

No. 47025-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DYLAN WOMER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge  
Cause No. 13-1-00624-7

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BRIEF OF RESPONDENT

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the findings of fact entered by the court following the defendant's motion to dismiss were supported by substantial evidence.

2. Whether exigent circumstances existed which justified the warrantless taking of a blood sample from the defendant.

3. Whether defense counsel's performance was constitutionally deficient because he failed to move to exclude photographs of the deceased victim and failed to move to suppress the blood test on the ground that a separate warrant for testing was not obtained.

4. Whether the trial court erred by imposing mandatory legal financial obligations on the defendant without inquiring into his ability to pay.

#### B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive facts of the case with some exceptions. Womer states that Deputy Adams, after hearing a vehicle speeding north on Cooper Point Road and stopping another speeder to issue a warning, then drove north in an attempt to find the first vehicle. Appellant's Opening Brief at 3-4. Deputy Adams testified that he was not attempting to catch up to that vehicle, but was resuming his routine patrol. RP 329.<sup>1</sup>

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<sup>1</sup> Unless otherwise noted, references to the Verbatim Report of Proceedings are to the four volume trial transcript dated December 8-11, 2014.

Womer states that Trooper Walwark arrived at the hospital at exactly 2:00 a.m. Appellant's Opening Brief at 5. Walwark testified that he arrived "about" 2:00 a.m. RP 208.

Womer states that Sgt. Bassett estimated the speed of the defendant's vehicle to be between 61 and 77 miles per hour just prior to beginning the skid. Appellant's Opening Brief at 7. In fact, Bassett testified that the car would have been going faster than that; at a speed of 61 to 77 mph the car would have been able to stop without colliding with anything. RP 435, 437, 444-45.

The State accepts the appellant's statement of the procedural facts.

### C. ARGUMENT.

1. The record contains sufficient evidence to support the trial court's findings of fact following the hearing on Womer's motion to suppress the blood test results.

Womer challenges the trial court's Findings of Fact 9, 13, 14, 16, and 21, CP 264-65, arguing that the court was incorrect in identifying 2:15 a.m. as the time that Washington State Patrol Sgt. Greer developed probable cause to support obtaining blood from him. Appellant's Opening Brief at 25-29. Those Findings of Fact all contain the phrase "approximately 2:15 A.M.," or "between 1:15 and 2:15 A.M." CP 264-65. Womer then cites to the testimony of Sgt.

Greer to argue that probable cause was actually developed much earlier. He quotes Greer's testimony that by 2:05 he had made the decision to obtain a blood sample from the defendant. Appellant's Opening Brief at 27, 12/09/13 RP 26. The difference between 2:05 and "approximately 2:15" does not seem particularly significant.

Womer's primary argument, however, is that probable cause was actually established by 1:05 a.m. Appellant's opening brief at 28. That was not the evidence.

On cross-examination during the suppression hearing, Greer testified as follows:

Q: Okay. So if we take your educated guess that the accident was about 12:30—

A: Um-hmm.

Q: --by 1:05, so in 35 minutes, you already had the impression not only of who the driver was but that the driver was possibly impaired?

A: That's what was told to me, yes.

Q: Okay. Based on finding an alcohol bottle at the scene?

A: Correct.

Q: Okay. Did you not have enough evidence at that time to apply for a warrant, 35 minutes into this investigation?

A: I don't think so. I mean, its—when I got the call and we got down there, I didn't—we actually didn't get on scene until 2:00 a.m. So at 2:00 a.m., after we discussed it and we confirmed those suspicions that we were told, then yeah, at around 2:00 a.m. we probably had enough to write a search warrant. But just to go off of what someone else says is, well, we found this bottle and the driver, who we think is the driver, is transported, and here's the passenger who is deceased, we still, as the patrol, have to do our own investigation to make sure that those suspicions are accurate.

12/09/13 RP 25-26.

Womer contends that it was unreasonable for the trial court to accept Greer's testimony that he did not form probable cause for the blood draw until after he had been to the scene and conducted at least a minimal investigation of his own. Womer does not assign error to the court's Finding of Fact 1, that the State Patrol had the responsibility to investigate serious traffic collisions that occurred in Thurston County. CP 263. Unchallenged findings of fact are verities that are binding on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

A search warrant must be based upon probable cause, which is defined as "the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the

indicated crime. It is only the probability of criminal activity and not a prima facie showing of it which governs the standard of probable cause." State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001) (citing to State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981)). There can be a shadowy line between suspicion and probable cause and that line must be drawn in light of the particular situation and with account taken of all the circumstances. Brinegar v. United States, 338 U.S. 160, 176-77, 69 C. Ct. 1302, 93 L. Ed. 1879 (1949).

