

NO. 47025-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DYLAN WOMER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered findings of fact unsupported by substantial evidence.

2. Under *Missouri v. McNeely* exigent circumstances did not justify the officers' decision to take the defendant's blood without first seeking a search warrant and their actions in taking his blood thus violated Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

2. Under *State v. Martines*, the state's failure to get a warrant authorizing a test of the defendant's blood required suppression of the test results because that action violated Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

3. The defendant was denied effective assistance of counsel when his trial attorney (1) failed to object to the introduction of 16 irrelevant, gruesome photographs of the decedent, and (2) failed to move to suppress the results of the blood test under *State v. Martines*.

4. The trial court erred when it imposed legal financial obligations upon an indigent defendant without addressing the defendant's ability to pay.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. In a case in which the police immediately have evidence that (1) a defendant drove a vehicle well in excess of the speed limit, (2) smelled of alcohol, (3) had alcohol in his vehicle, (4) skidded off a roadway and hit a tree thereby killing his passenger, must the police at least attempt to obtain a telephonic search warrant prior to a warrantless seizure of the defendant's blood instead of relying upon their experience that sometimes judges are not available to issue telephonic warrants?

3. Does a trial counsel's (1) failure to object to the introduction of 16 irrelevant, gruesome photographs of a decedent in a vehicular homicide case, and (2) failure to move to suppress the results of a warrantless blood test under the decision in *State v. Martines* deny that defendant effective assistance of counsel under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, when these failures fell below the standard of a reasonably prudent attorney and those failures caused prejudice?

4. Does a trial court err if it imposes legal financial obligations upon an indigent defendant without addressing the defendant's ability to pay?

STATEMENT OF THE CASE

Factual History

Sometime after midnight on April 25, 2013, Thurston County Deputy Anthony Adams was sitting in his patrol car at the Texaco Village Mart at 3210 Northwest Cooper Point Road in Thurston County getting ready to go off duty. RP 325-326.¹ While he was sitting in his patrol car he heard a vehicle driving at a high rate of speed northbound on Cooper Point Road. RP 326. Upon hearing this he then looked up and saw the tail lights as they disappeared into the darkness. RP 329. He immediately pulled onto the road to pursue the vehicle. *Id.* The speed limit in this area is 40 mph, although Deputy Adams has driven it as fast as 100 mph during a chase, and in his opinion an experienced driver could make it through the slight right and then slight left bends on Cooper Point Road north of the Texaco station at up to 70 mph. RP 349-350, 576.

When Deputy Adams pulled onto Cooper Point Road he saw a vehicle approaching him southbound. RP 329-330. Seeing that his radar had this vehicle at 8 mph over the limit, Deputy Adams quickly pulled the vehicle

¹The record on appeal includes four volumes of continuously numbered verbatim reports of the jury trial and sentencing held in this case. They are referred to herein as “RP [page #].” The record on appeal also includes three volumes of individually numbered verbatim reports of the hearings held on December 9, 2013, on October 13, 2014, and October 20, 2014. They are referred to herein as “RP [date] [page #].”

over and told the driver to slow down. *Id.* He then got back in his patrol car and drove north in an attempt to find the first vehicle he had been pursuing. *Id.* It was 12:30 or 12:31 am at that time. RP 332 According to Deputy Adams, when he got up to the first bend in the 3500 block of Cooper Point Road he saw debris in a wooded area by the road. RP 332. Seeing this, he stopped, put a spotlight into the trees, and then saw that a vehicle had gone off the road and apparently sideswiped a tree, nearly cutting the vehicle into two parts. *Id.* Deputy Adams immediately called for assistance. *Id.* Deputy Adams then looked closer and saw a person he immediately recognized was deceased laying partially on the ground with his right arm amputated. *Id.*

As Deputy Adams approached the vehicle he also saw a second person partially under the driver's side with his legs sticking out. RP 334-335. The person partially under the car was the defendant Dylan Womer. RP 565-566. In fact, the vehicle belonged to the defendant's mother. *Id.* When Deputy Adams got to the vehicle he told the defendant to remain still. RP 337-339. However, the defendant pulled himself out from under the vehicle. *Id.* Deputy Adams then took the defendant by the elbow and helped him get over to the curb where Deputy Adams told him to sit and wait for the ambulance. *Id.* As they waited, Deputy Adams asked the defendant if he had been driving and how many people had been in the vehicle. *Id.* The defendant responded that he had not been driving and that there had only

been one other person in the vehicle with him. *Id.*

While still at the scene, the defendant asked three times if the other person had wrecked his car. RP 337-339. Once the aid crews arrived Deputy Adams helped get the defendant into an ambulance. *Id.* During this time he did not remember smelling the odor of alcohol on the defendant's breath. RP 358. However, upon inspection of the crash scene, Deputy Adams did find two bottles of alcohol in or near the car and he photographed them. RP 339-341.

At 12:47 am Washington State Patrol Trooper Daniel Walwark arrived on the scene, confirmed the fatality, spoke with Deputy Adams and other deputies who had arrived to assist, and began his investigation. RP 204, 205-208. About an hour after arriving Trooper Walwark called his supervisor, Sergeant Jason Greer, and gave him a summary of the information he had gathered. *Id.* Sergeant Greer stated that he would respond to the scene. *Id.* He also instructed Trooper Walwark to go to the hospital and contact the driver. *Id.* Trooper Walwark then left the scene of the accident and drove to the hospital, arriving at exactly 2:00 am. *Id.*

Once in the emergency room at the hospital Trooper Walwark went into the examining room where the defendant was in bed. RP 208-209. When he did he detected an obvious odor of alcohol in the air. R 209. He then spoke with the defendant, who identified himself and made the

following statements: (1) that the decedent was his friend David Helms, (2) that the decedent had been driving, (3) that the car belonged to the defendant's mother, (4) that he the defendant had drank four or five shots of alcohol earlier in the evening, (5) that he had smoked a bowl of marijuana earlier in the evening, and (6) that much earlier that day he had smoked a "tiny bowl" of methamphetamine. RP 213-214. During this conversation Trooper Walwark noted that the defendant's eyes were very bloodshot and watery, and that his speech was fast and fairly slurred. RP 210-212.

After speaking with the defendant Trooper Walwark called Sergeant Greer and gave him an update on the information he had gathered. RP 2/9/13 19. Sergeant Greer then instructed Trooper Walwark to go back in to the emergency room, place the defendant under arrest, and have hospital staff draw blood from the defendant for testing. RP 223-226. Trooper Walwark then returned to the room and placed the defendant under arrest. *Id.* At Trooper Walwark's request, a hospital phlebotomist drew the first of two vials of the defendant's blood a 2:41 in the morning. RP 173-174. Later testing of this vial by the Washington State Patrol crime lab indicated that the defendant's blood alcohol level was .071 percent, just below the legal limit. RP 253-254. This testing also revealed that the defendant's blood contained .21 milligrams of methamphetamine per liter of blood. RP 270-271.

