

NO. 44771-1-II

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

STATE OF WASHINGTON, Respondent

v.

KIRK MICHAEL HERNANDEZ JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00236-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. HERNANDEZ CONCURRED WITH THE TRIAL COURT'S DECISION NOT TO GIVE SELF-DEFENSE INSTRUCTIONS AND WITHDREW HIS REQUEST.
- II. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD.
- III. THE ACCOMPLICE LIABILITY INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF.
- IV. HERNANDEZ CANNOT COMPLAIN ABOUT THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WHERE HE FAILED TO OBJECT BELOW AND WHERE HE HAS NOT DEMONSTRATED THAT THE STATE IS ACTIVELY SEEKING COLLECTION OF THE COSTS.

B. STATEMENT OF THE CASE

On September 20, 2012, Patrick Wade, who works as a cook, had gotten his paycheck and went out for some drinks. RP 62-64. He had about \$240 with him and he was paying for his drinks in cash. RP 63. He went to the Hideaway Lounge in Vancouver. RP 63. At the bar he came into contact with two Latino males and a Latino female. RP 65. One of the males was the defendant, Kirk Hernandez, Jr. RP 65. He went outside for a cigarette and the defendant approached him there and offered to sell him some methamphetamine. RP 66. Wade is a former methamphetamine user and recognized what was being offered. RP 66. He did not make a

purchase at that time. RP 66. He decided, however, that he would buy the methamphetamine and after talking with the defendant he separated out his money, putting the amount he would purchase the methamphetamine with in one pocket and the rest of his money in another pocket. RP 102-03. Later on the female of the trio approached him and told him she was with the other two and he decided to go outside with her to purchase the methamphetamine. RP 68. He thought he might be able to party with the woman (later identified as Stephanie Torres) as well as get some meth. RP 68-69. He and the woman walked across Hazel Dell Avenue, the road outside the bar. RP 69. They walked over to an area next to a fence, and Wade later recalled that Ms. Torres was trying to get him to face her as they walked, grabbing him by both arms and turning him to Wade her. RP 70-71, 105. As Ms. Torres began preparing a \$20.00 baggie of meth and he handed her his money, something came over the fence at Mr. Wade. RP 71. Mr. Wade got hit at that point. 71. After the hit he turned and started backing away and saw that the defendant and another man had come over the fence. RP 72. Wade said they “squared up off at me,” and one of them had his fists up. RP 72. At that point Ms. Torres instructed him to empty everything out of his pockets. RP 72. The blow to his head was hard. RP 73. At that point Mr. Wade began backing walking back Wades to get as much distance as he could from them and all of a sudden the trio turned

around and walked away. RP 75. Mr. Wade called 911 to report the crime. RP 75. He waited for at least half an hour and when he didn't see any police come he went home. RP 76. He called 911 again the next day, and he was contacted by a detective. RP 76. The jury heard the recording of Mr. Wade's first call to 911. RP 80-92. Mr. Wade denied ever touching Ms. Torres. RP 96.

Stephanie Torres testified that she was planning to sell Mr. Wade \$20 of methamphetamine. RP 174-75. It was her idea to cross the street to do the deal because she didn't want to be seen by cameras. RP 176. She testified that the defendant and the other male came up behind her while the transaction was going on, and that they were in full view of Mr. Wade. RP183. Nevertheless, according to her, Mr. Wade grabbed her breast while in full view of the two men he knew she was associated with. RP 182-83. Hernandez, according to her, then shoved Mr. Wade and said "Why are you touching my bitch?" RP 182-83. She said that the parties then went their separate ways. RP 184. Torres testified that she, the defendant and the other male left the area right away, afraid that they would get in trouble. RP 185. She could not explain why, if she was the victim of an assault, she would have been in trouble, saying only "I don't like dealing with cops." RP 185. Although she had the opportunity, Torres never told the police about Mr. Wade supposedly grabbing her breast. RP

186-87, 194. Torres testified that she visited the defendant in jail three times. RP 231.