Greer would reasonably believe that the Thurston County Sheriff's deputies who were at the scene were not investigating. He testified that he sent Trooper Walwark to the hospital, where Womer had been transported, because the deputies were there to secure the scene and conduct traffic control. 12/09/12 RP 14-15. They were not there to investigate. And while the deputies may have relayed some information, it was not unreasonable for Greer to determine for himself the reality of the situation before he made a decision to obtain a blood sample from Womer. The evidence does not support Womer's argument that probable cause was established at 1:05 a.m., and it does support the court's finding that "probable cause was not developed until a few minutes prior to Sgt.

Greer contacting Trooper Walwark at approximately 2:15 a.m.”  
Finding of Fact 14; CP 264.

Womer also argues that the trial court was unreasonable to accept Greer’s testimony that it would have taken Walwark some time to prepare an affidavit for a search warrant and obtain a warrant. Appellant’s Opening Brief at 28. He maintains that a written affidavit is unnecessary for a telephonic search warrant, which is true. See State v. Ettenhofer, 119 Wn. App. 300, 79 P.3d 478 (2003). It is, however, reasonable to expect that an officer seeking a telephonic search warrant would reduce to writing the information that goes into an affidavit so that he could be sure of including everything relevant. It is common sense that actions done in haste often result in mistakes. Further, there is apparently a WSP policy requiring written affidavits even for telephonic warrants. Walwark testified that it was his understanding that such an affidavit was required. 12/09/13 RP 46. During the suppression hearing no one, including Womer, questioned the troopers’ testimony that it was necessary to write an affidavit and that doing so would take approximately an hour. *E.g.*, 12/09/13 RP 17.

Womer further asserts that it was unreasonable for the court to accept the testimony that it can take a significant amount of time

to contact a judge at night for a telephonic warrant. Appellant's Opening Brief at 28. He claims that "all the officers had to do was call a judge, who was supposed to be available, . . ." Id. He offers no evidence for this assertion, nor is there anything in the record to support it. The only testimony regarding the availability of a judge came from Greer, who said that in his experience it can take an hour "or so" to locate a judge. 12/09/13 RP 17. He was aware of times when officers have spent "many hours" unsuccessfully searching for a judge. 12/09/13 RP 18. Womer produced no evidence that a judge would have been immediately available and it was not unreasonable for the trial court to accept Greer's testimony.

Womer challenges the trial court's finding that one of the exigencies of this situation was that the defendant was about to be discharged from the hospital and could have left before the blood draw. Appellant's Opening Brief at 29. He argues that if the trooper had probable cause to get a search warrant he also had probable cause to arrest and could have handcuffed Womer to the bed. Appellant's Opening Brief at 29. The notion of leaving an arrested suspect handcuffed to a hospital bed while the arresting officer goes to another location to obtain a warrant is simply

nonsensical. Hospital staff people are not law enforcement, and it is certainly reasonable to infer that a person under arrest would not be left unattended by a law enforcement officer, particularly attached by handcuffs to a piece of furniture while the key to the handcuffs is somewhere else. It was undisputed that the State Patrol was seriously understaffed that evening and there were no other officers to guard an arrestee. 12/09/13 RP 13, 18, 43. Womer does not assign error to Findings of Fact 4 and 5, that Walwark was the only trooper available in Thurston County on that evening. No other law enforcement was present at the hospital. 12/09/13 RP 42.

Womer also challenges Finding of Fact 20, claiming that the court found it would take two approximately two hours to prepare a search warrant, whereas the trooper testified that it would take about an hour. Appellant's Opening Brief at 28. This misquotes the Finding of Fact. The court actually found that "it takes approximately two hours *from the time the State Patrol begins its process to put together an affidavit to the time the search warrant is granted.*" CP 265, emphasis added. Greer testified that it would take "maybe an hour" to write a warrant and calling the judge could take another hour. 12/09/13 RP 17. That totals approximately two hours.

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 685, 314 P.2d 622 (1957).

