33859-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SOSA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Is there manifest error permitting the review of unpreserved error where no record was made to establish the Defendant's factual premise, where the Defendant cannot demonstrate a statutory basis for his claim, where the law specifically prohibits suppression on the Defendant's claim, and where the Defendant does not demonstrate prejudice?
2. Are persons who consent to breath tests similarly situated to those from whom blood is drawn by warrant?
3. Was counsel ineffective for failing to argue the existence of a right which is contrary to the plain language of the statute and when no prejudice can be shown because independent testing could have been conducted at any time prior to trial?

4. Was counsel ineffective for failing to object to the testimony regarding the Defendant's *non-responsiveness* to the officer's request for the portable breath test (PBT), for the reason that any PBT result (although there was none) was not shown to pass the *Frye* standard and where the jury also convicted under other prongs unrelated to blood alcohol content?

5. Was counsel ineffective for failing to request the jury be instructed that it may consider evidence and argument clearly before it, self-evident in the context of this trial, and where no prejudice can be shown in light of convictions under other prongs unrelated to blood alcohol content?

6. Did the prosecutor commit prejudicial irremediable error in summarizing the evidence?

7. Is there cumulative error?

8. Did the court abuse its discretion in imposing LFO's of a currently employed criminal defendant?

9. Should the court impose costs on appeal?

IV. STATEMENT OF THE CASE

At approximately 6:30 in the morning on March 9, 2014, on the

Defendant Jose Luis Sosa's 30th birthday, he was involved in a two car collision causing serious injury to the other car and driver, Mark Gomes. CP 1-2; RP 116, 144, 149, 194, 236.

Mr. Gomes was a registered nurse at St. Mary's Hospital in the critical care float pool (intensive care unit and emergency department), a volunteer firefighter, and EMT. RP 229-30. His wife and 15 year old daughter were passengers in his vehicle; all on their way to a girls' volleyball tournament. RP 230-31.

The collision left Mr. Gomes' car upside down and crushed. RP 194, 200, 203-04, 233, 242, 258 (most significant impact was to the driver's compartment). The car had to be pried apart to extract Mr. Gomes. RP 242. Mr. Gomes heard his ribs crack and could not breathe. RP 236, 240. He knew that if a broken rib punctured a lung, it would be life threatening. RP 236. As he hung upside down from his seat belt, he was blinded by broken glass and blood running from the cut under his chin. RP 235, 240. Severe bruising to his left side felt like a broken arm and leg. RP 242-43. He could smell the fuel leaking from a fuel tank as the engine continued to run. RP 235. His daughter escaped and called 911. RP 235-36. Mr. Gomes begged his wife not to crawl over him or leave him in the vehicle. RP 236-37. His wife, a nursing student, held the

C-spine and kept his head tilted so he did not choke on his own blood. RP 237, 240-41.

The Defendant's car had bumper damage and deployed airbags. RP 193-94. The Defendant called 911 and reported that he had fallen asleep and hit another car head on. CP 92; RP 110-14. When the operator asked if he were injured, the Defendant replied, "unfortunately, I'm not." CP 92-93; RP 111-14. He exited his black Monte Carlo and observed the other car flipped over on the side of the road, noting it was "a pretty bad accident" and that he felt bad for the people that he hit. RP 112-14.

The Defendant smelled of alcohol; his eyes were watery and bloodshot; his speech was slurred; he was swaying back and forth, having a hard time standing; and he seemed to be having a hard time staying awake. CP 2; RP 118-19, 130, 169-70, 214-15. He admitted that he had been drinking beer. RP 120. In the hospital, he told Dep. Edwards that he did not mean to hurt anyone, it was "just a bad choice." RP 122.

Trooper Jensen testified that he offered to administer a portable breath test (PBT), which would only have provided a preliminary indication without taking the place of an official breath test or blood toxicology results. RP 173. The Defendant did not respond to the question. RP 173. Although the Defendant readily provided name and

date of birth, he refused to respond to any of the drug recognition expert requests for testing (horizontal gaze nystagmus, PBT, or physical field sobriety tests). CP 2; RP 171-74.

Two vials of blood were collected from the Defendant that day. CP 66-67, 70; RP 174. Three hours after the collision, the Defendant's blood ethanol level was .12, well above the legal limit. RP 333, 532. At the time of the collision at about six in the morning, his blood alcohol would have been .155 -.225 i.e., 2-3 x the limit. RP 343-46. He was arrested that day and charged with vehicular assault the next day. CP 1-2, 11-12.