Hernandez testified that he followed Torres and Mr. Wade to the area by the fence and that when he saw Mr. Wade “go for a tit” he felt disrespected and hit Mr. Wade, saying “Keep your hand off my bitch.” RP 239. He described it variously as a “hit-push,” and a “push-punch.” RP 240, 248. He hit Mr. Wade because he felt “disrespected,” and that it was an “eye for an eye” thing, and that he knew it was wrong. RP 247, 249. He denied ever trying to take money from Mr. Wade, and denied that either he or his accomplices told Mr. Wade to empty his pockets. RP 240. He denied that they attempted to rob Mr. Wade. RP 242. He testified that they walked away immediately after he hit Mr. Wade. RP 240. Hernandez claimed that his only visitor at the jail was a woman named Elisha—not Ms. Torres. RP 243. When interviewed by Detective Zimmerman, Hernandez admitted that he was at the Hideaway Tavern that night with Torres and Castillo (the other accomplice). RP 201. After Zimmerman told him the information the police already had about what happened, and invited him to give his side, Hernandez said words to the effect that he (Zimmerman) already knew everything and it wouldn’t do him any good to explain anything further. RP 202. He specifically denied having hit Wade, and said nothing about Ms. Torres supposedly being groped. RP

202. He also said he was “too drunk to remember” what happened outside the Hideaway. RP 252.

Hernandez was convicted of attempted robbery in the first degree. CP 55. This timely appeal followed.

C. ARGUMENT

I. HERNANDEZ CONCURRED WITH THE TRIAL COURT’S DECISION NOT TO GIVE SELF-DEFENSE INSTRUCTIONS AND WITHDREW HIS REQUEST.

As an initial matter, the State disagrees with Hernandez on the posture of this claim of error. Hernandez claims that he objected to the trial court’s decision not to give self-defense instructions after earlier indicating that he would (citing to page 294 of the VRP). This is inaccurate. Hernandez *agreed* with the trial court’s decision not to give self-defense instructions and effectively withdrew his request. Indeed, there are no defendant’s proposed instructions among the clerk’s papers because the trial court removed the proposed instructions and defense counsel did not object, nor did he ask to have them remain in the file to preserve an objection (which would be customary). Here is the relevant portion of the exchange:

JUDGE NICHOLS: Okay. Okay, elements state: The taking was against the person's will by the Defendant or an accomplice use or

threatened use of any force, violence, or fear of injury to that person. Force or fear was used by the Defendant or an accomplice to prevent or overcome resistance to the taking. We don't have that issue here. The use of force or fear wasn't used to overcome resistance to the taking. He's saying that there's no force used at all. Had nothing to do with the taking. So that -- that's what the argument about the intent aspect is.

MR. KURTZ: Yeah.

JUDGE NICHOLS: Makes sense.

MR. KURTZ: So what's Your Honor's ruling?

JUDGE NICHOLS: Well, based upon what Lewis says, the intent to inflict bodily injury is not -- there's no intent to inflict bodily injury. It's -- that's the use of force to overcome the taking. So self defense would not be appropriate here.

MR. KURTZ: Right.

JUDGE NICHOLS: But as an assault charge, I could see that, obviously. But here this is a robbery, so I -- I think you're right. I think under *Lewis* you're right. And you've indicated that has not been overruled by any subsequent decisions.

MR. GASPERINO: Your Honor, I think that we should doublecheck. I did not get a chance to Shepherdize it. What I said was I had it e-mailed to me. I have the PDF document.

JUDGE NICHOLS: Okay.

...

Nope, I think it's still applicable. So what -- I think we just need to destroy a couple -- withdraw a couple papers (inaudible.).

MR. KURTZ: Just for the record, I'll accept to the giving of that. So --

JUDGE NICHOLS: Okay. Okay, let's take a look at the changes we can make.

RP 292-94.

Thus, Hernandez agreed with the trial court's decision not to give self-defense instructions. This is evidenced not only by the plain words defense counsel used, but also by the trial court's use of "okay," following that statement, rather than something along the lines of "the objection is noted for the record." Indeed, as noted above, defense counsel did not even ask the court to retain the proposed instructions because they were no longer being proposed. Defense counsel also expressed his agreement with the trial court's analysis in declining the instructions when he said "right" immediately following the trial court's statement that "self-defense would not be appropriate here." Defense counsel did not object to the trial court declining to give self-defense instructions and this issue is not preserved for review.

