

NO. 47572-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR SAAVEDRA-RUIZ,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The State's presentation of misleading expert testimony denied appellant a fair trial.

2. The State's reliance on misleading expert testimony to convict appellant violated due process.

3. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. The State presented medical expert testimony based on an outdated understanding of pediatric head trauma as the basis for its theory that appellant was responsible for his daughter's death. Where there is a reasonable likelihood this misleading testimony affected the verdict, was appellant denied a fair trial and due process?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

On August 19, 2014, the Kitsap County Prosecuting Attorney charged appellant Hector Saavedra-Ruiz with second degree murder,

alleging that in the course of committing or attempting to commit second degree assault of a child, he caused the death of his five month old daughter. CP 1-8; RCW 9A.32.050(1)(b). The State amended the information to add allegations that the crime involved domestic violence, a particularly vulnerable victim, and abuse of a position of trust. CP 9-12; RCW 9.94A.535(3)(b); RCW 9.94A.535(3)(n). The case proceeded to jury trial before the Honorable Kevin D. Hull. The first jury was unable to reach a unanimous verdict. Following the second trial, the jury returned a guilty verdict and affirmative findings on the special allegations. CP 163-66. The court imposed a high-end standard range sentence of 220 months, and Saavedra-Ruiz filed this appeal. CP 171, 183.

2. Substantive Facts

NFS was born on February 10, 2014. Her parents are Kayla Des Rochers and Hector Saavedra-Ruiz. 7RP¹ 277. Des Rochers moved with NFS from Redding, California, to Olympia, Washington, shortly after NFS was born. 7RP 278. Saavedra-Ruiz moved to Kingston, Washington in May 2014. 3RP 167. After that, he and Des Rochers would see each other about once a week. She would drive to Kingston with the baby,

¹ The Verbatim Report of Proceedings is contained in 11 volumes, designated as follows: 1RP—1/16/15; 2RP—3/6/15; 3RP—3/30/15, 3/31/15, 4/1/15, 4/2/15; 4RP—3/31/15 (jury selection); 5RP—4/1/15 (jury selection); 6RP—4/2/15 (jury selection); 7RP—4/6/15; 8RP—4/7/15; 9RP—4/8/15; 10RP—4/10/15; 11RP—5/1/15.

spend the night, and return to Olympia the next day. 7RP 216, 279-80. These weekly visits with Des Rochers were the only times Saavedra-Ruiz was able to spend with his daughter. 7RP 280. Des Rochers was the child's primary caregiver, and she did not leave the baby with anyone but her grandmother with whom she lived. 7RP 297-98.

On July 16, 2014, Des Rochers drove to Kingston for her weekly visit with Saavedra-Ruiz. 3RP 146. She arrived at the restaurant where Saavedra-Ruiz worked and waited in the car with the baby until he got off work around 9:00. 3RP 146; 7RP 283, 301. They drove to Saavedra-Ruiz's apartment and went into one of the bedrooms. Des Rochers put the baby on the bed to sleep, and then Des Rochers and Saavedra-Ruiz went into the bathroom for 30-45 minutes, where they smoked methamphetamine. 7RP 283-85.

Saavedra-Ruiz wanted to return to the restaurant so he could show the baby off to his co-workers. 3RP 147. Des Rochers did not like the idea, because the baby was sleeping and because Saavedra-Ruiz had never been alone with her before. 7RP 216, 286. After a short argument, Des Rochers agreed. 7RP 216. She strapped NFS into her car seat, and Saavedra-Ruiz left with the child. 7RP 217, 287. He was gone for about an hour, and Des Rochers texted him several times while he was gone. 3RP 194-95; 7RP 217, 288.

Angel Espino, Saavedra-Ruiz's supervisor, was taking the garbage out after closing the restaurant that evening when he saw Saavedra-Ruiz in his car. He appeared to be alone, although Espino could not tell if there was a baby's car seat in the car. 9RP 5-8-20. Espino testified that he had told a deputy he did not see Saavedra-Ruiz return to the restaurant that night, but he explained that Saavedra-Ruiz had not come inside, and Espino only saw him in the parking lot. 9RP 547-49.

Saavedra-Ruiz returned to his apartment around midnight, panicked because NFS was not breathing. 7RP 217. Des Rochers saw that NFS was not moving, breathing, or responding to what was going on. 7RP 292.

Katie Raber was in a neighboring apartment when she heard someone banging up the stairs. She looked through the peephole and saw Saavedra-Ruiz running very fast carrying a car seat with a baby in it. He was upset and yelling. 7RP 257-58. The baby was not crying, her head was lolling to the side, and she looked unconscious. 7RP 259. Saavedra-Ruiz banged on his apartment door and then went inside. The baby did not respond when the carrier hit the door frame on the way in. 7RP 252.