The prosecution was delayed by defense's failure to provide discovery. CP 22-23, 26-30, 41-59. In August of 2015, just before the issuance of *State v. Martines*, 184 Wn.2d 83, 355 P.3d 1111 (2015), the defense filed a motion to suppress the blood test, claiming the warrant permitted seizure, but not testing, of the blood. CP 62-67. The matter was cured with a new warrant permitting testing of the preserved sample 17 months after collection. CP 71, 76-85.

V. ARGUMENT

A. THE DEFENDANT DOES NOT DEMONSTRATE MANIFEST ERROR, THE FACTUAL PREMISE FOR THE CLAIM, PREJUDICE, OR VIOLATION OF AN EXISTING RIGHT.

For the first time on appeal, the Defendant challenges the blood alcohol evidence for the reason that he was not advised of his right to independent testing of the blood sample. Appellant's Opening Brief (AOB) at 9. The Defendant claims RAP 2.5(a)(3) permits him to raise this unpreserved challenge. AOB at 9. It does not. The Defendant fails to demonstrate manifest error affecting a constitutional right.

An error is manifest if it had practical and identifiable consequences in the case, i.e. if the appellant can show actual prejudice. *State v. Schaler*, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). He claims the constitutional issue is his due process right to present a defense. Because the sample was preserved and testing went on many months later after the appointment of counsel, the Defendant could have tested the sample at any time. Nothing suggests that different testing would have a different outcome or that his right to present a defense was impeded.

The Defendant further fails to demonstrate (1) whether or not such an advisement was given, where no objection made and no pertinent

question was put to any witness, or (2) that a right to an advisement exists.

The Defendant alleges, but does not prove, that he was never advised of his right to obtain additional blood testing. AOB at 17 (citing CP 66-72, 76-82; RP 107-31, 164-228, 262-63, 396-409). The record only establishes that no attorney ever inquired into this subject of any witness, and no witness spontaneously volunteered this information. It is impossible to infer the Defendant's necessary premise from this record.

"[W]hen a defendant wishes to suppress certain evidence, he must, within a reasonable time before the case is called for trial, move for such suppression, and thus give the trial court an opportunity to rule on the disputed question of fact." *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638, 642 (1966). If the Defendant had made this challenge below, the State would have had an opportunity to develop the record on this question. Absent an objection, no record exists for the Defendant's claim.

The Defendant cannot find a right to an advisement of a right to additional blood testing in the statute. Rather, the Defendant claims the right exists in the penumbra of RCW 46.20.308(2) and RCW 46.61.506(6). In fact, the clear language of RCW 46.61.506(6) proves the opposite. No such right exists.

Under RCW 46.20.308(2), the officer shall inform the person of their right to have additional tests administered by any qualified person of their choosing *prior to administering a* ***breath*** *test*. This section was not violated. In this case, no breath test was administered. The Defendant was non-responsive to the invitation.

Under RCW 46.61.506(6), a person ***may*** have a qualified person of their choosing administer blood tests in addition to those administered at the direction of law enforcement. However, the statute does not require any advisement. AOB at 23 (Defendant conceding that the statute does not require an officer seeking a blood draw to advise the suspect of his right to independent testing). And, although the Defendant fails to quote this (AOB at 11), the section also provides that the failure to obtain an additional test "shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer." In other words, there is no penumbra. It is clear in the legislative language that the State's test cannot be excluded on this basis.

Even if the Defendant had made a timely objection and created a factual record to support this claim, there is no lawful basis to suppress the State's evidence.

B. THE DEFENDANT FAILS TO DEMONSTRATE THAT PERSONS WHO CONSENT TO GIVE A BREATH SAMPLE ARE SIMILARLY SITUATED TO THOSE FROM WHOM A BLOOD SAMPLE IS TAKEN.

The Defendant claims equal protections require that he have the same right to advisement of independent testing whether it be a breath test or a blood test. AOB at 20. The challenge presumes that persons who take a breath test are similarly situated to those who take a blood test. *City of Richland v. Michel*, 89 Wn. App. 764, 771, 950 P.2d 10, 14 (1998) (the equal protections clause requires similar treatment under the law for similarly situated people). They are not.

