error and affirm.

FACTS

The State charged Mr. Como with rape of a child in the second degree. The information alleged "on or between October 31, 2012 and December 15, 2012, [Mr. Como] did engage in sexual intercourse with and was at least thirty six months older than Jane Doe (D.O.B.: 02/25/99), a person who was at least twelve years of age but less than fourteen years of age . . . ." Clerk's Papers (CP) at 1. A jury found Mr. Como guilty of rape of a child in the second degree on May 22, 2014.

Prior to the filing of the information, Mr. Como voluntarily came to the police station in February 2013 to speak with Detective Marcus Goodwater regarding an inappropriate sexual relationship involving a minor and another man. However, between Halloween 2012 and December 2012 Mr. Como had been involved in a sexual relationship with the same minor. Although Detective Goodwater suspected a sexual relationship had occurred between Mr. Como and the minor, during the course of the interview Mr. Como was advised that he was not in custody. The interview lasted under one hour and, at one point, Mr. Como told Detective Goodwater that he woke up at five that morning. During the interview Detective Goodwater employed a ruse, claiming that a piece of the minor's clothing appeared to be stained with what could be Mr. Como's deoxyribonucleic acid (DNA). After the ruse, Mr. Como confessed.

In a pretrial CrR 3.5 hearing, Mr. Como challenged the voluntariness of his confession based on Detective Goodwater's ruse. At the hearing, the State questioned Detective Goodwater:

> Q. Okay. Did you make any promises to Mr. Como during the course of your interview about how the case would be handled, or any sort of positive consequences to him if he spoke with you?
> A. No.

Report of Proceedings (RP) at 11. Defense counsel cross-examined the detective on this point:

> Q. Okay. And did Mr. Como then indicate to you that if he did have DNA that matched with him he was afraid that he would get into a lot of trouble, do you recall him saying that?
> A. I do.
> Q. Do you recall you responding that you were not interested in getting anyone in trouble?
> A. Something to that affect [sic].

RP at 16. At the close of the CrR 3.5 hearing, the trial court made the following findings of fact:

> The detective asked the defendant about his own relationship with the victim. At first the defendant demurred, but, when asked if DNA testing would reveal the defendant did have sexual intercourse with the victim, the defendant admitted to a sexual relationship with the victim, encompassing a number of instances of sexual intercourse and touching, over several months.

CP at 3-4. Consequently, the trial court concluded "[t]he defendant's statements were made freely and voluntarily, and should be admitted under CrR 3.5." CP at 4.

During the trial, defense counsel did not specifically renew a challenge to the admissibility of the confession, but did cross-examine Detective Goodwater concerning the confession. While being cross-examined, Detective Goodwater testified as follows:

> Q. . . . You had referred to [C.J.] as a beautiful woman, correct?
> A. I believe so.
> Q. You really wanted to emphasize that you understood that they had a romantic relationship, that it was a consensual dating relationship; would that be fair to say?
> A. Yes, it would.
> Q. You also made the point of telling him that you weren't interested in getting him into trouble, correct?
> A. I believe I stated something along that.

RP at 79-80.

Mr. Como did not testify at trial, but the minor testified to the sexual relationship between herself and Mr. Como. The jury found Mr. Como guilty.

After the trial but before sentencing, multiple letters were sent to the trial court either by Mr. Como or on his behalf. On May 29, 2014 (seven days after being found guilty), Mr. Como wrote:

> I would like to request a new attorney and a new trial. I do not feel that my attorney represented me well. None of my witnesses were called, and [my attorney] did not present verifiable evidence that would have cleared me of these charges. . . . As a matter-of-fact, I am quite certain that [my attorney] was convinced that I was guilty, without even hearing my side. [My attorney] also probably should not have represented me due to the fact that, many years ago, he judged against me in a trial where I "supposedly" was dealing marijuana.