The only method for Hernandez to obtain review of his attorney's decision to withdraw the request for instructions on self-defense is by demonstrating that he was denied the effective assistance of counsel.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go

to trial strategy or tactics.’ ” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694).

When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). “The decision of when or whether to object is a classic example of trial tactics.” *Madison* at 763. This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). With respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).

Here, there was a legitimate trial tactic in defense counsel withdrawing his proposed instructions on self-defense: They would have

confused the jury and potentially undercut his complete denial of the crime. In order to prove attempted robbery, the State was required to prove that the defendant intended to commit robbery in the first degree and that he or an accomplice did an act that was a substantial step toWade the commission of robbery in the first degree. CP 45. Thus, the State was required to prove that the defendant or an accomplice intended to commit theft of personal property from the person of another against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person, and that the defendant or an accomplice took an act which was a substantial step toWade doing so. Hernandez, however, denied that he or an accomplice had the intent to commit theft of personal property from Mr. Wade, and denied that he or an accomplice did any act which would have in any way indicated that he or an accomplice intended to take personal property from Mr. Wade. Stated another way, his defense was denial.

Self-defense would have made no sense in this case. Self-defense says "I took the physical action the State says I took, but I was justified in doing so." In a murder case, self-defense would be something along the lines of "yes, I shot the victim, but he was running at me with a knife so I was justified." In an assault case, it would be something along the lines of "yes, I punched him, but only because it appeared he was about to punch

me.” Here, Hernandez did not agree to the physical act of which he was accused, namely that he or his accomplice (Ms. Torres) told the defendant to empty his pockets. He denied that ever occurred. RP 240. The demand for Mr. Wade to hand over his property was the hallmark of the offense. He wasn’t saying “yes, my accomplice demanded that Mr. Wade hand over his property and she was justified in doing so.” He was saying “no, neither I nor my accomplices demanded that Mr. Wade hand over his property.” As Hernandez was not charged with assault his admitted “push-punch” of Mr. Wade was totally irrelevant and had no bearing upon the case. Self-defense instructions would have confused the jury and it was a reasonable tactic to withdraw the proposed instructions and proceed on the defense of complete denial.

Moreover, Hernandez cannot demonstrate prejudice. Hernandez makes much in his brief about the fact that the trial court was prepared to give self-defense instructions, but the trial court was incorrect. A review of the record reveals the trial court gave scant analysis to the request for self-defense instructions. There is no such thing as justifiable robbery. There is no such thing as taking the property of another against his or her will and by force or the threatened use of force in defense of oneself or another. There was, after all, no good faith claim of title here. Even if the hit on Mr. Wade was done to repel an imminent attack on Ms. Torres

(which it wasn't), that would not negate the defendant's decision, after leveling the blow, to demand, or have an accomplice demand, that Mr. Wade empty his pockets. How was Mr. Wade handing over his money necessary for Hernandez to defend Torres? It wasn't, and the jury would have rejected the claim of self-defense for that reason. Hernandez' blanket claim that the trial court *must* give self-defense instructions, when requested, in any crime involving an intent element is made without citation to authority and clearly incorrect. Attempted rape is a crime involving an intent element, but the undersigned counsel could find no case holding that self-defense instructions must be given, for example, where the defendant asserts that any of the unwanted touchings he levels in an attempted rape were done in self-defense.

Further, Hernandez did not present any evidence which justified the giving of self-defense instructions in any event, their total inapplicability to the case notwithstanding. "To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." *State v. Walden*, 131 Wn. 2d 469, 473, 932 P.2d 1237 (1997). Further, a defendant must subjectively believe that danger to himself or another is imminent and that belief must be

objectively reasonable. *State v. Bell*, 60 Wn.App. 561, 566, 805 P.2d 815 (1991); see also *State v. Hughes*, 106 Wn.2d 176, 188-89, 721 P.2d 902 (1986).