Blood tests are more invasive than breath tests. Accordingly, they are rare, occurring under particular circumstances. Breath tests are always by consent; blood draws are generally, although not always, by warrant.

In one circumstance, the person who takes a blood test will have been offered a breath test and been advised of the right for independent testing. This person either (1) refuses to blow, (2) requests a blood draw, or (3) tests negative suggesting intoxication by something other than alcohol. If a person does not consent to a blood draw, the test is only taken after a warrant issues upon a magistrate's finding of probable cause. In this case, the person would already have been advised of the right to

independent testing. There would be no need to advise the person of their rights a second time when blood is taken.

In another circumstance, the person will have been incapable of consent (to either a breath test or a blood draw) and of comprehending any advisement. The advisement would be pointless here. So a blood draw only occurs upon a magistrate's issuance of a warrant upon a finding of probable cause.

For a breath test, any additional testing must be promptly performed. For a blood test, additional testing may be performed at any time because the samples have been preserved. Thus a prompt advisement in regards to additional blood testing is unnecessary.

The Defendant passed out immediately before the accident and again afterwards. He became non-responsive when questioned by police. A warrant was obtained. The sample was preserved. The Defendant could have tested the sample at any time prior to trial. And there was a lengthy pretrial period.

The equal protection claim has no application when comparing two entirely different situations.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State* v. *Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State* v. *McFarland,* 127 Wn.2d at 334-35. Prejudice exists if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d at 8. If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

1. Counsel was not ineffective for failing to object to admission of a blood test.

The Defendant claims his counsel should have made a motion to suppress the blood evidence based on the argument that he should have

been advised of his right to independent testing. Because, as explained *supra*, such a motion would be without merit, the Defendant cannot show deficient performance. Because the Defendant could have performed additional testing on the blood sample prior to trial, he also cannot show prejudice.

2. Counsel was not ineffective for failing to object to admissible evidence of Mr. Sosa's non-responsiveness when requested to perform field sobriety testing.

The Defendant claims his counsel should have objected to testimony that he was non-responsive when the trooper asked him to blow into the portable breathalyzer. AOB at 33. He argues this evidence could only have been admitted if the State had first demonstrated that PBT's are approved by the state toxicologist and generally accepted in the scientific community. This is irrational. Not only did the State did not offer the results of a PBT, but the State also readily elicited evidence that a PBT would only have provided a preliminary indication but not taken the place of an official breath test or blood toxicology results. RP 173. Because no results existed, there could be no utility in a *Frye* hearing.

Counsel's performance could not be deficient for failing to object to results which were not offered or admitted. What was admitted was Mr. Sosa's lack of responsiveness. No *Frye* test is required for the jury to

interpret this refusal. Because the actual blood test results were admitted and are not objectionable, no prejudice can be shown.

3. Counsel was not ineffective for failing to request the jury be instructed under WPIC 92.16.

The Defendant claims his counsel's performance was deficient for failing to request the jury be instructed under WPIC 92.16, which reads:

> In determining the accuracy and reliability of a [breath] [blood] test, you may consider the testing procedures used, the reliability and functioning of a testing instrument, maintenance procedures applied to a testing instrument, and any other factors that bear on the accuracy and reliability of the test.

First, counsel's challenge to the BAC evidence is abundantly clear on the record. AOB at 38 (citing RP 154-62, 333-34, 344-50, 362-71, 377-81, 388-95, 413-14). When this argument and evidence is presented to the jury in detail, it is readily apparent without further comment that the jury "may" consider it. *See also* CP 99 ("The evidence that you are to consider ... consists of the testimony that you have heard."); CP 114 (jurors not required to accept an expert's opinion but "may also consider" the basis and source of that opinion). The instruction was insignificant. Because the instruction was not necessary to defense counsel making this case, its absence cannot establish deficient performance.

Second, because the jury convicted on other alternative means, no prejudice can be shown. Vehicular assault may be committed by any one of three means: in a reckless manner, while intoxicated, or with disregard for the safety of others. RCW 46.61.522(1)(a)-(c). By special verdict, the jury convicted the Defendant on each of these three means. CP 118. The Defendant acknowledges WPIC 92.16 is only relevant to the conviction on the second means (under the influence) for which the BAC is relevant. AOB at 37-38. Because the Defendant is convicted under two other means, the challenge cannot demonstrate prejudice.