At about 1:15 am that morning Washington State Patrol Sergeant

George Bassett arrived at the accident scene and began an investigation. RP 61-62. He has been trained as an accident reconstruction specialist. RP 58-60. While at the scene he examined and mapped skid marks on the asphalt from the defendant's vehicle, which he claimed indicated that the defendant had hit his breaks when entering a curve on Cooper Point Road, that his vehicle had skidded sideways in a counter-clockwise rotation, and that he had left the road sideways with the rear of the vehicle slightly ahead of the front. RP 67-83, 94-101. The defendant's vehicle then sideswiped a large rock and a tree, almost shearing off the right side of the vehicle. RP 111-125. According to Sergeant Bassett, he estimated the defendant's speed at somewhere between 61 and 77 mph just prior to the skid and between 27 and 44 mph at the time the vehicle left the roadway. RP 431-446.

Sergeant Bassett's estimates of the rotation of the defendant's vehicle during the skid prior to going off the road and the cause of the accident were later converted by Mr. Roger Smedsrud, a forensic mechanic with over 40 years of experience who examined the vehicle the defendant was driving. RP 297. According to Mr. Smedsrud, the skid was caused by two things: (1) the fact that the vehicle was out of alignment, causing it to severely pull to the right, and (2) the fact that the driver's side front brake was not functioning and the driver's side rear brake was barely functioning, while the passengers side brakes were working. RP 502-591. Thus, in his opinion, the defendant

entered the curve and braked, the misalignment and faulty brakes pulled the vehicle into an uncontrollable skid clockwise and it went off the road. RP 520-521.

A later autopsy performed on the decedent revealed that he had suffered a traumatic amputation of his right arm during the accident, a near amputation of his right foot, numerous contusions and cuts, a lacerated spleen and liver, and a blunt force trauma to the head causing a fracture to the skull, bleeding around the brain and a contusion to the brain stem. RP 381-391. In the opinion of the forensic pathologist who performed the autopsy the latter injury to the brain stem was the cause of death, which was essentially instantaneous with the infliction of the injury. RP 388-391, 416.

Procedural History

By information filed April 26, 2013, and later amended on November 25, 2014, the Thurston County Prosecutor charged the defendant Dylan James Womer with one count of vehicular homicide under all three alternatives available under RCW 46.61.520(1). CP 4, 163. The defense subsequently filed two separate motions to suppress the results of the blood test. CP 17-97, 123-151. In the first motion, filed on November 18, 2013, the defense argued that (1) under the United States Supreme Court's decision in *Missouri v. McNeely*, — U.S. —, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), the mere fact that alcohol in the blood dissipates with the passage of time does not *per se*

constitute an exigent circumstance sufficient to justify the failure to seek a judicially authorized search warrant, and (2) no other exigent circumstances justified the troopers failure to seek a warrant. CP 98-106.

The defendant's motion later came on for hearing with the state calling WSP Sergeant Greer and Trooper Walwark as its only witnesses. RP 12/9/13 7-36, 28-58. In his testimony WSP Sergeant Greer explained the following: (1) that he had sent Trooper Walwark to the hospital to interview the defendant, (2) that by 1:05 am he knew that the passenger was deceased and that the driver was possibly impaired, (3) that it can take up to an hour to get a telephonic warrant, (4) that according to his report at 2:05 am he called Trooper Walwark and the two of them decided to have Trooper Walwark proceed with a warrantless blood draw, and (5) that neither he nor Trooper Walwark attempted to obtain a telephonic warrant. RP 12/9/13 16-17, 19, 23-24, 26, 30, 32.

In his testimony, Trooper Walwark explained that he had responded to the scene of the accident, spoke with the deputies present, and eventually called Sergeant Greer. RP 38-40. He went on to explain that at Sergeant Greer's direction he drove to the hospital, arriving at 2:00 am. RP 41-43. Once at the hospital he spoke with the defendant and then called Sergeant Greer. *Id.* According to Trooper Walwark, at the end of this conversation Sergeant Greer instructed him to arrest the defendant and have hospital

personnel take blood from the defendant. RP 53-55. He went on to testify that he did as directed. *Id.* According to Trooper Walwark, at the time he went in and placed the defendant under arrest the hospital personnel were about to release him. 41-43.

Following the end of this testimony the parties presented their arguments. RP 59-73. The court then denied the motion and eventually entered the following findings of fact and conclusions of law in support of its decision. RP 74-90.

I. FINDINGS OF FACT

1. Prior to April 25, 2013, the Washington State Patrol (WSP) had an agreement with the Thurston County Sheriff's Office (TCSO) where they would respond to and investigate serious traffic collisions that occurred within Thurston County, Washington.
2. On April 25, 2013, at approximately 1:00 AM, Sgt. Greer of WSP was contacted by Pierce County dispatch regarding a collision that occurred on Cooper Point Rd in Thurston County, Washington.
3. On that date, Sgt. Greer was the acting supervisor for both Pierce and Thurston County since the State Patrol was understaffed as a result of other troopers being unavailable or on vacation.
4. Besides Trooper Walwark, Trooper Aston was the only other trooper that was on duty within Thurston County. At that time, Trooper Aston had a trainee with him.
5. Sgt. Greer decided that Trooper Aston and his trainee should stay on the roads patrolling so there will be coverage on the highways in Thurston County.
6. Dispatch advised Sgt Greer that the collision occurred at approximately 12:30 A.M. Besides receiving information from

Pierce County Dispatch, Sgt. Greer was not receiving information about the collision from any other independent source.

7. Dispatch advised Sgt. Greer, who was the supervising officer for both Pierce and Thurston County at the time that Trooper Walwark had already been dispatched to the scene.

8. Sgt. Greer attempted to contact Trooper Walwark but was not able to find Trooper Walwark.

9. At some point between 1:15 to 2:15 A.M., Trooper Walwark returned Sgt. Greer's telephone call and advised Sgt. Greer of his initial findings.

10. Trooper Walwark indicated the following to Sgt. Greer; there were two individuals at the scene. One of the individuals was deceased and the other one, the defendant, had suffered some injuries and was already taken to the hospital by medical aide.

11. During the telephone conversation, Sgt. Greer asked Trooper Walwark to go to St. Peter Hospital to "keep an eye" on the defendant.

12. Sgt. Greer, along with other detectives, arrived at the scene at approximately 1:55 A.M. Upon arrival, Sgt. Greer conducted a "survey" of the scene and concluded that there was a "possibility" or "indication" that the person at the hospital was the driver of the vehicle.

13. At approximately 2:15 A.M., Sgt. Greer, while still at the scene of the collision, contacted Trooper Walwark and advised Trooper Walwark that after his (Sgt. Greer) investigation, he believed that he had probable cause to believe that the individual at the hospital was the driver of the vehicle.

14. The court finds, based on the testimony presented, that probable cause was not developed until a few minutes prior to Sgt. Greer contacting Trooper Walwark at approximately 2:15 A.M.

15. While Trooper Walwark was at the hospital, he was not in communication, directly or indirectly, with any law enforcement

officers except Sgt. Greer with regards to the evidence that was being collected at the scene.

16. During the telephone conversation between Trooper Walwark and Sgt. Greer at approximately 2:15 A.M., the two officers discussed the time that had lapsed since the discovery of the collision.