The evidence presented at the suppression hearing supported the court's Findings of Fact. Womer argues that the State Patrol Troopers should have relied on unsubstantiated information and rushed to get a search warrant before carefully assessing the situation. He further maintains that the court should have disregarded the testimony regarding the procedures for obtaining a warrant and the possible availability of a judge to issue one and instead assumed facts which were not in evidence. There was, in fact, substantial evidence to support the Findings of Fact.

Even if the court had erred in finding the results of the blood test admissible, it would have been harmless error. An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially

affected.” State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Womer does not dispute that probable cause existed to justify taking a sample of his blood and he agrees that a warrant, if requested, would have been granted. Appellant’s Opening Brief at 29. He has not argued that he was prejudiced in any way by the absence of a warrant, and indeed he was not. With or without a warrant, his blood would have been drawn and tested and the results would have been the same.

Even constitutional error is subject to the harmless error test. A constitutional error is harmless if the State “established beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.” State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). “Where there is overwhelming evidence to support the jury’s verdict, . . . a constitutional error can be said to be harmless if it is so established beyond a reasonable doubt.” State v. Counts, 99 Wn.2d 54, 659 P.2d 1087 (1983).

Womer was charged under all three alternative means of RCW 46.61.520—being under the influence of intoxicating liquor or drugs, driving in a reckless manner, and driving with disregard for

the safety of others. CP 163. The jury was instructed on all three alternatives. CP 200. The jury found that he was guilty of all three alternatives. CP 215. The results of the blood test established only the first alternative. Even without those results, he would have been found guilty of the other two alternatives. He suffered no prejudice from the evidence of the blood alcohol content.

2. The holding of Missouri v. McNeely does not preclude the warrantless taking of a blood sample under the circumstances of this case.

Womer argues that the evidence did not support the warrantless seizure of his blood sample based upon exigent circumstances. While findings of fact made following a motion to suppress are reviewed under the substantial evidence standard, conclusions of law are reviewed de novo. State v. Hinshaw, 149 Wn. App. 474, 752, 205 P.3d 178 (2009). The trial court entered Conclusion of Law 5, which reads:

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 day that the crash occurred; the time that had already elapsed following [sic.; presumably the court meant "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.

CP 266.

Although Womer does not specifically assign error to the trial court's conclusions of law, he argues that there were no exigent circumstances. He bases his argument on a theoretical set of circumstances which were not shown to exist, and the holding of Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

Once again, Womer claims that at 2:05 a.m. the trooper could have simply handcuffed him to a bed in the emergency room, instructed a phlebotomist to stand by with needle in hand, called a judge who would be immediately available, turned on a recording device, and told the judge the facts of the case. Appellant's Opening Brief at 32-33. As argued before, common sense says that this is totally impracticable, and the record does not support a conclusion that it was possible.

Womer's reliance on McNeely is misplaced. The holding of that case is that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." McNeely, 133 S. Ct. at 1568. Womer's argument seems to imply that the McNeely court held that because a procedure exists to obtain a telephonic or electronic warrant there can never be exigent

circumstances involving the dissipation of alcohol in the body. That is not so.

[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*,<sup>2</sup> it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

McNeely, 133 S. Ct. at 1563.

[B]ecause “[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction,” . . . we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delays under the circumstances. Reviewing courts in turn should assess those judgments “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

Id. at 1564, quoting the dissent of Chief Justice Roberts and Ryburn v. Huff, 565 U. S. \_\_\_\_, \_\_\_\_, 132 S. Ct. 987, 992, 181 L. Ed. 2d 966 (2012).

[T]he fact that a drunk-driving stop is “routine” in the sense that it does not involve “special facts,” . . . such as the need for the police to attend to a car accident, does not mean a warrant is required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way

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<sup>2</sup> Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances of the case.

....

[T]he metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. . . [F]or in every case the law must be concerned that evidence is being destroyed.

Id. at 1568.

In Womer's case, there were "other factors" to consider. This was a serious collision which resulted in a death. The State Patrol troopers did not simply ignore the warrant requirement. Greer was aware of the McNeely opinion, which had been issued a few days before this event. 12/09/13 RP 35. By the time he believed probable cause was established, an hour and a half had elapsed since the collision. He was worried about the evidence of alcohol in Womer's bloodstream dissipating. 12/09/13 RP 15, 35-36. Based upon his experience, it would take approximately an hour to prepare an affidavit for a search warrant; Walwark was the only officer available both to guard Womer and to obtain a warrant. 12/09/13 RP 16-17. Also based upon his experience, it could take

an hour, or even longer, to locate a judge and get a warrant authorized. 12/09/13 RP 17-18, 29. Greer made the reasonable judgment from his perspective on the scene, which the McNeely court expects of law enforcement officers, and made the judgment call that by the time a warrant could be obtained the alcohol on Womer's system would have dissipated to the point where it would have no evidentiary value.