Taylor Bowden testified that she was in her apartment in the same complex when she heard a loud thump that sounded like something heavy hit the floor or wall. 8RP 467, 473. A couple of minutes later she heard a

woman crying, asking for help. 8RP 469. She looked out the window to the parking lot and saw another neighbor telling them to call an ambulance because the baby was not breathing. 8RP 469-70. She saw some men run down the stairs and then Saavedra-Ruiz went across the parking lot and returned with a car parked at the bottom of the stairs. Bowden said the mother was very upset, crying, and inconsolable. 8RP 470-71.

A short time later, there was a knock on Raber's door. Two people she recognized as living in Saavedra-Ruiz's apartment asked to use a phone, saying the baby wasn't breathing. Raber knew CPR, so she returned to the apartment with them. 7RP 262-63. It was very hectic in the apartment, and Saavedra-Ruiz asked her to save his baby. Raber went into the bedroom and started performing CPR on the baby, who was lying on the floor. At some point someone brought a phone with the 911 dispatcher on the line, and the dispatcher talked her through the CPR. 7RP 264-65, 268.

Des Rochers testified at trial that she tried to call 911, but a bunch of stuff was happening at once. She claimed that Saavedra-Ruiz took her phone and put it in his pocket. Eventually she got her phone back, but she did not know the address of the apartment. 7RP 292-93. A 911 call was made at 12:09 a.m. 7RP 237. Medics and law enforcement responded. 7RP 294.

Deputy Heather Wright arrived within six to ten minutes of the 911 call. 7RP 212. Several people were in the living room of the apartment, and medics were in the bedroom working on NFS. Saavedra-Ruiz was assisting by holding an IV bag. 7RP 214. Des Rochers was hysterical, and Wright tried to calm her down. Des Rochers told Wright that she had driven up from Olympia with NFS to visit Saavedra-Ruiz. She drove him home from work, but he wanted to take the baby back to work to show her to his co-workers. She was against the idea but eventually relented. Saavedra-Ruiz was gone with NFS for about an hour, and he returned panicked that she was not breathing. 7RP 216-17.

After speaking to Des Rochers, Wright asked Raber to drive Des Rochers to the hospital where medics had taken NFS. 7RP 218. Wright then spoke to Saavedra-Ruiz. 7RP 218. He was visibly upset and kept repeating that he had tried to do CPR but he didn't know how. 7RP 225. He explained that as he drove NFS to the restaurant, she was quiet, and he assumed she had fallen asleep. When he went to pick her up after they arrived, she gasped, and he became scared. He tried CPR at that point, and he said he left a mark where he had grabbed her chin. He saw some blood coming from her nose, and he panicked some more. 7RP 233-34.

Detective Lori Blankenship spoke to Saavedra-Ruiz at the hospital. Although his primary language is Spanish, she conducted the interview in

English, going slowly and repeating herself or rephrasing until she felt he understood her questions. 3RP 137-39. Blankenship asked Saavedra-Ruiz why his child was in the hospital, and he said she had stopped breathing. 3RP 139. He said he was alone with NFS because he wanted to take her to the restaurant where he worked to show her to his friends. 3RP 168. When he arrived and went to remove the baby from the car, he saw that she was either choking or coughing. There was a bit of blood coming from her nose, her arms were outstretched, and her eyes were fixed straight ahead. 3RP 147. Saavedra-Ruiz said he attempted to do CPR to revive her, but he did not know how to do it. He demonstrated that he tried laying the baby on his legs and hitting her back and then turning her back over and pushing her stomach. 3RP 147, 171. When he was unable to revive her, he put her back in her car seat and returned to his apartment, which was about five minutes away. 3RP 148.

Des Rochers talked to a social worker at Mary Bridge Children's Hospital. 7RP 312. She told the social worker that that night was the first time she had been to the restaurant where Saavedra-Ruiz worked, even though she had actually been there a few times and had eaten there at least once. 7RP 313-14. She also told the social worker that she and Saavedra-Ruiz took the baby back to the restaurant together that night after going to the apartment. 7RP 315.