CP at 24. On June 22, 2014, Mr. Como wrote: "I had many witnesses and many facts that I wanted brought to court, but [my attorney] said none of them would help." CP at 26. Voicing the same complaints, on July 30, 2014, Mr. Como wrote:

> [My attorney] refused to believe me, and also refused to call my witnesses, two of whom were present in court. He was the Judge in a case that I was involved in, in College Place, around 2007. This led to his being convinced of my guilt, and poor representation. He repeatedly attempted to convince me that my testimony in court was damning, and that my witnesses could not help me.

CP at 52. The July 30, 2014, letter further states that Mr. Como's witnesses "are submitting written statements." CP at 52.

The only additional witnesses mentioned in the record are Abby Achziger and Rodney Marquette. Prior to sentencing, Mr. Marquette sent a letter to the trial court stating: "Alex is my friend so I will support him. However I do not condone the things he has done." CP at 54. At the sentencing hearing, Mr. Marquette testified: "Alex isn't the type of person that is going to go out and do this again." RP at 147. In the same vein, Ms. Achziger testified that Mr. Como "made a very terrible mistake." RP at 146.

At sentencing, the trial court imposed $3,178.65 in mandatory and discretionary LFOs. The judgment and sentence contains the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered 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 specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP at 60. Mr. Como was ordered to pay his LFOs at the rate of $50 per month.

During the sentencing hearing, the trial judge noted that he had read the special sex offender sentencing alternative (SSOSA) report and presentence investigation report. Notably, the SSOSA report indicates that Mr. Como "well may be capable of academic and vocational successes beyond his past level of attainment." CP at 34. The reports also indicate that Mr. Como has previously worked at Taco Bell and Macy's. Further, if released on SSOSA, Mr. Como may have been able to find work through his father's girl friend, who "owns an orchard and likely would have odd chores, which he might be able to physically handle." CP at 32. In the same vein, the presentence investigation states that Mr. Como enjoys writing "and has considered doing so for a living, publishing under a pseudonym." CP at 46.

At the same time, the reports indicate that at the time of sentencing Mr. Como "has been pursuing permanent disability benefits through the local Community Service Office and [the Department of Social and Health Services] for rather implausible medical

limitations." CP at 35. Further, the trial judge signed an order of indigency for Mr. Como's appeal as "issues with [his] hands or wrists" might prevent him from working. RP at 153. After going through what LFOs were being imposed, the trial judge stated:

> I understand that Mr. Como has some physical issues. Really haven't explored those in any great detail. We will make—obviously, these legal financial obligations are subject to later review. And in terms of his ability to pay at the time he is going to be required to pay.

RP at 149.

Mr. Como timely appealed.

ANALYSIS

1. *Whether the trial court erred in admitting Mr. Como's confession*

If the admissibility of a confession is challenged based on voluntariness, the trial court conducts a CrR 3.5 hearing. If a confession is deemed admissible after a CrR 3.5 hearing, the weight of the confession is then a matter for the jury. *See* CrR 3.5(d). On review, this court "look[s] to the findings of fact and conclusions of law entered after the CrR 3.5 hearing." *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012).

Findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "'Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of

the finding.'" *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Further, this court "review[s] de novo whether the trial court derived proper conclusions of law from its findings of fact." *Pierce*, 169 Wn. App. at 544.

Mr. Como cites *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011), claiming "appellate courts examine the entire record that was before the trial court." Br. of Appellant at 13 n.3. However, *Brousseau* is based on considerations not present for determining the voluntariness of a confession. Specifically, *Brousseau* states that in reviewing the trial judge's competency determination of an infant witness, the appellate court "may examine the entire record." *Id.* at 340. This is so because "[t]he presumption of competence persists throughout the proceedings but may be challenged at any time." *Id.* at 341. Since competency can fluctuate, "[a] child found competent at one point in time may become incompetent at trial." *Id.* at 348.

Unlike a child's competency as a witness, the voluntariness of a confession cannot fluctuate between the CrR 3.5 hearing and the trial. If the admissibility of a confession is challenged on appeal, any portion of the record from trial relating to the confession goes to the weight of the evidence, not its admissibility. *See* CrR 3.5(d) ("if the defense raises

the issue of voluntariness . . . the jury shall be instructed[1] that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit"). Therefore, this court only considers "the findings of fact and conclusions of law entered after the CrR 3.5 hearing." *Pierce*, 169 Wn. App. at 544.

