

NO. 46292-3

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NATHAN SQUIRE AUSTIN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 13-1-04710-3

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**Brief of Respondent**

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MARK LINDQUIST  
Prosecuting Attorney

By  
CHELSEY MILLER  
Deputy Prosecuting Attorney  
WSB # 42892

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has Defendant failed to meet his burden of showing counsel was ineffective since defense counsel's decision not to object to certain testimony was a legitimate trial tactic or strategy, and defendant fails to show that but for counsel's decision not to object, the result of the trial would have been different.
2. Has Defendant further failed to show his right to a fair trial was violated where the officer's testimony had no impact on Defendant's physical indicia of innocence and where no improper opinion testimony was adduced?
3. Did the trial court properly impose legal financial obligations where the court properly determined Defendant had the likely future ability to pay such obligations?

B. STATEMENT OF THE CASE.

1. Procedure

On March 4, 2014, the State charged Nathan Austin, herein after "Defendant," with one count of unlawful possession of a stolen vehicle, one count of second degree taking a motor vehicle without permission, and one count of unlawful possession of a controlled substance. CP 1-2.

The case proceeded to a jury trial before the honorable Judge Arend. 2RP 67.<sup>1</sup> A CrR 3.5 hearing was held prior to trial where the court found Defendant's statements to police officers admissible at trial. 1RP 43-44.

Defendant did not testify at trial. 2RP 135. The jury subsequently found him not guilty of unlawful possession of a stolen vehicle and guilty as charged of second degree taking a motor vehicle without permission and unlawful possession of a controlled substance. 3RP 169-70; CP 6-8, 50. During sentencing, defense counsel successfully argued that Defendant be sentenced to a Drug Offender Sentencing Alternative (DOSA) program despite Defendant's offender score of 9 and extensive criminal history. CP 50-51; 4RP 7-8, 14. The court further imposed a \$500 crime victim assessment, a \$100 DNA database fee, a \$1500 court-appointed attorney fee, and a \$200 criminal filing fee. CP 52; 4RP 6, 15. Defendant subsequently filed a timely notice of appeal. CP 80.

## 2. Facts

On November 29, 2013, Paul Siskin was at the Emerald Queen Casino when he briefly ran into Defendant. 2RP 101, 104. The two men were not friends and only knew of each other from rehab treatment. 2RP

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<sup>1</sup> The State will refer to the verbatim report of proceedings as follows:

3/4/14 as 1RP  
3/5/14 as 2RP  
3/6/14 as 3RP  
5/9/14 as 4RP

101. Shortly thereafter, Siskin noticed his car keys were missing. 2RP 100. He immediately contacted casino security but was unsuccessful in locating his keys. 2RP 100. Siskin's car subsequently went missing from the casino parking lot and Siskin's mother<sup>2</sup> reported the car stolen the following day. 2RP 101.

On December 5, 2013, Puyallup Tribal Police Officer Moises Lopez was patrolling the Emerald Queen Casino when he observed an unoccupied vehicle matching the description of a vehicle he recalled had been reported stolen. 2RP 68, 70-71. Officer Lopez ran the license plates to confirm the vehicle was in fact reported stolen. 2RP 74. He then observed the vehicle from afar to see if anyone would approach it. 2RP 74. A short while later Officer Lopez observed Defendant and two females approach and enter the vehicle. RP 74-75, 79. Officer Lopez then drove near the stolen vehicle, activated his emergency lights, and initiated a traffic stop. 2RP 75. Officer Lopez also called in for backup to assist in the stop, noting that based on his training and experience, stops involving stolen vehicles are considered "high risk" due to the fact that there are often weapons present. 2RP 75-76.

Officer Lopez then removed all of the occupants from the vehicle including Defendant, who was in the driver's seat. 2RP 77. Defendant was read and subsequently waived his *Miranda* rights. 2RP 79. He alleged that

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<sup>2</sup> Siskin's mother was the registered owner of the vehicle. 2RP 94.