17. Sgt. Greer was aware of the recent decision of Missouri v. McNeely when he advised Trooper Walwark to obtain the defendant's blood in the absence of a search warrant.

18. Sgt. Greer made the decision to proceed with the warrantless blood draw for the following reasons: concerned with the lapse of time between the time of the collision and the time that Sgt Greer believed he had probable cause for a blood draw; Sgt. Greer was concerned with the loss of evidence, specifically the dissipation of alcohol from the body of the defendant.

19. In addition to the above listed factors, another factor that Sgt. Greer considered in deciding to proceed with a warrantless blood draw was the amount of time that it would take to obtain a search warrant.

20. In Sgt. Greer's experience, it takes approximately two hours from the time the Sate Patrol begins its process to put together an affidavit to the time that the search warrant is granted. Additionally, Trooper Walwark would have to physically leave the defendant unattended to go out to his patrol vehicle to access his computer to prepare the search warrant affidavit.

21. Prior to speaking with Sgt. Greer at approximately 2:15 A.M., Trooper Walwark had received indication from the hospital that the defendant was ready to be discharged. Therefore, had Trooper Walwark gone outside to his patrol car to prepare the search warrant affidavit, there was no assurance that the defendant would have stayed inside the hospital.

22. Trooper Walwark was in the best position to prepare the affidavit for the search warrant because, at the time, he was on the receiving end of virtually all of the evidence that was being collected a the scene.

23. The court finds that the blood draw occurred roughly two hours after the discovery of the collision. Furthermore, the court finds that there was probable cause for the warrantless blood draw.

From the above Findings of Fact, the court hereby makes the following:

II. CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter.

2. Prior to Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed 2d 696 (2013), a person under arrest for vehicular assault or for vehicular homicide is subject to a mandatory blood alcohol test pursuant to RCW 46.20.308. Post McNeely, the statute was amended in that a blood draw without the consent of the arrestee may occur in the following circumstances; pursuant to a search warrant; a valid waiver of the warrant requirement; or when exigent circumstances exist.

3. Pursuant to McNeely, the dissipation of alcohol from the body of the arrestee, in and of itself, is not per se exigent circumstance.

4. Under McNeely, in determining whether exigent circumstances existed to justify a warrantless blood draw, the court must consider the totality of the circumstances. Furthermore, the court must consider only the information that was available to law enforcement officers at the time of and immediately prior to the blood draw and take into consideration what was going on in the minds of reasonable law enforcement officers.

5. The court finds that exigent circumstances did exist in this case to justify the warrantless blood draw based on the following facts: the time of the day that the crash occurred; the time that had already elapsed following the fatal collision; the anticipated delay of approximately two hours before a search warrant could be obtained; the possibility that the defendant would have been discharged from the hospital if Trooper Walwark went to his patrol vehicle to prepare the search warrant affidavit.

6. The Defendant's motion to suppress the blood draw on the grounds that the police did not obtain a search warrant is denied.

CP 263-266.

The defendant later brought a second motion to suppress arguing that Trooper Walwark had failed to read him the required warnings prior to taking his blood. CP 123-151. During the hearing on this motion Trooper Walwark testified that he had indeed given the defendant the warnings required by law. RP 10/13/14 7-19. The defendant and two of his family members who said they were present in the hospital room at the time testified that the officer did not read the defendant any warnings. RP10/13/14 10-35, 35-48. Following this testimony and argument, the court denied the motion, finding the Trooper's testimony more credible. RP 10/30/14 22-27. The court later entered findings and conclusions in support of this decision. CP 267-269.

This case finally came on for trial before a jury beginning December 8, 2014. RP 1. During that trial the state called nine witnesses, and twice recalled Sergeant Bassett for more testimony. CP 49-497. These witnesses testified to the facts set out the in preceding factual history. *See* Factual History, *supra*. The defense then called Mr. Roger Smedsrud, its expert on forensic mechanics, before taking the stand on his own behalf. RP 497-582. Following the close of the defendant's case the stated called Sergeant Bassett in short rebuttal. RP 582.

During the trial in this case the Coroner and Sergeant Bassett both testified that they took a series of photographs at the scene of the accident, which included *in situ* photographs of the decedent. RP 302, 422. The state's forensic pathologist then testified that while performing the autopsy on the decedent she also took a series of photographs, which were all of the decedent. RP 383-392. The state had provided the defense with all of these photographs as part of discovery. RP 10-14. At the beginning of the trial, the court asked if there were going to be any objections to the use of these photographs in evidence. RP 10. The court stated:

THE COURT: I tend to ask a lot of questions . You know the issue, of course, is whether you can get this jury selected before lunch. I'm not terribly optimistic in this case. We will see.

So I understand there is a number of exhibits. Do we have an issue with respect to exhibits? Reading the statement of probable cause, it appears that there is some potential for dramatic photos.

MR. HACK: Yes.

RP 10.

At this point the prosecutor explained that she had about 80 photographs that she would seek to introduce into evidence, including a number of autopsy photographs and photographs of the decedent at the scene of the accident. RP 11-12. At this point the court again enquired whether or not the state was seeking to introduce photographs that had the potential to "cause a reaction" with the jury. RP 12. This exchange went as follows:

THE COURT: How many photos would we have that would have the potential to cause a reaction in a juror?

MS. ZHOU : Your Honor, there was six autopsy photos. I believe two of them should – at least for the State. It wasn't bad , and then there's four that could be more – could be more difficult , and then there's some photos of the crime scene showing where the victim was found.

RP 12.

At this point the court asked the defendant's attorney whether or not he had an issue with presenting these photographs to the jury. RP 12. Defendant's counsel's response was that he apparently didn't believe he had a basis to object. RP 12-13. This exchange went as follows:

THE COURT: Mr. Hack, your thoughts ?

MR. HACK: The photos at the scene where the victim was found, they are not terribly shocking, although they might shock some people. Some of the autopsy show the immediate cause of death was traumatic head injury, although the victim received other injuries. I don't have an objection to the State showing photos of the actual skull fracture, and, unfortunately, you cannot really see the skull fracture from the outside.

So the State is proposing to show the skull fracture and how far it went into the skull after the scalp had been cut and peeled back and the brain taken out. It seems to me that the State is probably within its right, given its burden of proof, to show at least those photos because, like I said, it's difficult. You cannot really see the skull fracture from the outside. That's it. We have already discussed all of the other autopsy photos. I think the State is in agreement there is no need to show those.

RP 12-13.

In spite of this exchange and the defense's failure to seek to limit the

state's use of "shocking" photographs before the jury, the court again raised the issue of the potential prejudice that might arise from showing the jury such photographs. RP 13-14. This exchange went as follows:

THE COURT: So two issues: Do we have any dispute on the photos; the second issue, do we have photos we need to be concerned with jurors? And it sounds like there are no disputes between the photos, correct ?

THE COURT: The second issue is just with respect to shock of jurors, and it sounds like we do have those issues.

MR. HACK: Uh- huh , and that's what voir dire is about.

RP 13-14.

In spite of the defense attorney's reply, the court insisted that the parties give the court an opportunity to review the photographs before they were shown to the jury. RP 14. The court's specific response to defense counsel's statement that "that's what voir dire is about" was as follows:

THE COURT: Right, right, okay. I will want to, before we show those types of photos to the jury, I want to have a chance to look at them first.