Exigent circumstances are determined by considering the totality of the situation. State v. Smith, 165 Wn.2d 511, 518, 199 P.3d 386 (2009). While the dissipation of blood alcohol is not a per se exigency, it is one factor in assessing the reasonableness of a warrantless blood draw. McNeely, 133 S. Ct. at 1561-63. The troopers here were investigating a vehicular homicide, a serious offense. The combination of dissipating blood alcohol evidence connected with a serious offense has justified the warrantless, nonconsensual entry into a suspect's home in order to take a blood sample. State v. Komoto, 40 Wn. App. 200, 213, 697 P.2d 1025, *review denied*, 104 Wn.2d 1009 (1985).

In short, the evidence presented to the court justified a warrantless blood draw, and McNeely does not prohibit that result.

3. Womer was not denied effective assistance of counsel. Defense counsel had no basis upon which to object to the admission of the photographs of the victim. The court had entered an order authorizing the testing of the defendant's blood.

Womer argues that his trial counsel rendered ineffective assistance in two respects—by failing to object to the admission of photographs of the deceased victim during the testimony of the pathologist, and by failing to move to suppress the results of the blood test for lack of a warrant specifically authorizing testing of the defendant's blood.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn.2d 1012 (1974). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire

record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Prejudice occurs when but for the deficient performance, the outcome would have been different. Pirtle, 136 Wn.2d at 487.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696.

a. Photographs of the deceased victim.

Several photographs of the deceased victim, taken both at the scene of the collision and during autopsy, were admitted into evidence during the State's case in chief. They were gruesome. Womer did not object to them at trial.

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Womer is, therefore, raising this issue as a claim of ineffective assistance of counsel, which is a constitutional claim.

Photographs which accurately depict the subject matter and which are relevant to prove some fact in issue are admissible even if they are gruesome, as long as the probative value outweighs their prejudicial effect. State v. Crenshaw 98 Wn.2d 789, 806, 659 P.2d 488 (1983). Balancing the probative value versus any prejudicial effect lies within the discretion of the trial court, and its decision will be reversed only if it abused its discretion. State v. Adams, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), *death sentence reversed sub nom., Adams v. Washington*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971). Unless the record is clear that the primary reason for admitting gruesome photographs is to appeal to the passions of the jury, the trial court’s decision will not be reversed on appeal. State v. Daniels, 56 Wn. App. 646, 649, 784 P.2d 579 (1990).

Womer argues that the trial court found the photographs to be “emotional,” “graphic,” “disturbing,” and “troubling.” Appellant’s

Opening Brief at 39; RP 314, 320, 321, 377. The court did not, however, find them irrelevant, inflammatory, or prejudicial. The trial court inquired even before jury selection about "dramatic" photos, and counsel for both sides advised the court that they had reached agreement on which photos the State would be offering. RP 10-11. Defense counsel told the court he did not find the photos of the victim at the scene to be "terribly shocking." He had no objection to the photos depicting the skull fracture that were taken during the autopsy because the State had the burden to prove the manner of death. RP 12. "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 13. Defense counsel had no objection to the photographs that the State had indicated it wanted to admit, and would explore during voir dire any concerns the potential jurors had about seeing unpleasant photos. RP 13-14. The court requested to see "those types of photos" before they were shown to the jury. RP 14.

The trial court inquired again, just after the lunch break on the second day of trial, when the photos would be shown, and advised that he would be admonishing the spectators about showing a visible or audible reaction to them. RP 192-93. At the

close of the trial on that same day, the court again admonished the spectators that additional photos would be shown the following day and that if they could not control their reactions they should leave the courtroom. RP 314. On the third day of trial, December 10, 2014, the court warned the spectators again. RP 320. At the midmorning recess, the court again warned the courtroom spectators. RP 377. While the pathologist, Dr. Gina Fino, was testifying about the autopsy, using the photographs to illustrate her testimony, Juror No. 8 fainted. RP 395. The record reveals no reaction by anyone else in the courtroom.