Siskin had given him permission to take his vehicle several days prior, and that Defendant attempted to return it but could not locate Siskin. 2RP 80. Defendant was subsequently transported and booked into Pierce County jail. 2RP 83. As Officer Lopez was performing a search incident to arrest, he found a plastic bag containing a substance later identified as methamphetamine and two syringes in defendant's coat pocket. 2RP 83, 90. Defendant admitted to the Officer that he injects meth. 2RP 86-87, 127.

At trial, Siskin testified that he had never socially spent time with Defendant prior to running into him at the casino on the evening in question, and had never given Defendant permission to take his vehicle. 2RP 101-02.

C. ARGUMENT.

1. DEFENDANT FAILS TO MEET HIS BURDEN OF SHOWING COUNSEL WAS INEFFICIENT SINCE DEFENSE COUNSEL'S DECISION NOT TO OBJECT TO CERTAIN TESTIMONY WAS A LEGITIMATE TRIAL TACTIC AND STRATEGY AND DEFENDANT FAILS TO SHOW THAT BUT FOR COUNSEL'S DECISION NOT TO OBJECT, THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109

Wn.2d 222, 229, 743 P.2d 816 (1987). Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable.

*State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)("Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.").

Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "The threshold for the deficient performance prong is high, given the deference afforded to the decisions of defense counsel in the course of representation." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215

P.3d 177 (2009). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *State v. Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Appellate courts will not find ineffective assistance of counsel if “the actions of counsel complained of go to the theory of the case or to trial tactics.” *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). A defendant can only rebut the strong presumption of reasonable performance if she can demonstrate “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-76, 975 P.2d 512 (1999).

To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

*Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d at 226; *State v. Garrett*, 124 Wn.2d at 519. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” *Strickland*, 466 U.S. at 694-95.

Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” *State v. Cienfuegos*, 144 Wn.2d at 229. “Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

Finally, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Appellate courts review de novo a claim of ineffective assistance of counsel. *State v. Castro*, 141 Wn. App. 485, 492, 170 P.3d 78 (2007).

- a. Defense Counsel's decision not to object was a tactical decision that did not deprive Defendant of the right to competent representation as such an objection would have drawn more attention to unfavorable testimony and where the testimony in question further supported Defendant's theory of the case that the two men were friends.

“The decision of when or whether to object is a classic example of trial tactics.” *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). “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.” *Id.* (citing *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). “To prove that failure to object rendered counsel ineffective, petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.” *State v. Johnston*, 143 Wn. App. at 20 (citing *In re Davis*, 152 Wn.2d at 714).

As our Supreme Court has explained:

An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. Collateral matters, which may appear in retrospect to have been errors in judgment or in trial strategy, cannot be said to constitute incompetence.

The test of skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial?

*State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961)(internal citations omitted).

In the present case, defense counsel did not object to the following testimony:

PROSECUTOR: Now, do you know the defendant, Nathan Austin?

WITNESS: Yes, from rehab. From treatment in Pioneer Center North.

PROSECUTOR: Are you friends?

WITNESS: We were—we got along just fine in treatment, yeah. Yeah, good guy.

PROSECUTOR: Did you—after treatment, did you hang out with him socially?

WITNESS: No. No. It was just that one day. I mean, we ran into each other at the casino. I saw him there.

2RP 101.

Defense counsel made a clear tactical decision to not object to Siskin's fleeting comment, as doing so would likely draw more attention to the fact Defendant had been in treatment. By strategically not objecting, no additional attention was directed to Siskin's brief comment regarding treatment, and Siskin moved on to testify about the events of the night in question. 2RP 102-04. Had counsel made an objection, it is likely the jury

would have taken particular notice of Siskin's statement, and such an objection could have potentially prejudiced the Defendant.