RP 14.

The following gives a list of 16 of those photographs the state showed to the court prior to seeking to showing them to the jury. The descriptions given are those from the exhibit list from the trial.

Exhibit 9 - Closeup photo of victims face;

Exhibit 10 - Photo of victims face;
Exhibit 11 - Photo of victims upper body;
Exhibit 12 - Photo of victims lower body;
Exhibit 75 - Photo of victims arm;
Exhibit 76 - Photo of victims arm close up;
Exhibit 77 - Photo of victim and vehicle;
Exhibit 78 - Photo of victim outside of vehicle;
Exhibit 79 - Photo of victim outside of vehicle;
Exhibit 80 - Photo of vehicle seat and victim arm;
Exhibit 84 - Autopsy photo of head;
Exhibit 85 - Autopsy photo of right side of face;
Exhibit 86 - Autopsy photo of bottom of skull;
Exhibit 87 - Autopsy photo of inside of head;
Exhibit 88 - Autopsy photo of hair, and;
Exhibit 89 - Autopsy photo of bloody face.

RP 193.

Having later seen these photographs, the court on four occasions prior to the introduction of this evidence expressed concerns about the effect there would be from showing these photographs to the jury and to those attending the trial. RP 192-3, 314, 320, 377. On the first occasion the court stated:

THE COURT: Ms . Zhou , are we anticipating the photos this afternoon?

MS. ZHOU : Of?

THE COURT: That are the autopsy photos?

MS. ZHOU: I believe so.

THE COURT: At what point?

MS. ZHOU: When the forensic pathologist testifies, assuming at the speed we are going we will get to her today.

THE COURT: Later today?

MS. ZHOU : Yes, your Honor.

THE COURT: Just give me a heads up before she takes the stand. I want to assure that the courtroom is prepared and that folks in the courtroom are aware that we cannot have emotional expressions, and if those photos are shown and people are incapable of controlling their emotions, we will have to ask people to leave. So to the extent I have already made that announcement , I have made it. To the extent I need to make it again, I will .

RP 192-193².

At the end of the second day of trial outside the presence of the jury the court gave the following admonishment in open court.

THE COURT: . . . I will also just remind the courtroom, we will have—*we have had emotional photographs. We will have more to come.* If spectators are unable to control emotions during the showing of those photographs , we won't be able to have you in the courtroom. So that is a reminder to the courtroom. I know that we had some folks here earlier when that was said . Perhaps there has been some additional spectators. That will be the Court's expectation going forward . Again , we have more to come. I expect that.

RP 314 (emphasis added).

On the beginning of the third day of trial, again outside the presence of the jury, the court stated:

THE COURT: Okay. I just want – we only have a couple of spectators here. I just want the courtroom to be prepared. I see another spectator coming in. I want the courtroom to be prepared for those photos to be shown. *They are graphic in nature. They are disturbing,* and, as I mentioned yesterday, we can't have emotional

²Counsel has been unable to find the court's prior admonition in the record on appeal and assumes that the court made it during *voir dire*, which was not transcribed and made part of this appeal.

outbursts in the courtroom.

The courtroom is always open, of course, but if spectators believe that the graphic nature of those photos would make it difficult for them to observe the trial without a showing of emotion, then I would ask the spectators to use discretion whether they remain in the courtroom.

If we have an opportunity for a break and there are further spectators in the courtroom prior to Dr. Fino's testimony, I will repeat that, but given the possibility we won't have that opportunity, I make that announcement now.

RP 320-321 (emphasis added).

The court then gave yet another admonition from the bench outside the presence of the jury just prior the introduction of the autopsy photographs.

RP 377. The court stated:

THE COURT: Thank you. *This is the session in which we are expecting to have troubling photographs.* So I just warn the courtroom, if you are unable to view such photographs, either do not view them or be advised to leave the courtroom. All right. Are we ready to bring the jury in?

MS. ZHOU : Yes, your Honor.

RP 377.

At this point the jury was returned to the courtroom and the state began projecting Exhibits 84 through 89 on a screen in the courtroom so the jury and public could see them. RP 378-394. During this testimony the prosecutor projected Exhibit 87 and 89 up on the screen for the jury to view. RP 393-394. Exhibit 87 was a photograph entitled "Autopsy photo of inside

of head.” *See* Exhibit 87. The pathologist took it from a position slightly behind and to the right of the decedent, who was placed supine on the examining table. *Id.* It shows the decedent’s scalp cut at the forehead and peeled back until it droops on the examining table. *Id.* The photograph shows that the pathologist has also cut the decedent’s dura, the membrane that covers the brain, and has peeled it back exposing the top of the decedent’s brain. *Id.* In the photograph the dura also hangs down but not all the way to the examining table. *Id.* The skull cap, which the pathologist had previously sawed out of the decedent’s skull to expose the brain, is shown sitting in two pieces in the background on the left. *Id.*

Exhibit 89 was entitled “Autopsy photo of bloody face.” The pathologist took this photograph from slightly above, behind and to the right of the decedent, who has been placed supine on the examining table but not yet unclothed. *See* Exhibit 89. It shows the decedent’s fairly long hair covered with blood and debris with a large amount of blood having streamed down the decedent’s face. *Id.* In the photograph the decedent is shown with the right eye open staring fixedly with mouth agape. *Id.* The left eye is either shut or obscured with blood or both. *Id.* Apparently showing these two photographs on the screen in the courtroom was more than juror No. 8 could stand, because at this point in the case he passed out in the jury box. RP 396-399. The verbatim report of proceedings recorded this event as follows:

(Juror No. 8 passes out in the jury box.)

THE COURT: We are taking a break. Let's go off the record.

(A recess was taken at 11:14 a.m.)

THE COURT: So what occurred at basically 11:12, the witness – Dr. Fino, was discussing, I believe, the testimony regarding seeing blood on the decedent, and she was explaining that when Juror No. 8 appeared to the Court to pass out. The Court had been watching the jury closely during the showing of the photos and had not seen evidence of this coming, and to the extent that it snuck up on the Court, it's unfortunate.

But in any event, Juror No. 8 then fell from his seat and fell to his left. At this point, the witness, Dr. Fino, jumped down off of her seat and went to him. We went off the record, and the jury was quickly ushered out by our bailiff, all, of course, but Juror No. 8.

And then the Court's observation was Dr. Fino spoke with Juror No. 8 in what the Court observed to be a medical response as a doctor to a potential person in a medical situation and kept Juror No. 8 on the floor until approximately 11:17.

Juror No. 8 then sat up and was being attended to by the witness, Dr. Fino. Just prior to going on the record, the bailiff then took Juror No. 8 out of the courtroom and has him now placed, I believe, in a separate jury room.

RP 395-396.

After allowing Juror No. 8 to rest for a little while, the court brought him back in to the courtroom to determine whether or not he would be able to continue as part of the jury. RP 404-405.

THE COURT: Juror No. 8, how are you feeling?

THE JUROR: A little better.