Here, Hernandez testified that he hit Wade because he was mad, not because he believed an attack on Ms. Torres was imminent. He felt that Mr. Wade's alleged touching of Torres (his "bitch") was disrespectful to *him*, and he wasn't going to tolerate it. ("I said, 'What the—keep your hands off my bitch.'" RP 239; "I just felt disrespected." RP 247). With regard to his motivation for hitting Mr. Wade, he said:

Like I didn't worry about like—I just—yeah, I hit the guy—yeah—that's—that's wrong, but it was like, you know, *an eye for an eye*. He touched my girl. I felt disrespected.

RP 249. Hernandez made no indication that he feared an imminent assault on Torres. Likewise, Ms. Torres' testimony did not establish a basis for the giving of self-defense instructions. She concurred that Hernandez hit Wade due to his outrage over Wade allegedly "touching" his "bitch." RP 192. In sum, there was no evidence to support the giving of self-defense instructions, even assuming they made even a hint of sense in this case. The decision to withdraw the request for self-defense instructions was a legitimate tactical decision. Even if it weren't, Hernandez cannot demonstrate prejudice.

In order to demonstrate prejudice, Hernandez has to show that the jury would have concluded that Mr. Wade did, in fact, grab Ms. Torres' breast (in plain view of Hernandez, according to her testimony) and that he or an accomplice was justified in demanding personal property from Mr. Wade in response to Mr. Wade's alleged touching of Ms. Torres' breast. There is no basis on which to conclude that the jury's verdict would have been different had counsel not withdrawn his request for self-defense instructions. Moreover, a defense of justification would have been contrary to Hernandez's denial of the crime. Although irreconcilable defenses are permitted, they are not necessarily wise. As noted above, Hernandez's defense to this case was that neither he nor an accomplice ever demanded that Mr. Wade empty his pockets or handed over his money, and that Wade was not credible. Ms. Torres' statement that Mr. Wade grabbed her breast within direct view of the defendant and his companion, whom he had seen with Ms. Torres at the bar earlier, was likely deemed not credible by the jury. Likewise, her account of why she and the defendant left the area in great haste (because she didn't want to talk to the police—even though she was the victim of an assault, according to her) was not credible. Her refusal to tell her story to the police of having been victimized by Mr. Wade when they tried to speak with her during the investigation likely undermined her credibility with the jury severely. She

and Hernandez contradicted one another about whether she had visited him in jail, probably because Hernandez was trying to stifle the implication that he and Torres had planned this story ahead of time. Also, it appeared as though Hernandez was trying to tailor his testimony to Torres' when he described the hit as a "hit-push" or "punch-push." Torres testified it was a push. Finally, the evidence supported Mr. Wade's version of events. He testified that Ms. Torres was trying to turn him to face her during their walk to the fence area, which she was likely doing to divert his attention from what was going on around him. He was paying for his drinks in cash, which Hernandez and Torres likely saw. Finally, he had no reason to call 911 and make up this story.

Hernandez cannot demonstrate prejudice from his attorney's decision to withdraw his request for self-defense instructions. His claim fails.

II. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD.

Hernandez claims that the accomplice liability statute is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. This claim has been considered and rejected by this Court previously.

In *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011) this Court followed Division One’s opinion in *State v. Coleman*, 155 Wn. App. 951, 961, 231 P.3d 212 (2010) and held that the accomplice liability statute does not infringe upon constitutionally protected speech. The reasoning of the *Coleman* Court, adopted by this Court in *Ferguson* was that

[T]he accomplice liability statute *Coleman* challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. Therefore, by the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.

Coleman at 960-61. This Court, in *Ferguson*, added

Because the statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*. Agreeing with and adopting Division One's rationale in *Coleman*, we also hold that the accomplice liability statute is not unconstitutionally overbroad.

Ferguson at 376.

Hernandez asks this Court to reconsider *Ferguson*, arguing that this Court’s reliance on the mens rea requirement does not meet the federal standard imposed by *Brandenburg v. Ohio*, namely that the First Amendment protects speech advocating criminal activity unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447,

89 S.Ct. 1827 (1969). This Court should decline that request because the *Ferguson* Court addressed the *Brandenburg* standard, holding that “[b]ecause the [accomplice liability] statute’s language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*.” The State asks this Court to adhere to its holding in *Ferguson*.