D. THE PROSECUTOR DID NOT ERR IN DESCRIBING THE EVIDENCE PRESENTED AT TRIAL.

The Defendant objects to the prosecutor arguing the permissible inferences in closing. AOB at 41-43. No objection was made at trial, accordingly all claims of error are waived unless the argument was so flagrant and ill-intentioned as to be incurable by any court instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The courts will not find prejudicial error unless it is **clear and unmistakable** that counsel was not arguing an inference from the evidence, but rather expressing a personal opinion. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

The Defendant testified that his first thought upon waking was that "I might have killed somebody." RP 448. Indeed he might have. Mark Gomes arrived at the hospital strapped on a backboard with a hard cervical collar. RP 143. Initially, it was determined he had a facial laceration, multiple rib fractures, and a spleen laceration. RP 144. The doctor and patient discussed removing the spleen, but this would have compromised his immune system for life and prevented him from working around sick people, i.e. cost him his medical career. RP 244-45. Loss of the spleen can result in post-splenectomy sepsis, i.e. sudden, overwhelming, and deadly bacterial infection. RP 273. Mr. Gomes also had severe bruising to his left arm and leg. RP 243. The medial meniscus in his left knee was torn. RP 243. In his shoulder, his rotator cuff was torn and there was bone chip or spur. RP 243. Both injuries would require surgeries; and Mr. Gomes has endured multiple therapies to regain limited movement and stamina. RP 243-44, 252-54.

Within a few days of Mr. Gomes' return home, a complication developed that would require more surgery and a significantly longer hospitalization. RP 246-50. Dr. Frederick Field was the surgeon in this second hospitalization; his testimony was taken by deposition. CP 32-40, 60-61; RP 262-64, 269.

The doctor testified that after Mr. Gomes returned home there was further rupturing or bleeding of injuries caused by the vehicle accident. RP 274-75. The upper half of the spleen was so severely lacerated that it had to be removed. RP 272. The mesentery, the tissue which connects to the bowels, was torn and still bleeding many days after the original injury and had to be cauterized. RP 272-74. Mr. Gomes lost one third of his blood volume. RP 249. If he had not returned for the second hospitalization, "[h]e would have died." RP 275.

For several days following the surgery, Mr. Gomes' digestive system did not function. RP 278-79. He was given ice chips for oral comfort which was then sucked back out of his stomach via a nasogastric tube. RP 279. The 8-10 inch surgical incision to his mid-section resulted in significant scarring which required many kinds of therapy. RP 252, 270. He could not return to work for a year. RP 254. And complications continue to come up. RP 255 (developing abdominal hernia which will require another surgery), 271.

In closing argument, the prosecutor summarized the testimony:

> And as it turns out, we know from Dr. Field's testimony that Mark Gomes was a dead man if he hadn't been operated on. If Dr. Field hadn't operated on him, Nicole would have lost her father at 15, Dawn would not have a husband, and we would be here in a vehicular homicide trial and not vehicular assault.

> But fortunately, you know, this time it is not how it turned out.

RP 483.

The Defendant does not deny that this was the evidence. He cannot. Instead, he claims that because Mr. Gomes did not actually die, it was improper to argue the significant risk of death. AOB at 42-43. In support of his claim, the Defendant provides the following citations: *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Belgarde*, 110 Wn.2d, 507-08, 755 P.2d 174 (1988)) and *State v. Claflin*, 38 Wn. App. 847, 849-51, 690 P.2d 1186 (1984). AOB at 42. The cases do not stand for the proposition asserted by the Defendant. They regard the violation of court rulings and introduction of facts not in evidence.

In *Fisher*, a child molestation case, the court suppressed evidence of the defendant's physical abuse of his various stepchildren and biological children. However, the court ruled that the evidence could become admissible if the defendant argued that the victim's delay in reporting suggested she was not a credible witness. Then the evidence would only be admissible for the specific purpose of demonstrating why she delayed in reporting. But the prosecutor discussed the physical abuse in opening argument before the defendant opened the door. And the prosecutor used the evidence for a different purpose than it would have been admitted even had

the door been opened, i.e. the prosecutor argued that the defendant engaged in a pattern of abuse against children that spilled over from physical to sexual abuse. This argument violated a specific pretrial ruling and ER 404(b).

In the instant case there is no allegation that the prosecutor's argument violated a court ruling or evidentiary rule.