THE COURT: So clearly there was an issue, Juror No. 8, for you during the – well , actually, I don't know. Can you explain what –

THE JUROR: It was probably the gruesome pictures . I could handle the pictures yesterday at the scene, but the whole cutting open the skull got to me.

THE COURT: So let me ask you, Juror No. 8, how do you feel about proceeding as a juror in this case?

THE JUROR: If you don't show those types of pictures , I will be fine.

THE COURT: Well, the exhibits may be part of the jury deliberation. So I'm not sure that I can guarantee that you will not be exposed to those photos going forward.

THE JUROR: Right .

THE COURT: With the assumption that the photos will be both available and part of the jury's deliberation, how do you feel about proceeding as a juror.

THE JUROR: I don't know, probably not well, if I have to look at them again.

RP 404-405.

At this point the following exchange took place between the defendant's attorney and Juror No. 8. RP 405-406.

MR. HACK: Is it Juror No. 8? So even just a glance at those photos would have this effect on you?

THE JUROR: That I don' t know. I thought I was doing okay, and next thing I know, I passed out.

MR. HACK: Most of the case is probably not – I don't think the deliberations are going to focus on the cause of death here. I think that's undisputed. I don't think looking at the photos is really going

to be a big part, if any, part of deliberations. So aside from that, do you think that you can go forward ?

THE JUROR: Yeah.

RP 405-406.

Following this discussion the court released juror No. 8 upon the defendant's motion with the agreement of the state and the court seated the alternate. RP 408-412. At no point during this exchange did the defendant's attorney move for a mistrial. *Id.*

Following the presentation of evidence in this case the court instructed the jury with the defense taking exception to the court's refusal to give the defendant's proposed instruction on superceding, intervening cause. RP 543-558. Following argument by counsel, the jury retired for deliberation, eventually returning verdicts of guilty on all three alternative methods for committing the offense of vehicular homicide. RP 684-685; CP 189, 215. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 229-239, 270-279.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 9, 13, 14, 16, 20 AND 21 ON THE DEFENDANT'S FIRST MOTION TO SUPPRESS BECAUSE THESE FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, appellant assigns error to those portions of the following findings of fact shown in bold and italics:

9. At some point ***between 1:15 to 2:15 A.M.***, Trooper Walwark returned Sgt. Greer's telephone call and advised Sgt. Greer of his initial findings.

13. ***At approximately 2:15 A.M.***, Sgt. Greer, while still at the scene of the collision, contacted Trooper Walwark and advised

Trooper Walwark that after his (Sgt. Greer) investigation, he believed that he had probable cause to believe that the individual at the hospital was the driver of the vehicle.

14. The court finds, based on the testimony presented, *that probable cause was not developed until a few minutes prior to Sgt. Greer contacting Trooper Walwark at approximately 2:15 A.M.*

16. During the telephone conversation between Trooper Walwark and Sgt. Greer *at approximately 2:15 A.M.*, the two officers discussed the time that had lapsed since the discovery of the collision.

20. In Sgt. Greer's experience, *it takes approximately two hours from the time the State Patrol begins its process to put together an affidavit to the time that the search warrant is granted.* Additionally, *Trooper Walwark would have to physically leave the defendant unattended to go out to his patrol vehicle to access his computer to prepare the search warrant affidavit.*

21. Prior to speaking with Sgt. Greer at *approximately 2:15 A.M.*, Trooper Walwark had received indication from the hospital that the defendant was ready to be discharged. Therefore, *had Trooper Walwark went outside to his patrol car to prepare the search warrant affidavit, there was no assurance that the defendant would have stayed inside the hospital.*

CP 264-265.

The highlighted portions of these findings can be broken into the following four categories: (1) that at approximately 2:15 am Sgt. Greer and Trooper Walwark spoke on the phone and determined to take blood from the defendant, (2) that the officers did not develop probable cause to arrest the defendant until 2:15 am, (3) that in Sgt. Greer's opinion it takes two hours to prepare an affidavit and get a search warrant, and (4) that the defendant would have been free to leave while Trooper Walwark was preparing the

affidavit in support of the warrant. As the following explains, none of these findings is support by substantial evidence presented at the first suppression motion.

In his testimony on direct at the first suppression motion Sgt. Greer testified that he told Trooper Walwark to obtain a blood draw from the defendant at “just after 2:00 a.m., I believe.”

Q. Okay. And Sergeant Greer, to your recollection, what time did you advise Trooper Walwark to go ahead and obtain the blood draw?

A. It was just after 2:00 a.m., I believe.

RP 12/9/13 19.

On cross-examination defense counsel challenged Sgt. Greer on his lack of specificity on time. RP 12/9/13 26. After having Sgt. Greer refresh his recollection with his contemporaneous police report, Sgt. Greer revised his testimony and admitted that by 2:05 a.m. he, the officers on the scene and Trooper Walwark had decided to draw the defendant’s blood. This testimony was as follows:

Q. And according to your report, at least by 2:05, the decision had been made by you and the other deputies and Trooper Walwark, that we’re going to take the blood .

A. Yes , sir.

RP 12/9/13 26.

Thus, in this case, substantial evidence does not support the court’s

finding that this event occurred at 2:15 am. Similarly, the evidence does not support the court's finding that the officers did not establish probable cause to arrest the defendant and draw his blood until 2:15 a.m. In fact, on cross-examination Sgt. Greer admitted that by 1:05 they had the "impression" that the defendant was the driver and that he was "impaired," and that "at about around 2:00 a.m. we probably had enough to write a search warrant." RP 12/9/13 24, 25. Thus, the court's finding that the officers did not develop probable cause is also not supported by substantial evidence.

In its findings the court also states that in Sgt. Greer's opinion it takes around two hours to prepare a search warrant affidavit. In fact, Sgt. Greer did not make any such claim. Rather, as the following extract from his testimony at the suppression motion clarifies, his estimate of time was one hour. He stated: "But in a normal investigation for something like that , it would take the trooper maybe an hour or so to write the warrant." RP 12/9/13 16-17.

The trial court's finding on this fact was not only not supported by substantial evidence, but it ignored the fact that neither officer needed to write out an affidavit in order to obtain a search warrant. Rather, all the officers had to do was call a judge, who was supposed to be available, have the judge administer the oath to the officer, record the conversation, and then tell the judge the facts that the officer believed established probable case. Within a minute or two of getting the judge on the phone and getting the

conversation recorded the judge would no doubt have found probable cause and told the officers to sign his name on a warrant authorizing the blood draw.

Finally, in this case the court found that one of the exigent circumstances that justified the failure to even seek a search warrant was the fact that the defendant was about to be discharged from the hospital and would have been able to leave the scene. This finding is not supported by the record because it ignores the fact that once the officers developed probable cause to get the search warrant they also had probable cause to arrest the defendant. Thus, all Trooper Walwark had to do was enter the hospital room, place the defendant under arrest, and handcuff him to the bed. At that point the officer could have asked the hospital personnel to prepare for the blood draw while he called a judge and gave him a few minutes of sworn testimony sufficient to get the judge to issue the warrant.