The voluntariness of a confession is analyzed under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) ("The protection provided by the state provision is coextensive with that provided by the Fifth Amendment."). The test for determining the voluntariness of a confession is "whether in light of the totality of the circumstances, the defendant's will was overborne." *Id.* at 112. Under this approach, "both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant's ability to resist the pressure are important." *Id.* at 101.

Factors relevant under the totality of the circumstances test include: "the 'crucial element of police coercion'; the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation." *Id.* at 101 (quoting *Withrow v. Williams*, 507 U.S. 680,

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[1] Neither the State nor Mr. Como requested such jury instruction.

693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)). "A promise made by law enforcement does not render a confession involuntary per se, but is instead one factor to be considered in deciding whether a confession was voluntary." *Id.* However, in order to apply the totality of the circumstances test to an implied promise, "[w]hether any promise had been made must be determined" as a prerequisite. *Id.*

The totality of the circumstances factors are used to determine whether there was "a direct causal relationship between the promise [or other coercive techniques] and the confession." *Id.* at 102. In determining the causal relationship, "the key is whether the promise made it impossible for the defendant to make a rational choice as to whether to confess." *Id.* at 108.

> A police officer's psychological ploys, such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary."

Id. at 102 (quoting *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986)). A suspect's "failure to realize the possible consequences of giving the statement does not change its voluntary nature." *State v. Curtiss*, 161 Wn. App. 673, 691, 250 P.3d 496 (2011).

The Supreme Court of Washington has stated that while it "do[es] not condone deception, that alone does not make a confession inadmissible as a matter of law." *State*

v. Braun, 82 Wn.2d 157, 161, 509 P.2d 742 (1973). Consequently, misrepresentation of DNA evidence also does not make a confession involuntary. *State v. Burkins*, 94 Wn. App. 677, 695-96, 973 P.2d 15 (1999) (additionally courts "have held confessions to be voluntary when police falsely told a suspect that his polygraph examination showed gross deceptive patterns, when police told a suspect that a co-suspect named him as the triggerman, and when police concealed the fact that the victim had died").

Here, Mr. Como argues that his confession was involuntary as it was elicited by an "implied promise" that "'You won't get in trouble for having sex with this beautiful woman as long as it was consensual.'" Br. of Appellant at 13. However, it is unclear from the record whether Detective Goodwater's statements were an "implied promise." *See Unga*, 165 Wn.2d at 101-02 ("Whether any promise has been made must be determined and, if one was made, the court must then apply the totality-of-the-circumstances test."). All the record reveals is that Mr. Como voluntarily came to speak with Detective Goodwater, was advised that he was not in custody, told Detective Goodwater that he had woke up around 5:00 a.m., built a conversational rapport with Detective Goodwater, and eventually confessed when Detective Goodwater bluffed that the police may have DNA evidence that could implicate Mr. Como.

Following the CrR 3.5 hearing, the trial court concluded that Mr. Como's confession should be admitted as it was made freely and voluntarily. The trial judge's findings of fact are supported by substantial evidence in the record. Under *Burkins*, the trial judge's conclusions of law are correct as claiming to have DNA evidence does not overbear a defendant's will under the totality of the circumstances approach. *Burkins*, 94 Wn. App. at 695-96. Even if we could consider Detective Goodwater's trial testimony, and it was in fact an "implied promise," Mr. Como's will was not overborne and his confession was a product of his own balancing of competing considerations. Mr. Como's failure to realize the possible consequences of giving the statement does not change its voluntary nature. We hold that the trial court did not err in admitting Mr. Como's confession.

2. *Whether this court should exercise its discretion to review an unpreserved LFO claim of error and, if so, whether the trial court's finding that Mr. Como has the ability to pay $3,178.65 in LFOs at a rate of $50 per month is clearly erroneous*

Whenever a person is convicted, the trial court "may order the payment of a legal financial obligation" as part of the sentence. RCW 9.94A.760(1); *accord* RCW 10.01.160(1). However, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015); *accord*

RCW 10.01.160(3) ("[T]he court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.").