After a brief recess, the court conducted an inquiry of the juror. He indicated that he “could handle” the earlier photographs, but the picture of the victim’s open skull “got to” him. RP 404. After Juror No. 8 indicated he could not look at the photographs during deliberation, the court granted defense counsel’s motion to excuse him and the alternate was seated. RP 406-09.

The State does not dispute that the photographs were gruesome. But gruesome is not the same as unfairly prejudicial. Womer’s argument seems to assume that because one juror fainted that the photos must necessarily have been intended to inflame the jury and cause them to convict him even if the

remaining evidence did not support a conviction. He has not raised a sufficiency of the evidence claim. Unless the record is clear that the primary reason for admitting gruesome photos is to inflame the passions of the jury, appellate courts will uphold the decision of the trial court to admit them. State v. Stackhouse, 90 Wn. App. 344, 357, 957 P.2d 218 (1998).

As much as courts should and do keep a trial clear of potentially prejudicial matter, this obligation, within our concept of a fair trial for an accused, must be applied with the realities of the facts which the state is required to prove. A bloody, brutal crime cannot be explained to a jury in a lily-white manner to save the members of the jury the discomfort of hearing and seeing the results of such criminal activity.

Adams, 76 Wn.2d at 656.

Womer further argues that the photographs were irrelevant because he did not dispute the cause of death. Appellant's Opening Brief at 41. However, Womer pled not guilty, and that put every element of the crime into issue. The State had the burden to prove every element of the offense even if the defense did not dispute one of them. In presenting its case, the State cannot anticipate that the defense will admit anything. Adams, 76 Wn.2d at 657. Photographs have probative value where they are used to

illustrate or explain the testimony of the pathologist performing the autopsy. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991).

It is apparent from the record cited above that defense counsel was aware of the State's burden and consulted with the prosecutor to limit the photographs that would be admitted. The court exercised supervisory control by viewing them before they were offered. Defense counsel provided very effective assistance, by narrowing down the number of photographs before trial to those he felt were not particularly shocking and those that were necessary for the State to prove its case, and by successfully moving to excuse the juror who fainted. RP 408-09.

b. Failure to move to suppress.

Womer also claims ineffective assistance of counsel because his defense attorney did not move to suppress the results of the blood test for failure of the police to obtain a warrant specifically for the testing of the blood. He cites to State v. Martines, 182 Wn. App. 519, 331 P.3d 105 (2014), *review granted*, 181 Wn.2d 1023, 339 P.3d 634 (2014).

In Martines, the court held for the first time that even if a blood sample is obtained following a search warrant, a separate warrant is required before the blood can be tested. The warrant

must specify what the test may search for. Id. at 530. The opinion in that case was issued on July 21, 2014. Womer was arrested, and his blood drawn, on April 25, 2013. 12/09/13 RP 38, 54. The trooper would have not had any reason to seek a search warrant for testing. The record does not indicate when a test was done on the blood, but it was tested, with blood alcohol results of .08 and a methamphetamine level of .23. CP 166.

On August 14, 2014, less than a month after the Martines decision, and well before the trial, the State obtained an Order Authorizing Testing of Defendant's Blood Samples. CP 120, Supp. CP 281-83. In that order, the trial court found probable cause for the search, and ordered that the blood be tested by specified methods and the testing be limited to searching for evidence of alcohol or drug intoxication. Supp. CP 281-82. Defense counsel did not object to the order, but preserved the right to move to suppress based on other grounds. CP 120; Supp. CP 283. A second test of the blood sample was conducted, with blood alcohol results of .071 and a methamphetamine level of .21. The difference in results from the first test was due to the degradation of the blood over time. CP 166.

Counsel was not ineffective for failing to move to suppress the blood test results based upon the lack of a warrant. The State obtained a court order, the equivalent of a warrant, as soon as practicable following the Martines decision. There would have been no grounds on which to object. Counsel successfully protected Womer's right to move for suppression on other grounds, and he did so. 12/09/13 RP; 10/13/14 RP. Womer is incorrect that his attorney was unaware of the Martines decision and that failure to seek suppression shows a deficiency in counsel's performance.

4. The financial obligations imposed by the trial court are all mandatory and the defendant's ability to pay is irrelevant at the time of imposition. If it was error for the court to fail to inquire into Womer's ability to pay, the error was harmless.