In the murder and attempted murder case of *Belgarde*, witnesses testified that they delayed coming to police because the defendant had threatened to use the AIM (American Indian Movement) against them. *State v. Belgarde*, 110 Wn.2d at 506. Only the defendant testified as to the meaning of AIM, i.e. a group organized to protect Indian rights. *Id.* However, in closing, the prosecutor compared AIM to Sean Finn or a deadly group of madmen feared through the world. *Id.* The prosecutor said AIM was a militant butcher faction that killed indiscriminately and was responsible for Wounded Knee, "one of the most chilling events of the last decade." *State v. Belgarde*, 110 Wn.2d at 507. The court found prosecutorial error in prejudicial remarks which "introduced 'facts' not in evidence." *State v. Belgarde*, 110 Wn.2d at 508.

In *Claflin*, the prosecutor read a poem to depict most poignantly how the child rape victims "probably" felt. Claflin claimed the poem appealed to the jury's passions and prejudice "and assumed facts not in evidence." *State v. Claflin*, 38 Wn. App. at 849. The court found the poem

"contained many prejudicial allusions to matters outside the actual evidence against Claflin." *State v. Claflin*, 38 Wn. App. at 851.

Every case includes conjunctive language prohibiting appeals to passion and prejudice *together with* references to evidence outside the record. *State v. Fisher*, 165 Wn.2d at 747. Unlike the *Fisher*, *Belgarde*, or *Claflin* cases, here there is no allegation that the prosecutor here made reference to any evidence outside the record.

The Defendant was charged with causing substantial bodily harm. CP 11, 105, 112. It was appropriate in this context to summarize the actual trial testimony describing the extent of the harm. Although substantial bodily harm does not require a risk of death (CP 110), the Defendant cannot show that an instruction to the jury would not cure any prejudice in summarizing the properly admitted evidence.

The Defendant takes particular offense at this sentence: "But fortunately, you know, this time it is not how it turned out." The context is that "if he had not been operated on," "if Dr. Field hadn't operated on him," the outcome could have been different. RP 483. The victim suffered complications after his release. The injuries were too significant to heal on their own. RP 274-75. Fortunately, Mrs. Gomes recognized the seriousness of the complication and took her husband back to the ER right away. RP 247, ll. 4-8. Fortunately, the ER doctors immediately recognized that they needed

to call a surgeon. RP 248. And fortunately, Dr. Field had the ability to do what he did. This time, the complication was caught in time.

The Defendant believes the prosecutor was arguing to the jury that the Defendant is a repeat offender, that this time, of the many times the Defendant was drunk driving, he did not kill someone. AOB at 42. The Defendant's unlikely interpretation does not demonstrate the prosecutor made a "clear and unmistakable" argument that he had driven drunk on other occasions. Such an interpretation ignores the context and requires several leaps or connections that were never made. There was no suggestion in evidence or argument that the Defendant had driven while intoxicated on any other occasion. "This time" *when the victim suffered a complication*, he got to the doctor in time. The prosecutor's fair discussion of the evidence cannot be shown to "so flagrant and ill-intentioned as to be incurable by any court instruction."

E. WHERE THERE IS NO ERROR, THERE IS NO CUMULATIVE ERROR.

The Defendant argues that if the alleged errors do not demand reversal individually, then cumulative error demands it. The State denies any error.

F. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LFO'S.

At sentencing, the Defendant acknowledged that he had full time employment at Tyson Foods. RP 536-37.

The Gomes family has lost their home, savings, and their parent's savings, and Mark Gomes can expect more bills yet to come. RP 539-40. The court imposed restitution in the amount of $179,280.32 and reserved the right to modify the amount to account for further medical costs. CP 129; RP 542.

The court waived various fines totaling $1222.35, including witness fees, jury demand fees, sheriff fees for booking and serving witnesses, the county DUI Cost Recovery fund, and the crime lab fee. CP 129. The court imposed other fines, including $1041.90 as a DUI Fine. CP 129. After defense counsel had informed the court the Defendant could pay at least $100-150 a month toward his LFO's, the court ordered the Defendant to begin making payment of not less than $100/mo beginning 90 days after his release. RP 538, 542.

Despite the examination apparent in the record and the Defendant's own concession, he now accuses the trial court of making

"boilerplate" findings as to his ability to pay. AOB at 49-50. There is no credibility to this claim.