Importantly, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Blazina*, 182 Wn.2d at 838. This inquiry 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.* Therefore, "[t]he record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Id.*[2] However, neither RCW 10.01.160 nor the Washington Constitution "'requires a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs.'" *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (alteration in original) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)).

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[2] Although courts have little guidance at to what counts as an "individualized inquiry," *Blazina* makes clear, at a minimum, the sentencing court "must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In the absence of a presentence report discussing these subjects, a sentencing court might inquire from the prosecutor the opportunity an able-bodied prisoner has to earn money, and the typical monthly pay for such prisoners who choose to work.

"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, 404 n.13, 267 P.3d 511 (2011) (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991)). "'A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a definite and firm conviction that a mistake has been committed.'" *Lundy*, 176 Wn. App. at 105 (internal quotation marks omitted) (quoting *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007)).

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Blazina*, 182 Wn.2d at 832. Subject to three exceptions, RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." In *Blazina*, the Washington Supreme Court recently confirmed that an appellate court's discretion under RAP 2.5(a) extends to review of a trial court's imposition of discretionary LFOs. *Blazina*, 182 Wn.2d at 830. The *Blazina* court noted "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Blazina*, 182 Wn.2d at 835.

Here, the trial court imposed both mandatory and discretionary LFOs. The $500

victim assessment, $100 DNA collection fee, and $200 criminal filing fee are required irrespective of Mr. Como's ability to pay. *See Lundy*, 176 Wn. App. at 102. However, the $1,200.00 SSOSA evaluation, $775.00 court-appointed attorney fees, $250.00 jury demand fee, $129.17 sheriff fees, and $24.48 for witness fees are all discretionary LFOs. *See Lundy*, 176 Wn. App. at 103-04; *see also State v. Young*, 125 Wn.2d 688, 697, 888 P.2d 142 (1995) ("the decision to order the expenditure of public funds for the requisite [SSOSA] evaluation is . . . within the trial court's discretion"). The discretionary LFOs equal almost $2,000.

Under *Blazina*, this court has the discretion to decline review of Mr. Como's LFOs. *Blazina*, 182 Wn.2d at 832. Admittedly, the judges of this court are not in agreement to what extent discretion should be exercised to review unpreserved LFOs. An approach favored by the author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing, versus the likelihood that the discretionary LFO result will change.

In reviewing the sentencing record, we note the trial court's statement that it had "read [the doctor's SSOSA] psychological report [and] reviewed the Presentence Investigation and recommendation." RP at 147. The reports refer to Mr. Como's past employment history and possible vocational success after Mr. Como is released from

custody. During sentencing the trial judge stated that he had not explored Mr. Como's physical issues "in any great detail." RP at 149. However, the reports the trial court reviewed refer to Mr. Como's possible medical conditions as "rather implausible." CP at 35. Further, as Mr. Como's past employment was in the service industry, his alleged medical conditions do not necessarily impact his ability to find work. *See Lundy*, 176 Wn. App. at 108 ("a showing of indigence is [the defendant's] burden"). Given this record, and the trial court's decision to allow LFO payments to be made at $50 per month, a new sentencing hearing is unlikely to change the LFO result. We decline to review Mr. Como's unpreserved LFO challenge.

SAG ISSUE I: Whether the charging document, alleging that the crime(s) were committed "on or between October 31, 2012 and December 15, 2012," is unconstitutionally vague

"Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense." *State v. Kiliona-Garramone*, 166 Wn. App. 16, 22, 267 P.3d 426 (2011); *see* CrR 2.1(a)(1). However, "[a] charging document is constitutionally sufficient if the information states each statutory element of the crime,

even if it is vague as to some other matter significant to the defense." *Kiliona-Garramone*, 166 Wn. App. at 22.