Counsel's decision not to object was further tactical because Defendant's theory of the case was that the two men were friends and Siskin had given Defendant permission to use his car. *See* 2RP 106. This is also evidenced in counsel's closing, where he repeatedly argued that the two were friends and that Siskin had voluntarily given Defendant the keys to the vehicle. 2RP 153-58. Thus, in order to effectively argue his theory of the case, defense counsel had to establish that the two men had previously met and known each other. Counsel's decision not to object was tactical in that it allowed in information relevant to his theory of the case. Such a decision based on trial strategy cannot be deemed ineffective.

Even if the court were to find one alleged error in counsel's failure to object, when the court reviews counsel's performance as a whole it cannot be deemed ineffective. *See State v. Carpenter*, 52 Wn. App at 684-85; *State v. White*, 81 Wn.2d at 225. Counsel effectively advocated on behalf of his client throughout trial. He thoroughly cross examined the State's witnesses both during trial and at the CrR 3.5 hearing. 1RP 22-26, 42-43; 2RP 88-91, 98-99, 129-132. Counsel provided effective representation, as evidenced by the fact that the jury acquitted Defendant on the charge of unlawful possession of a stolen vehicle. 3RP 169-70; CP 6-8. Finally, counsel was able to successfully secure a DOSA sentence for

his client, despite his offender score of 9 and lengthy criminal history. CP 50-51; 4RP 7-8, 14. When counsel's performance is reviewed in its entirety, it is evident counsel's performance overall was not deficient.

Defendant additionally fails to show how Siskin's statement was prejudicial. The testimony adduced was that the two men knew each other from "rehab treatment." 2RP 101. However nowhere in the record does Siskin, or anyone else, testify as to what type of treatment Defendant and Siskin were attending. While Defendant alleges that the jury could have inferred this was a drug rehab program, the jury could have just as easily inferred it was a type of physical rehabilitation treatment for a bodily injury. Likewise, the jury could have also inferred that it was an alcohol rehab program, as counsel's theory of the case was that the two men were drinking together and Siskin asked Defendant to drive because he was drunk. 2RP 80. Because Siskin's testimony does not specify what type of treatment the men attended together, it is even more difficult for Defendant to show how he was prejudiced by the comment.

Furthermore, Defendant fails to meet his burden under the second prong of *Strickland* showing that but for counsel's failure to object, the outcome of the trial would have been different. *See State v. Kylo*, 166 Wn.2d at 862. There was significant evidence in the record establishing Defendant's guilt of second degree taking a motor vehicle without permission, and unlawful possession of a controlled substance. Siskin's

mother, the registered owner of the vehicle, had previously reported the vehicle stolen. 2RP 94, 101. Paul Siskin, who had possession of the vehicle, expressly testified that he had never given Defendant permission to take his vehicle, and that his car keys had disappeared shortly after running into Defendant at the casino the night his car was stolen. 2RP 100-02. Officer Lopez also testified that Defendant was apprehended while inside the stolen vehicle. Additionally, Defendant had methamphetamine and two syringes on his person at the time of the arrest, as well as admitted to the officer that he injects meth. 2RP 83, 86-87, 90, 127. Given the significant evidence put before the jury, Defendant is unable to show that but for the comment about he and Siskin meeting in rehab, he would not have been found guilty.

Defendant fails to show counsel's decision fell below an objective standard of reasonableness and that Defendant suffered any prejudice. Accordingly, this Court should affirm Defendant's conviction and sentence.

2. DEFENDANT FAILS TO SHOW HIS RIGHT TO A FAIR TRIAL WAS VIOLATED WHERE THE OFFICER'S TESTIMONY HAD NO IMPACT ON DEFENDANT'S PHYSICAL INDICIA OF INNOCENCE AND WHERE NO IMPROPER OPINION TESTIMONY WAS ADDUCED.

"The presumption of innocence, although not articulated in the Constitution, 'is a basic component of a fair trial under our system of

criminal justice.;" *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)(quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). "In order to preserve a defendant's presumption of innocence before a jury, the defendant is "entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *Id.* "Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial." *Id.* At 845.