II. UNDER *MISSOURI v. MCNEELY* EXIGENT CIRCUMSTANCES DID NOT JUSTIFY THE OFFICERS' DECISION TO TAKE THE DEFENDANT'S BLOOD WITHOUT FIRST SEEKING A TELEPHONIC SEARCH WARRANT AND THE TRIAL COURT THEREBY ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE RESULTS OF THAT WARRANTLESS BLOOD DRAW.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As

such, the courts of this state will suppress the evidence seized as a fruit of that warrantless search unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

One of the recognized exceptions to the warrant requirement falls under the category of “exigent circumstance,” under which there exists some exigency that excuses the officer’s failure to seek a judicially authorized warrant. *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009). As with all other exceptions to the warrant requirement, the state bears the burden of establishing that an exception applies. *State v. Kirwin*, 165 Wn.2d 818, 824, 203 P.3d 1044 (2009).

In *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the United States Supreme Court addressed the *per se* exception to the warrant requirement it had found in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), which allowed the police to draw blood from DUI suspects based upon its finding that the natural dissipation of alcohol in the human body constituted exigent circumstances. In *McNeely* a Missouri police officer had arrested a defendant early one morning on a charge of driving while intoxicated and took him to the hospital for a blood

draw after the defendant stated that he would not submit to a breath test. The trial court later granted a motion to suppress the results of the blood test and the Missouri Supreme Court affirmed, finding that the natural dissipation of alcohol in the blood was not a *per se* exigent circumstance justifying the failure to seek a warrant. The United States Supreme Court agreed and rejected the state's argument for a *per se* finding that the dissipation of alcohol always constituted an exigent circumstance that excused the failure to get a warrant.

In its decision the court noted that one of the reasons to reject the *per se* rule advanced by the state was the fact that almost all jurisdictions had long had in place a mechanism for quickly obtaining electronic warrants at all times of day and night. The court noted the following on this issue:

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. See 91 Stat. 319. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means." Fed. Rule Crim. Proc. 4.1. States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications

for drunk-driving investigations.

Missouri v. McNeely, 133 S. Ct. at 1561-1562 (footnotes omitted).

Indeed, the same mechanism also exists in Washington State for obtaining telephonic warrants based solely upon the recorded testimony of a police officer to a magistrate over the telephone. This is found in CrR 2.3(c), which states:

(c) Issuance and Contents. A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. The evidence in support of the warrant must be in the form of . . . sworn testimony establishing the grounds for issuing the warrant and may be provided to the court by any reliable means. Any sworn testimony must be recorded The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court's authorization may be communicated by any reliable means. . . .

CrR 2.3(c).

Under this rule there is no need for a police officer to sit and write out an affidavit or affirmation in support of a request for a search warrant authorizing a blood test. Thus, in the case at bar, all either Sgt. Greer or Trooper Walwark needed to do, once they determined at 2:05 am that they had probable cause, was to take three steps. The first was to place the defendant under arrest and handcuff him to his hospital bed. The second was to tell the hospital prepare to draw the defendant's blood. The third was to

then call the magistrate on duty for that very purpose, have the magistrate administer an oath, turn on a recording device and then give the relevant facts to the magistrate, which were as follows: (1) the defendant was the driver of a vehicle that went off the road at a high rate of speed as indicated by the skid marks and the condition of the vehicle, (2) there were alcohol bottles at the scene, (3) the passenger was killed as a result of the accident, and (4) the defendant smelled of alcohol, his eyes were bloodshot and watery, had slurred speech, and admitted drinking alcohol, smoking marijuana and using methamphetamine that day. There was nothing particularly difficult, confusing or complicated about this process. As the Supreme Court recognized in *McNeely*, in the context of “drunk-driving investigations” the evidence offered to establish probable cause is simple.

In spite of the ease with which a warrant could have been obtained between the determination of probable cause at 2:05 a.m. and the drawing of blood at 2:37 a.m., neither trooper made any attempt to get a search warrant. While Trooper Walwark was probably in the better position to get the warrant as found by the trial court, this fact does not mean that Sgt. Greer could not have obtained the telephonic warrant himself. As CrR 2.3(c) specifically holds, and as our case law confirms, Sgt. Greer was free to use hearsay in recorded testimony in support of the warrant and tell the magistrate that Trooper Walwark had told him that the defendant smelled of alcohol, that his

eyes were bloodshot and watery, that his speech was slurred and that he had admitted using alcohol, marijuana and methamphetamine that day.

In this case the failure of either trooper to seek a telephonic warrant vitiates any claim that exigent circumstances justified the warrantless blood draw. As a result, the trial court erred when it denied the defendant's motion to suppress the results of the blood test.

III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY (1) FAILED TO OBJECT TO THE INTRODUCTION OF 16 GRUESOME PHOTOGRAPHS OF THE DECEDENT, AND (2) FAILED TO MOVE TO SUPPRESS THE RESULTS OF THE BLOOD TEST UNDER *STATE V. MARTINES*.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense

attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon (1) trial counsel's failure to move to exclude 16 highly inflammatory, gruesome photographs of the decedent the state introduced solely for the purpose of inflaming the jury's passion, and (2) trial counsel's failure to move to suppress the results of the blood test under the decision in *State v. Martines*. The following sets out these arguments.

(1) Trial Counsel's Failure to Object to the Introduction of 16 Gruesome Photographs of the Decedent Denied the Defendant Effective Assistance of Counsel.

Gruesome photographs are admissible in a jury trial if (1) they are

accurate, and (2) if their probative value outweighs their prejudicial effect. *State v. Sargent*, 40 Wn.App. 340, 698 P.2d 598 (1985); *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). As the Washington Supreme Court notes in *Crenshaw*, “[p]rosecutors as well as trial courts must exercise their discretion in the use of gruesome photographs.” *State v. Crenshaw*, 98 Wash.2d at 807. Consequently, when proof of the criminal acts at issue may be amply proven through testimony and noninflammatory evidence, prosecutors and the court must “use restraint in their reliance on gruesome and repetitive photographs.” *Id.*

As with most other evidentiary decision, the admissibility of photographs is generally within the sound discretion of the trial court. *State v. Sargent*, 40 Wn.App. at 347; *State v. Crenshaw*, 98 Wn.2d at 807. As a result, the decision to admit photographs will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 651, 904 P.2d 245 (1995); *State v. Sargent*, 40 Wn.App. at 347. However, if “it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury’s passion,” then the appellate courts will find an abuse of discretion and grant a new trial. *State v. Daniels*, 56 Wn.App. 646, 649, 784 P.2d 579, *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990).

In the case at bar the state introduced 16 digital color photographs into

evidence while at the same time projecting those computer files onto a screen in the courtroom. Every single one of these photographs shows a view of the decedent or one of his body parts. While every one of these digital photographs is shocking in its own right, the photographs marked as Exhibits 9, 10, 11, 12, 79, 86, 87 and 89 are particularly gruesome. Exhibit 11 is a closeup of the decedent's upper body on the ground with mouth agape and blood covering the upper half of his head. Exhibit 12 is essentially the same photograph with the decedent now in a body bag with a large smear of blood above his bloody hair, face and ear. Exhibit 11 and 12 are essentially repeats of each other, showing the decedent's body being placed in a white body bag with the stump of his mangled right arm and right foot prominently displayed. Exhibit 79 shows the decedent laying on the ground next to the wrecked vehicle again with the stump of his mangled right arm displayed prominently.