Womer challenges the imposition of legal financial obligations (LFOs), on the grounds that the court did not first conduct an individualized inquiry into his financial circumstances to determine his ability to pay them. It is true that the court imposed a \$500 crime victim fund assessment, a \$200 filing fee, a \$100 DNA fee, and restitution without addressing Womer's ability to pay. 12/23/14 RP 40-41.

Womer anticipates an argument from the State that because he did not object at sentencing he failed to preserve the issue for

appeal. Appellant's Opening Brief at 49-50. However, Womer not only failed to object, but his attorney specifically waived an objection. ("I have no basis to object to what the State's asking with respect to other restitution and the standard legal financial obligations, et cetera.") 12/23/RP 37.

Womer cites to State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), to support his argument that this court should review his claim. Appellant's Opening Brief at 49-50. In that case the Supreme Court exercised its discretion under RAP 2.5(a) to review the issue, but it did not require that appellate courts do so in every case. "Each appellate court must make its own decision to accept discretionary review." Id. at 835. Given that Womer specifically waived any objection to the LFOs involved, this court should decline to address his claim.

Even if this court reviews his claim, his argument is without merit. All of the LFOs imposed on Womer were mandatory; the court had no discretion, and the defendant's ability to pay was irrelevant.

a. Restitution.

Womer was ordered to pay restitution. CP 272. Restitution may not be waived.

“Restitution shall be ordered whenever the offender is convicted of an offense which results in...damage to or loss of property ... unless extraordinary circumstances exist which make restitution inappropriate. . .” RCW 9.94A.753(5). “A trial court’s order of restitution will not be disturbed on appeal absent abuse of discretion.” State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Failure to object to the amount of or basis for the restitution in the trial court waives appellate review. State v. Harrington, 56 Wn. App. 176, 181, 782 P.2d 1101 (1989); State v. Branch, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996).

Once an order of restitution has been entered, the court has discretion to modify it for the time that the defendant remains under the court’s jurisdiction. RCW 9.94A.753(4); State v. Burns, 159 Wn. App. 74, 79, 244 P.3d 988 (2010); State v. Gonzalez, 168 Wn.2d 256, 266, 226 P.3d 131 (2010). Once restitution has been ordered, the court may modify the amount, terms, and conditions more than 180 days after sentencing. State v. Gray, 174 Wn.2d 920, 925, 280 P.3d 1110 (2012). The only restriction on the court’s discretion is that it may not reduce the amount of restitution ordered based on the offender’s possible inability to pay the total amount. Id. at 927-28.

Because the court must impose restitution, the court's failure to inquire into his financial circumstances makes no difference.

b. Crime Victim Assessment.

A crime victim assessment is required by RCW 7.68.035.

When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a).

The victim assessment of \$500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991) (victim assessment is not a "cost"); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992). As such, it follows that the defendant's financial circumstances are irrelevant.

c. Filing fee.

The judgment and sentence reflects \$200 in court costs. CP 272. The court called it a filing fee. 12/23/14 RP 40. The filing fee

is mandatory. RCW 36.18.020(2)(a) directs the clerk of the superior court to collect a \$200 filing fee for the initiation of most litigation. RCW 36.18.020(2)(h) provides:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, a defendant in a criminal case shall be liable for a fee of two hundred dollars.

Because the court has no discretion regarding the filing fee, a court's failure to find the defendant has the ability to pay is not error. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

d. Felony DNA Collection Fee.

The court also imposed the DNA collection fee of \$100. CP 272. A fee for DNA collection is required by RCW 43.43.7541: "Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars." (Emphasis added.) All other financial obligations take precedence and the DNA collection fee is the last to be collected. The imposition of a \$100 DNA collection fee is mandatory, and has been since June 12, 2008. RCW 43.43.7541; State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009). Therefore, Womer's ability to pay was irrelevant to the imposition of that amount.

e. The court must, by statute, consider the defendant's ability to pay costs, not all LFOs.

RCW 10.01.160(3) requires the court to consider the defendant's ability to pay "costs." "Costs" are "limited to expenses specially incurred by the state in prosecuting the defendant . . . ." RCW 10.01.160(2). Those include such expenses as the service of warrants for failure to appear, jury fees, administering pretrial supervision, administering a deferred prosecution, and incarceration. *Id.* The statute caps the amount that may be imposed in several categories. *Id.*

In Blazina, 182 Wn.2d 827, the court exercised its discretion under RAP 2.5 and considered a consolidated challenge to the imposition of costs where the trial court had made no inquiry into the defendants' ability to pay. The court held that RCW 10.01.160(3) required the sentencing court to make an individualized inquiry on the record regarding the defendant's ability, both present and future, to pay LFOs before imposing them. It did not specify what exactly constitutes the LFOs at issue. Blazina, 182 Wn.2d at 839. In the opinion, however, the court repeatedly referred to "discretionary" LFOs. *Id.* at 830 ("[J]udges ordered [appellants] to pay discretionary legal financial obligations .