This court reviews allegations of constitutional violations de novo. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012)). "When a defendant challenges the sufficiency of a charging document for the first time on appeal, an appellate court will liberally construe the language of the charging document in favor of validity." *Id.* at 161. "Liberal interpretation 'balances the defendant's right to notice against the risk of . . . "sandbagging"—that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it.'" *Id.* at 161-62 (quoting *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010)).

In liberally construing the charging document, we employ the two-pronged *Kjorsvik* test: (1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the inartful language. *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991); *Zillyette*, 178 Wn.2d at 162. "'An "essential element is one whose specification is necessary to establish the very illegality of the behavior" charged.'" *Zillyette*, 178 Wn.2d at 158 (quoting *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640

(2003)). However, "[g]reat specificity is not required, only sufficient facts for each element." *State v. Lindsey*, 177 Wn. App. 233, 246, 311 P.3d 61 (2013), *review denied*, 180 Wn.2d 1022, 328 P.3d 903 (2014).

When a charging document regarding sexual abuse informs of the nature and cause of the accusations against a defendant, it is not necessary for the State to give the exact dates for each alleged offense. *See State v. Carver*, 37 Wn. App. 122, 126, 678 P.2d 842 (1984) ("The State need not fix a precise time for the commission of the offense when it cannot intelligently do so."); *see also State v. Cozza*, 71 Wn. App. 252, 257, 858 P.2d 270 (1993) ("When a child has an inability to recall the time of sexual contact with the defendant, the defendant should not escape prosecution, whether there were multiple events or only a single event."). "Washington case law has approved 1- to 3-month time frames when sexual charges are brought and the victims are young and unable to establish calendar dates." *Id.* at 260 n.4.

Here, the information alleges that "on or between October 31, 2012 and December 15, 2012, [Mr. Como] did engage in sexual intercourse with and was at least thirty six months older than Jane Doe (D.O.B.: 02/25/99), a person who was at least twelve years of age but less than fourteen years of age." CP at 1. Where the sexual relationship with the minor was ongoing over the course of several months, the State

cannot intelligently allege specific dates if the minor cannot recall specific dates. *See Carver*, 37 Wn. App. at 126. Further, because the defense strategy was to challenge the voluntariness of Mr. Como's confession, he could not be prejudiced by any lack of specific dates in the information. Consequently, the information against Mr. Como was sufficient to afford him notice of the nature and cause of the accusations to allow him to prepare a defense.

SAG ISSUE II: Whether Mr. Como's Sixth Amendment right to conflict-free representation was violated by his public defender previously having served as a judge in a municipal court matter involving Mr. Como

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to effective assistance of counsel, and "includes the entitlement to representation that is free from conflicts of interest." *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). "Defense counsel has a duty of loyalty to the defendant, and thus the right to effective assistance of counsel includes the right to conflict-free counsel." *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348, 325 P.3d 142 (2014). "The trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists." *Regan*, 143 Wn. App. at 425-26. "But if the defendant does not make a timely objection in the trial court, a

conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance." *Id.* at 426.

This court reviews whether circumstances demonstrate a conflict of interest de novo. *Id.* at 428. This court "'will not find an actual conflict unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interest.'" *State v. James*, 48 Wn. App. 353, 366, 739 P.2d 1161 (1987) (internal quotation marks omitted) (quoting *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983)).

"An 'actual conflict' is 'a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.'" *Regan*, 143 Wn. App. at 427-28 (internal quotation marks omitted) (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). "Possible or theoretical conflicts of interest are 'insufficient to impugn a criminal conviction.'" *Gomez*, 180 Wn.2d at 349 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). "'[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003) (alteration in original) (quoting *Cuyler*, 446 U.S. at 350).