"Whether a particular practice had a negative effect on the judgment of the jurors receives close judicial scrutiny." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). Reviewing Courts "evaluate the likely effects based on reason, principle, and common human experience." *Id.* "Alleged violations of the right to an impartial jury and the presumption of innocence are reviewed de novo." *Id.*

Defendant argues that his right to an impartial jury was violated when the police officer involved in the incident testified that the stop of Defendant's vehicle was considered "high risk." App.Br. at 11. However, the cases Defendant cites to support this proposition, all deal with physical restraints and the appearances of a defendant during trial. *See State v. Gonzales*, 129 Wn. App. 895, 120 P.3d 645 (2005)(the trial court's announcement that the defendant could not afford bail and was transported

from jail in restraints violated defendant's right to presumption of innocence); *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010)(holding of defendant's trial in a jail courtroom violated his right to due process by eroding the presumption of innocence). In the present case the officer's testimony was not a "measure," as discussed by controlling case law, which singled out Defendant in any way. Nor did it have any bearing on Defendant's physical indicia of innocence or affect his appearance in any way. See *State v. Finch*, 137 Wn.2d at 844. *Gonzales*, *Finch*, and *Jaime* dealt with the physical appearance of a defendant in a courtroom and his surroundings, while Defendant's argument on appeal discusses the officer's testimony. As such, Defendant's argument that such a comment violates his right to a fair trial by an impartial jury under the legal proposition that *Gonzales*, *Finch*, and *Jaime* stand for is a mischaracterization of the law. Defendant fails to show his right to a fair trial was violated under this case law.

- a. Officer's testimony that the stop of Defendant's vehicle was "high risk" was not improper opinion testimony where the officer did not give an opinion as to Defendant's guilt or credibility and was only describing the circumstances he was in and qualifying it based on his experience and training.

"No witness may express his opinion that the defendant is guilty."  
*State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989). "However,

testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

Furthermore, Evidence Rule 701 states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Defendant alleges that the police officer gave improper opinion testimony when he described the stop of Defendant's vehicle as "high risk." App.Br at 11; 2RP 76. Defendant's claim fails, as the officer never gave his opinion regarding Defendant or his innocence, nor did the officer single him out in any way. Rather, the officer described that, based on his training and experience as a police officer, stops concerning stolen vehicles usually involve guns and are for that reason considered "high risk." 2RP 76. The officer was not describing Defendant in any way, but was rather describing the circumstances of the stop he was making and further providing the jury with insight as to why he called for backup. *See* 2RP 76-77. The officer's statements were permissible within the

confines of ER 701, which allow for opinion testimony based on the witness' perceptions. ER 701; *See also State v. Sanders*, 66 Wn. App 380, 388, 832 P.2d 1326 (1992)(police officer's opinion testimony was not improper where it was an inference based solely on the physical evidence and his experience and where the officer did not express any opinion to defendant's guilt or credibility). Defendant's right to an impartial trial was not violated. As such, this Court should dismiss Defendant's claim and affirm his conviction.

3. ALTHOUGH THIS ISSUE IS NOT RIPE, THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WAS NOT CLEARLY ERRONEOUS WHERE THE RECORD SHOWS IT TOOK INTO ACCOUNT DEFENDANT'S ABILITY TO PAY.

There are mandatory court costs and fees, which sentencing courts must impose, including a criminal filing fee, a crime victim assessment fee, and a DNA database fee. RCW 36.18.020(h); RCW 7.68.035; RCW 43.43.7541. Trial courts may also require a defendant to pay costs associated with bringing a case to trial, such as recoupment for Department of Assigned Counsel pursuant to RCW 10.01.160.

- There are two limitations in the statute to protect defendants:
- (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.
  - (4) A defendant who has been ordered to pay costs and who

is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs . . .

RCW 10.01.160. In this case, Defendant challenges the discretionary cost imposed: the Department of Assigned Counsel recoupment. *See* RCW 10.01.160; Ap.Br. at 12, 16.