III. THE ACCOMPLICE LIABILITY INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF.

Hernandez argues that the accomplice liability instruction found at CP 43 (to which he did not object) relieved the State of its burden of proof. This is so, he argues, because, the instruction used the term “indicates” rather than “corroborates,” and said “a criminal purpose” rather than “the criminal purpose.” These precise arguments were considered and rejected by this Court in *State v. Davis*, 174 Wn.App. 623, 300 P.3d 465 (2013). Hernandez acknowledges this Court’s holding in *Davis* and merely states “*Davis* was decided incorrectly, and should be reconsidered.” See Brief of Appellant at 21. He makes no argument in support of that point and appears to have made this assignment of error for

preservation purposes. This Court should reject this claim and adhere to its decision in *Davis*.

IV. HERNANDEZ CANNOT COMPLAIN ABOUT THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WHERE HE FAILED TO OBJECT BELOW AND WHERE HE HAS NOT DEMONSTRATED THAT THE STATE IS ACTIVELY SEEKING COLLECTION OF THE COSTS.

Hernandez asserts that the imposition of legal financial obligations for repayment of his defense costs should be reversed by this Court because the trial court, he claims, did not inquire into his ability or willingness to pay them. He further claims that the trial court must inquire about his ability or willingness to pay defense costs before the court can order future repayment in order to pass constitutional muster.

Hernandez did not object to the imposition of these costs below and cannot complain about them for the first time on appeal. Although Hernandez cites to *State v. Bertrand*, 165 Wn.App. 393, 404, 267 P.3d 511 (2011), that case is distinguishable. The defendant in that case was disabled and the sentencing court ordered her to begin payment on her LFOs 60 days after entry of the judgment and sentence, while she would still be in confinement for her 36 -month sentence. *Bertrand* at 398. Based on these facts, this Court reversed the trial court's finding that the

defendant had the ability to pay the LFOs. *Bertrand* at 404. Here, in contrast, there is no evidence that Hernandez would be similarly unable to pay LFOs when the State eventually seeks to collect them.

In addition to having waived this issue on appeal by not objecting below, Hernandez's claim is not ripe for review. Hernandez does not show the State is currently seeking payment of his LFOs. The correct time to challenge an inability to pay LFOs is at the time the State seeks to enforce the judgment:

As a final matter, we note that generally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them.

...

Here, nothing in the record reflects that the State has attempted to collect legal financial obligations from Lundy or even when Lundy is expected to begin repayment of these obligations. Accordingly, any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review.

State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013).

In an effort to have this issue reviewed for the first time on appeal Hernandez attempts to convert this claim into a constitutional one, asserting that the Washington Supreme Court has misapplied *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116 (1974). He doesn't argue, however, that the cases interpreting *Fuller*, namely *State v. Blank*, 131

Wn.2d 230, 239, 930 P.2d 1213 (1997) and *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992), were incorrect and harmful. (See e.g. *State v. Stalker*, 152 Wn. App. 805, 808, 219 P.3d 722 (2009) (“The State now asserts that subsequent case law has undermined that holding. The standard for overruling precedent is strict: the earlier decision must be both incorrect and harmful.”)). He simply asks this Court to ignore Supreme Court precedent.

But Hernandez is not entitled to review because not every constitutional error is reviewable for the first time on appeal. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’ *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in

unnecessary appeals, undesirable retrials, and wasteful use of resources.”
Robinson at 305.

As explained in *McFarland*, supra RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional magnitude.’” *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *McFarland* at 333. “It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record.” *Id.* at 334. Further, if the facts necessary to adjudicate the claimed error are not adequately presented in the record on appeal, a defendant cannot show prejudice and the error is not manifest as a matter of law. *McFarland* at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Hernandez does not even discuss this standard nor make any attempt to meet it. This Court should deny review of this assignment of error.

D. CONCLUSION

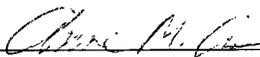
Hernandez's judgment and sentence should be affirmed.

DATED this 5th day of February, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

February 05, 2014 - 5:08 PM

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