However, by far the two most shocking photographs from the whole series are exhibits 86 and 87. Exhibit 86 was entitled "Autopsy photo of bottom of skull." The pathologist took it from a position directly behind the decedent's head with the defendant supine on the examining table. The photograph shows a view from the top of the decedent's head with his scalp peeled back and hanging from the back of his head. The top of the skull has been removed as has the brain. It is particularly shocking to view and vies with Exhibits 87 as the most gruesome of the whole set.

Exhibit 87 was a photograph entitled “Autopsy photo of inside of head.” *See* Exhibit 87. The pathologist took it from a position slightly behind and to the right of the decedent, who was placed supine on the examining table. *Id.* It shows the decedent’s scalp cut at the forehead and peeled back until it droops on the examining table. *Id.* The photograph shows that the pathologist has also cut the decedent’s dura, the membrane that covers the brain, and has peeled it back exposing the top of the decedent’s brain. *Id.* In the photograph the dura also hangs down but not all the way to the examining table. *Id.* The skull cap, which the pathologist had previously sawed out of the decedent’s skull to expose the brain, is shown sitting in two pieces in the background on the left. *Id.*

Finally, exhibit 89 is entitled “Autopsy photo of bloody face.” The pathologist took this photograph from slightly above, behind and to the right of the decedent, who had been placed supine on the examining table but not yet unclothed. *See* Exhibit 89. It shows the decedent’s fairly long hair covered with blood and debris with a large amount of blood having streamed down the decedent’s face. *Id.* In the photograph the decedent is shown with the right eye open staring fixedly with mouth agape. *Id.* The left eye is either shut or obscured with blood or both. *Id.*

Here are some of the words the court used to describe these photographs having only reviewed a description of their content but without

even having seen them: “dramatic,” “potential to cause a reaction in a juror,” and “shocking.” RP 10, 12, 130-14. The court then used the following words to describe these photographs after having viewed them, which court insisted on doing prior to their admission into evidence in spite of defense counsel’s failure to object: “emotional,” “graphic,” “disturbing,” and “troubling.” RP 314, 320, 321 and 377. Apparently the court’s assessment was correct, because when the prosecutor projected Exhibits 87 and 89 on the screen in the courtroom Juror No. 8 fainted and fell out of his chair. Eventually the court excused this juror from further service when he explained that he could only continue if he didn’t have to look at any more of the state’s “gruesome” photographs. RP 404-405.

In this case the irony of bombarding the jury with 16 “shocking,” “emotional,” “graphic,” “disturbing,” “troubling” and “gruesome” photographs is that under the facts of this case they were all essentially irrelevant. Under ER 401, “relevance” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, for evidence to be relevant, there must be a “logical nexus” between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State*

v. Demos, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. In addition, under ER 403 the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and,

where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

In the case at bar the defense did not dispute that the decedent died as a result of the vehicle accident. Indeed, defense counsel stated as follows:

MR. HACK: Most of the case is probably not – I don't think the deliberations are going to focus on the cause of death here. I think that's undisputed. I don't think looking at the photos is really going to be a big part, if any, part of deliberations.

RP 404-405.

Given defense counsel's admission as well as the overwhelming weight of the evidence, there was no reason at all to introduce any of the "shocking," "emotional," "graphic," "disturbing," "troubling" (the court's words) and "gruesome" (the juror's words) photographs into evidence. The pathologist's testimony was itself more than graphic enough without the photographs and it certainly proved the fact at issue that the defense did not even dispute. Neither was there any possible tactical reason for defense counsel to refrain from bringing a motion *in limine* to exclude all of the photographs given their marginal relevance and their overwhelming prejudicial effect. In fact, a careful review of defense counsel's statements at the beginning of the trial reveals that he apparently did not know that he could object. When the court asked him about the admission of these

photographs counsel responded as follows:

THE COURT: Mr. Hack, your thoughts ?

MR. HACK: The photos at the scene where the victim was found, they are not terribly shocking, although they might shock some people. Some of the autopsy show the immediate cause of death was traumatic head injury, although the victim received other injuries. I don't have an objection to the State showing photos of the actual skull fracture, and, unfortunately, you cannot really see the skull fracture from the outside.

So the State is proposing to show the skull fracture and how far it went into the skull after the scalp had been cut and peeled back and the brain taken out. It seems to me that the State is probably within its right, given its burden of proof, to show at least those photos because, like I said, it's difficult. You cannot really see the skull fracture from the outside. That's it. We have already discussed all of the other autopsy photos. I think the State is in agreement there is no need to show those.

RP 12-13.

These comments reveal that counsel simply did not understand that he had a basis to object. Thus, given the "shocking," "emotional," "graphic," "disturbing," "troubling" and "gruesome" nature of the photographs, trial counsel's failure to move *in limine* to exclude them fell below the standard of a reasonable prudent attorney, as did his failure to seek a mistrial after Juror No. 8 passed out after viewing the exhibits. In addition, this failure undermines confidence in the outcome of the trial. As a result, trial counsel's failure to move to exclude these photographs and failure to move for a mistrial after one of the jurors passed out after seeing these photographs

denied the defendant effective assistance of counsel.

(2) Trial Counsel's Failure to Move to Suppress the Results of the Blood Test under the Decision in State v. Martines Denied the Defendant Effective Assistance of Counsel.

In *State v. Martines*, 182 Wn.App. 519, 331 P.3d 105 (2014), witnesses saw the defendant drive his sport utility vehicle erratically on State Route 167, saw him veer into another vehicle, careen off the highway, bounce off a barrier, and then roll over. A Washington State Trooper who responded to the accident arrested the defendant for driving while intoxicated after determining that the defendant smelled of alcohol, had bloodshot and watery eyes, and stumbled when he walked. About one hour after the arrest the Trooper obtained and executed a warrant allowing him to take blood samples from the defendant for testing. Those tests later revealed that the defendant's blood alcohol reading was .121 percent and that he had also diazepam in his blood. The state later charged the defendant with felony driving while intoxicated.

Prior to trial the defendant moved to suppress the results of the blood test, arguing that (1) the court did not have probable cause to issue the warrant authorizing the blood draw, and (2) that while the warrant authorized testing for alcohol it did not authorize testing for drugs. Ultimately the trial court denied the motion. The defendant was later convicted following trial. On appeal the defendant renewed his first argument that there was no

probable cause to justify issuance of the warrant. However, he also argued that the trial court erred in denying the motion to suppress because the warrant did not authorize the testing of the blood, which the defendant argued was a separate search distinct from the seizure of the blood.

The state responded to the defendant's second argument by citing *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003) and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006). In *State v. Cheatam, supra*, a police officer examined a defendant's shoes which were part of his jail inventory and used the tread pattern to connect the defendant to a separate offense. The defendant then unsuccessfully sought to suppress this information. The Washington Supreme Court eventually held that once the state seizes property from a defendant booked into jail and places it in an inventory, that defendant loses any privacy interest sufficient to prevent the police from later examining those items.