- a. Defendant's challenge to the legal financial obligations is not ripe for review because the State has not attempted enforcement.

Challenges to orders establishing Legal Financial Obligations (LFOs) are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation").

In the present case, there is nothing in the record showing that the State has attempted to enforce the LFO. Therefore, the issue is not yet ripe for review.

- b. The court did not act in a clearly erroneous manner by imposing legal financial obligations because the record shows the judge considered evidence of Defendant's ability to pay.

Even if this issue was ripe for review, the LFO at issue should be affirmed. The question of whether LFOs were properly imposed is

controlled by the clearly erroneous standard. *State v. Lundy*, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d at 619. If the appellant fails to meet this burden, the decision stands. *State v. Tracy*, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006). Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012).

The trial court's consideration of Defendant's financial situation is indicated by Paragraph 2.5 of the Judgment and Sentence. CP 51-52. Therein, the court states that it has considered the total LFOs owing, taking into account Defendant's past, present, and future ability to pay LFOs, and finds that Defendant has the ability *or likely future ability* to pay the LFOs imposed. CP 51-52 (emphasis added). Paragraph 2.5 goes on to state that the court finds no extraordinary circumstances that make restitution appropriate. CP 52.

During the sentencing hearing, the court which presided over the entire bench trial considered Defendant's future ability to pay LFOs. Defendant himself spoke at sentencing, and stated: "I want to enter right back into programming. I'm going to pick myself back up. I am driven and determined to do what it takes to get my life back together, and I'm going to do that. I have plans to get back into school and to do what it takes to stay clean and sober...." 4RP 13. Defendant's own admission that he has every intention of going to school and acquiring gainful employment indicates that he has a "likely future ability" to pay his LFOs. The court properly took this into account in imposing the discretionary LFOs, finding that Defendant would be able to pay them in the future.

Defendant relies on *Fuller v. Oregon* to argue that the imposition of LFOs violated Defendant's right to counsel. 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); App.Br. at 12. However, the court in *Fuller* specifically noted that "no requirement may be imposed if it appears at the time of sentencing that *there is no likelihood that a defendant's indigency will end...*" *Id* (*emphasis added*). Here, the court considered Defendant's likely future ability to pay, including Defendant's own statements that he wanted to go back to school and find gainful employment, and subsequently found that there was no indication that his indigency will not end. *See* CP 51-52; 4RP 13.

Furthermore, our own State Supreme Court has interpreted *Fuller* to mean that the determination of ability to pay and inquiry into defendant's finances is not constitutionally required before recoupment order may be entered. See *State v. Blank*, 131 Wn.2d 230, 238-29, 930 P.2d 1213 (1997). Thus, Defendant's reliance on *Fuller* is misplaced.

Because the court took into account Defendant's future ability to pay LFOs and properly found that his indigency will end, the court thus was not clearly erroneous when it imposed a \$1500.00 Court appointed fee. As such, this Court should deny Defendant's claim and affirm the imposition of LFOs.

D. CONCLUSION.

Defendant failed to meet his burden of showing counsel was ineffective since defense counsel's decision not to object to certain testimony was a legitimate trial tactic or strategy, and defendant fails to show that but for counsel's decision not to object, the result of the trial would have been different. Defendant further failed to show his right to a fair trial was violated where the officer's testimony had no impact on defendant's physical indica of innocence and where no improper opinion testimony was adduced. Finally, the trial court's imposition of legal financial obligations was not clearly erroneous where the record shows the court

properly found Defendant had the likely future ability to pay those obligations. For the foregoing reasons, the State respectfully requests this Court affirm Defendant's conviction and sentence.

DATED: March 10, 2015.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
CHELSEY MILLER  
Deputy Prosecuting Attorney  
WSB # 42892

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Miryana Gerassimova  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by email or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.10.15 Theresa Ke  
Date Signature

**PIERCE COUNTY PROSECUTOR**

**March 10, 2015 - 10:11 AM**

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