The Defendant claims "the record shows" that he would likely not be able to pay the full restitution. AOB at 50. This is not the record. The record is that the restitution is large and that the Defendant will have to go down a different career path than one previously considered. He was considering becoming a correctional officer. However, he was also taking classes in business. Nothing prevents him continuing in this path.

The Defendant claims that the court had no discretion to impose any discretionary fines where the restitution amount is large and where he applied for public counsel on appeal. AOB at 50. This is categorically false. The court has discretion as a matter of law. RCW 9.94A.750. The fact that a criminal defendant applies for public counsel on appeal says very little about a person's ability to earn in the future. It only means that at a particular point in time, the defendant does not possess a lump sum to retain private counsel. In this case, the Defendant had the resources to hire private counsel for a long and expensive trial. He only applied for public counsel when private counsel refused to represent him on appeal. CP 144-45.

A male, a former football player, a high school graduate, and a soldier with mechanical training, the Defendant begins his professional life with many advantages. RP 418-19, 424. He is a native English speaker, but also speaks fluent Spanish. RP 427. He has free health resources through the VA. CP 126. The Defendant is a young man with a good employment history who is currently employed and attending community college. He plans on getting an associate's degree and then transferring to a four year college to get a degree in business. RP 426. His potential is boundless.

The Defendant notes the *Blazina* court's concern that in certain cases LFO's may make it difficult to re-enter society, may increase recidivism, and may accumulate interest. AOB at 47, citing *State v. Blazina*, 182 Wn.2d 827, 834-37, 344 P.3d 680 (2015). None of this applies here. The Defendant has a job waiting for him and is only required to pay $100/mo toward his debt beginning three months after his release. The court's LFO order does not make it difficult for the Defendant to re-enter society or promote his recidivism. The Walla Walla clerk does not impose interest on LFO's. RP (1/28/16) 4-5.

The Defendant testified that the only error he made which contributed to the accident was turning on the heat in his car. RP 463,

540. In the face of scientific evidence and despite having attended outpatient substance abuse treatment prior to trial (CP 126), the Defendant refused to acknowledge the extent and effect of his drinking. He also refused to acknowledge the recklessness of driving while sleep deprived. He considered himself a safe driver who looked out for the interests of others on the road. He said this after seeing Mr. Gomes being rescued, after hearing the extent of Mr. Gomes' injuries, and after hearing the entirety of the State's case. The small monthly payment is nothing compared to the victim's losses. This regular reminder may also rehabilitate the Defendant in ways that his trial did not.

The Defendant challenges whether the RCW 46.61.5055(1)(a)(ii) DUI fine was be imposed on his conviction for vehicular assault. AOB at 48. DUI requires proof of driving that is either under the influence or affected by alcohol or with a BAC of .08 or higher. RCW 46.61.500(1)(a), (c). In finding the Defendant guilty of vehicular assault, the jury necessarily found a DUI that was the proximate cause of substantial bodily harm to another. The jury found that the Defendant was operating a motor vehicle while under the influence of intoxicating alcohol or drugs and in a reckless manner and with disregard for the safety of

others. CP 112, 118. *See* RCW 46.61.522(1). The fine is properly imposed.

G. THIS COURT SHOULD IMPOSE COSTS IF THE STATE PREVAILS ON APPEAL.

The Court's general order of June 10, 2016 requires a criminal defendant who anticipates challenging a cost award to cite to relevant parts of the record regarding ability to pay and to provide the transcript of the trial court's determination of indigency. The Defendant ignores many relevant portions of the record and makes bare conclusory allegations that costs collected at $100/mo beginning 90 after his release "would be detrimental to [his] successful re-entry." AOB at 51. These boilerplate motions lack credibility. In fact, his trial counsel informed the court the Defendant could comfortably pay $150/mo.

The Defendant does not provide a transcript showing how the lower court determined the Defendant was indigent. Perhaps this is because these orders are signed on very little information. A finding of indigency offers very little information as to an offender's current or future ability to pay. In this appeal, the Defendant has only argued that the restitution is large, which is to say the damage he did to Mr. Gomes' life was enormous. He has not made and cannot make any offer of proof that

he cannot comfortably pay back his debt, which will not accrue any interest, at $100/mo.

The order requires the offender himself to file a report as to continued indigency and future inability to pay. This report has not yet been filed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 5, 2016.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Kristina Nichols <wa.appeals@gmail.com>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 5, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**