. . .” ); 831 (“The trial court, however, did not examine Blazina’s ability to pay the discretionary fees on the record.”); 832 (“A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.”). Nothing in the Blazina opinion holds that all LFOs are discretionary or that the court’s obligation to inquire into the defendant’s ability to pay extends to all amounts imposed. The trial court is instructed to consider such factors as “a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” Id. at 838. Clearly restitution, even though a legal financial obligation, factors into the analysis only by impacting the defendant’s ability to pay other costs.

Some costs clearly are discretionary. “The court *may* require a defendant to pay costs.” RCW 10.01.160(1), emphasis added. Because the term “costs” refers to expenses incurred by the State, restitution and victim assessments would not be included as “costs.” RCW 10.46.190 provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee “as provided for in civil actions.”

The opinion in Curry supports the State’s arguments that only certain “costs” are discretionary. Womer quotes a list of

requirements set forth in Curry to justify “a constitutionally permissible costs and fees structure.” Appellant’s Opening Brief at

48. Those requirements are:

1. *Repayment* must not be mandatory;
2. *Repayment* must be imposed only on convicted defendants;
3. *Repayment* 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;
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*.

Curry, 118 Wn.2d at 915-16, emphasis added.

The term “repay” implies compensation for something on which another has expended funds. Those would be the “costs” of prosecuting the case, which are discretionary with the court. It specifically does not include the victim penalty assessment. Id. at 917. Nor does it include those fees made mandatory by statute.

The amounts imposed by the trial court in Womer's case were not discretionary. His ability to pay becomes most important at the time the State tries to collect them. A defendant always has the opportunity to seek relief from legal financial obligations.

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.

RCW 10.01.160(4).

If a court finds at a later time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. Curry, 118 Wn.2d at 914. Courts may refuse to address a request for remission until the State attempts to collect the financial obligations. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012).

Due process precludes incarcerating offenders for failure to pay fines if the offender is indigent. The burden is on the offender to show that nonpayment was not willful, but the court still must inquire into the offender's ability to pay when sanctions are sought

for nonpayment. State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

f. Harmless error.

Because the court could not have refused to impose these LFOs even if it had inquired into Womer's ability to pay, it was not error to fail to do so. Even if it were error it would be harmless. An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Smith, 106 W.2d at 780 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). An inquiry into Womer's financial circumstances would still have resulted in the imposition of the same LFOs.

D. CONCLUSION.

Substantial evidence supports the trial court's findings of fact and conclusion of law that exigent circumstances existed justifying the warrantless seizure of a blood sample from Womer. Counsel was not ineffective for failing to object to photographs of the victim, nor for failing to seek suppression of the blood test for lack of a warrant to test the blood. Finally, even if the court erred by failing to inquire into Womer's financial circumstances before imposing

LFOs, which the State does not concede, it was harmless error.

The State respectfully asks this court to affirm the conviction.

Respectfully submitted this 18<sup>th</sup> day of August, 2015.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

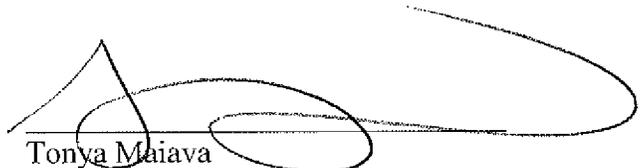
CERTIFICATE OF SERVICE

A copy of the State's Brief of Respondent was filed electronically with a copy of the uploaded file sent to the appellant's attorney on August 18, 2015, to the following address:

John A. Hays  
jahayslaw@comcast.net

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 18<sup>th</sup> day of August, 2015, at Olympia, Washington.

  
Tonya Maiava  
Paralegal, Thurston County PAO

# THURSTON COUNTY PROSECUTOR

**August 18, 2015 - 9:39 AM**

## Transmittal Letter

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Court of Appeals Case Number: 47025-0

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