Here, Mr. Como did not timely object in the record regarding a potential conflict of interest involving his trial counsel. The only portion of the record referring to even a possibility of a conflict of interest is when Mr. Como sent letters to the trial judge *after* being found guilty at trial. Mr. Como's letters allege that his public defender had a conflict as the public defender had previously served as a judge in a matter involving Mr. Como. Even if these letters could be considered an objection, such objection was not timely as the trial had already occurred. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) ("The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial."). Moreover, the situation described by Mr. Como in his letters would not have led any reasonable trial judge to suspect a potential conflict of interest. *See State v. Davis*, 141 Wn.2d 798, 862, 10 P.3d 977 (2000) (trial court should not have reasonably suspected a conflict of interest when the "lawyers never raised any concern about a possible conflict of interest," the defendant did not "claim at any time during trial that his legal representation was tainted by conflict of interest," and the trial court "properly relied upon the judgment of Appellant's own lawyers and had no reason to believe there was a conflict of interest").

Mr. Como's assertions[3] do not show a conflict of interest because if his defense counsel had previously presided as a judge in a case involving Mr. Como, the matters would have been wholly unrelated. *See* RPC 1.7(a). Even if an actual conflict of interest had been established, the record reveals that Mr. Como's defense counsel zealously advocated on his behalf. Mr. Como's defense counsel challenged the admissibility of Mr. Como's confession, vigorously cross-examined the State's witnesses, and moved to dismiss the case at the conclusion of evidence. Therefore, Mr. Como's Sixth Amendment guarantee of conflict-free representation was not violated as he cannot show that his public defender actively represented conflicting interests or his performance was affected.

SAG ISSUE III: Whether Mr. Como received ineffective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove (1) defense counsel's representation was deficient, i.e., it was below an objective standard of reasonableness under the circumstances, and (2) the deficient representation prejudiced him, i.e., a reasonable

[3] Mr. Como attached appendixes to his SAG, but under RAP 10.3(a)(8) this court does not review appendix material not contained in the record. The appropriate means of raising such matters is through the filing of a personal restraint petition. *State v.*

probability exists the outcome would have been different without the deficient representation. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

"A claim of ineffective assistance of counsel presents a mixed question of fact and law, reviewed de novo." *State v. Brown*, 159 Wn. App. 366, 370, 245 P.3d 776 (2011). "When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record." *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011). "While off-the-record conversations between [a defendant] and her attorney may be germane to her ineffective assistance claim, [a defendant] must file a personal restraint petition if she intends to rely on evidence outside of the trial record." *Id.*

"There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Decisions relating to contacting, interviewing, and subpoenaing witnesses are tactical trial decisions. *See State v. We*, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007). Further, "'when the facts that support a certain potential line of defense are generally known to counsel because of what the

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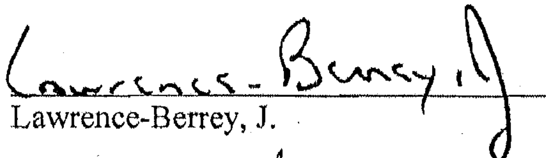
McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.'" *Gomez*, 180 Wn.2d at 355 (quoting *Strickland*, 466 U.S. at 691).

Mr. Como argues defense counsel did not call certain witnesses who would have been helpful to his case. However, the testimony of Mr. Como's proposed witnesses is not in the record. The appropriate means of raising such matters is through the filing of a personal restraint petition. *McFarland*, 127 Wn.2d at 335. Decisions on whether a witness should be interviewed or should testify are tactical trial decisions of defense counsel. The additional witnesses who spoke at Mr. Como's sentencing spoke to the fact that Mr. Como "isn't the type of person that is going to go out and do this again" and "made a very terrible mistake." RP at 146-47. It is not ineffective assistance of counsel merely because Mr. Como would have called these witnesses at his trial.

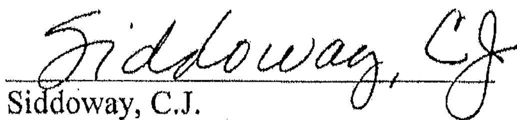
Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Lawrence-Berrey, J.

WE CONCUR:



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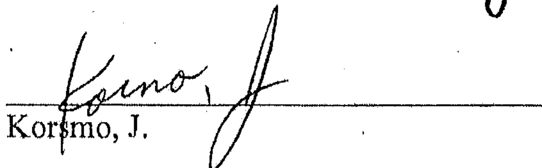

Korsmo, J.