In *State v. Gregory, supra*, the police had previously obtained the defendant's blood and tested it for the purpose of extracting that defendant's DNA profile. The defendant had not objected to either the drawing or testing of his blood. The police were later able to match that profile to DNA left at a murder scene. When the defendant was charged with that crime he moved to suppress, arguing that the police had violated his privacy interests when they compared his DNA profile to the evidence left at the new crime scene

because they had failed to get a warrant to authorize their actions. Ultimately the court rejected this argument, holding that once a suspect's DNA profile was lawfully in the State's possession, the State need not obtain an independent warrant to compare that profile with new crime scene evidence.

Ultimately Division I of the Court of Appeals rejected the state's arguments grounded in *Cheatam* and *Gregory* and found that a defendant who is subjected to a judicially authorized blood draw retains a privacy interest in the results of any testing of that blood. The court held:

Physical characteristics which are knowingly exposed to the public are not subject to Fourth Amendment protection. Thus, one has no reasonable expectation of privacy in one's voice, fingerprints, handwriting, or facial characteristics.

Blood is not like a voice or a face or handwriting or fingerprints or shoes. The personal information contained in blood is hidden and highly sensitive. Testing of a blood sample can reveal not only evidence of intoxication, but also evidence of disease, pregnancy, and genetic family relationships or lack thereof, conditions that the court in *Skinner* referred to as "private medical facts." *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402.

Citizens of this state have traditionally held, and should be entitled to hold, this kind of information safe from governmental trespass. Consistent with *Skinner* and *Robinson*, we conclude the testing of blood intrudes upon a privacy interest that is distinct from the privacy interests in bodily integrity and personal security that are invaded by a physical penetration of the skin. It follows that the testing of blood is itself a search, and we so hold.

State v. Martines, 182 Wn. App. 519, 530, 331 P.3d 105, review granted, 339 P.3d 634 (Wash. 2014); (some citations and footnotes omitted); (citing

Skinner v. Ry. Labor Exec's Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (the taking of a blood sample constitutes an invasion of privacy and must comport with the requirements of the Fourth Amendment)); (also citing *Robinson v. City of Seattle*, 102 Wn.App. 795, 10 P.3d 452 (2000) (the taking of a urine sample involves two separate privacy invasions: (1) the taking of the sample, and (2) the testing of the sample.))

Once the court found an independent privacy interest in the testing of the blood sample taken from the defendant the court ordered the results of that test suppressed because the police had invaded that privacy interest with the benefit of a warrant or an exception to the warrant requirement. As a result, the court reversed the conviction and remanded for a new trial with instructions to grant the motion to suppress.

In the case at bar the same result applies. In this case the police did not obtain a warrant authorizing the testing of the defendant's blood. Thus, had defendant's counsel simply moved to suppress on this basis, the trial court would have been compelled by the decision in *Martines* to grant the motion. Given that defense counsel had twice unsuccessfully attempted to suppress the results of the blood test there should be no credible argument that the decision to refrain from arguing from *Martines* was tactical in nature. Rather, what probably happened was that defense counsel was simply unaware of the decision in *Martines*, since it was published only a few

months prior to trial in this case. However, this fact does vitiate the conclusion that trial counsel's failure to argue from it fell below the standard of a reasonable prudent attorney.

In addition, a careful review of the evidence in this case reveals that trial counsel's failure to get the results of the blood test suppressed undermines confidence in the outcome of the trial, particularly on the first alternative method of committing the offense. As a result, trial counsel's failure to argue from *State v. Martines* denied the defendant effective assistance of counsel entitles him to a new trial.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT ADDRESSING THE DEFENDANT'S ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence 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.

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has

authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40,

40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court summarily imposed legal financial obligations without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not preserve the statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation

to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

State v. Blazina, at 11-12.

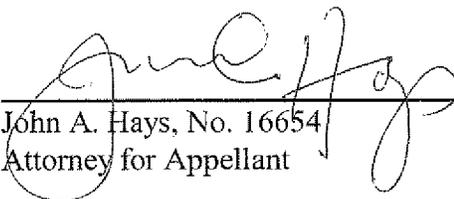
In this case the record reveals that the trial court imposed a 124 month sentence on a 21-year-old indigent defendant and then imposed legal financial obligations without any consideration of the defendant's ability to pay. Appellant argues that this case would also be appropriate for this court to exercise its discretion and to review the issue of legal-financial obligations.

CONCLUSION

This court should reverse the defendant's conviction and remand for a new trial with instructions to grant the defendant's motion to suppress the results of the blood test.

DATED this 16th day of June, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

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**EVIDENCE RULE 401
DEFINITION OF “RELEVANT EVIDENCE”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**ER 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS
OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

CrR 2.3
SEARCH AND SEIZURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by the court upon request of a peace officer or a prosecuting attorney.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents. A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. The evidence in support of the warrant must be in the form of affidavits, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant and may be provided to the court by any reliable means. Any sworn testimony must be recorded and made part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court's authorization may be communicated by any reliable means. A record shall be made of any additional evidence on which the court relies. The warrant shall be directed to any peace officer and shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. The warrant shall designate the court to which the warrant shall be returned. The warrant may be served at any time.

(d) Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be

accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

(f) Searches of Media.

(1) Scope. If an application for a search warrant is governed by RCW 10.79.015(3) or 42 U.S.C. §§ 2000aa et seq., this section controls the procedure for obtaining the evidence.

(2) Subpoena Duces Tecum. Except as provided in subsection (3), if the court determines that the application satisfies the requirements for issuance of a warrant, as provided in section (c) of this rule, the court shall issue a subpoena duces tecum in accordance with CR 45(b).

(3) Warrant. If the court determines that the application satisfies the requirements for issuance of a warrant and that RCW 10.79.015(3) and 42 U.S.C. §§ 2000aa et seq. permit issuance of a search warrant rather than a subpoena duces tecum, the court may issue a warrant.

RCW 10.01.160

Costs – What constitutes – Payment by defendant – Procedure – Remission – Medical or Mental Health Treatment or Services

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

(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 or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

(5) Except for direct costs relating to evaluating and reporting to the court, prosecutor, or defense counsel regarding a defendant's competency to stand trial as provided in RCW 10.77.060, this section shall not apply to costs related to medical or mental health treatment or services a defendant receives while in custody of the secretary of the department of social and health services or other governmental units. This section shall not prevent the secretary of the department of social and health services or other governmental units from imposing liability and seeking reimbursement from a defendant committed to an appropriate facility as provided in RCW 10.77.084 while criminal proceedings are stayed. This section shall also not prevent governmental units from imposing liability on defendants for costs related to providing medical or mental health treatment while the defendant is in the governmental unit's custody. Medical or mental health treatment and services a defendant receives at a state hospital or other facility are not a cost of prosecution and shall be recoverable under RCW 10.77.250 and 70.48.130, chapter 43.20B RCW, and any other applicable statute.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 47025-0-II

vs.

**AFFIRMATION
OF SERVICE**

DYLAN WOMER,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Carol Laverne
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lavernc@co.thurston.wa.us
2. Dylan Womer, No.379589
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Dated this 16th day of June, 2015, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

June 16, 2015 - 5:18 PM

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Court of Appeals Case Number: 47025-0

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