Des Rochers had also been untruthful in a taped statement to Detective Blankenship. She said she and Saavedra-Ruiz had returned to the restaurant with NFS and had dinner there. 7RP 317. Although she had fed NFS in the car while waiting for Saavedra-Ruiz to get off work, she made up a story about feeding the baby a bottle while she and Saavedra-Ruiz ate Mexican food. She went so far as to make up the detail that she considered feeding the baby pears but decided that would be too messy. 7RP 321-22. Des Rochers told Blankenship that Saavedra-Ruiz wanted to stay longer and chat with his friends, but she wanted to leave, so she put the baby in her car seat to drive home. She said she then went back inside to use the restroom while Saavedra-Ruiz stayed at the car with the baby. 7RP 323, 325. Des Rochers told Blankenship she was only gone about five minutes, because there was no line for the restroom. She told the social worker she was gone about ten minutes because there was a line. 7RP 325. Des Rochers told Blankenship that when she returned to the car NFS was not moving. Saavedra-Ruiz was holding her and hitting her on the back like he wanted her to spit up. She said she took NFS from him and put her on the back of the car, where she attempted CPR. When NFS did not respond, she wanted to call 911, but Saavedra Ruiz insisted on driving back to the apartment first. 7RP 325-27.

Des Rochers admitted at trial that the entire tape recorded statement to Blankenship was untrue, and everything she told the social worker was untrue. 7RP 327-28. She said she lied because she was upset and she did not want to get in trouble for using methamphetamine. 7RP 328. She admitted she did not have a good memory of what happened after Saavedra-Ruiz returned to the apartment with NFS. She knew the baby either was not breathing or was having trouble breathing, and she picked her up from the car seat. She denied shaking the baby to try reviving her, or that the baby hit her head at that time. 7RP 329. She denied letting the baby fall off the bed onto the floor before Raber performed CPR. 7RP 330.

When paramedics arrived at the apartment, NFS was not breathing and she had no pulse. 8RP 386. They were able to establish a heartbeat, and they intubated her. She was taken to Harrison Hospital in Silverdale. 8RP 387-88. She had no obvious signs of external trauma, but her pupils were fixed and dilated, indicating she was probably brain dead. 8RP 428. When she was transferred to Mary Bridge Children's Hospital in Tacoma around 3:00 a.m., her condition was still grave with no evidence of brain activity. 8RP 429.

John Whitt, the pediatric intensivist who treated NFS at Mary Bridge, testified that she had suffered severe shock and multisystem organ

failure due to lack of oxygen after cardiac arrest. 8RP 437. A CT scan showed signs of subdural blood around the brain, and there was damage to her kidney, liver, and bowel from lack of blood flow. 8RP 438. There was also blunt force injury to NFS's abdomen. 8RP 404. And a chest x-ray showed that NFS had a healing rib fracture, which was at least two weeks old and did not contribute to NFS's death. 7RP 354, 357; 8RP 404-05. Whitt testified that her brain injury was the most concerning, though. 8RP 438.

In trying to figure out what happened, Whitt talked to NFS's caregivers and did a physical exam to see what signs of disease were present. He also ran labs and radiology, trying to make a diagnosis. Whitt testified that he did not believe disease or infection could have caused NFS's condition. Based on his training and experience, he believed the most likely cause of her brain injury was non-accidental trauma, child abuse, or shaken baby syndrome. 8RP 443. He explained that he saw no signs of infection or that NFS had been sick. By history she had been completely normal until 10:00 p.m. and then had gone into cardiac arrest, which indicated something traumatic happened. 8RP 444. His opinion was that the trauma was non-accidental. 8RP 445.

Michele Breland, a pediatric nurse practitioner, saw NFS at Mary Bridge in the early afternoon on July 17. 7RP 342. She noted that NFS

had suffered catastrophic injuries complicated by a difficult resuscitation and lack of prompt medical attention. There were significant injuries to her brain from lack of oxygen, and her brain was swelling. *Id.* The CAT scan of NFS's head showed a fracture to the skull at the back of the head. She had a subdural hematoma at the top of her head. The CAT scan showed injury and edema which indicated a global event to the brain. 7RP 343-44. There was also a subarachnoid hematoma close to the skull fracture, and Breland testified that the force from the skull fracture caused bleeding in the arachnoid space. 7RP 346.

Breland further testified that because there was subdural bleeding the assumption was that bridging veins in the brain had ruptured. 7RP 347. She explained that that happens with an acceleration/deceleration injury, where the head is going back and forth. The brain does not keep up, and the blood vessels are sheared and rupture. 7RP 348. NFS also had hemorrhaging in many layers of her retinas, which Breland testified was an extreme injury. 7RP 349. She explained that considering NFS's subdural hematoma and retinal hemorrhaging, she believed that the bridging veins in the back of NFS's eyes ruptured from shearing force. 7RP 351.

Breland testified that with NFS's injuries, symptoms would have presented emergently. 7RP 353. She testified there was a shaking and

also possibly an event that caused a skull fracture. She would expect to see symptoms immediately after the shaking occurred. From that moment forward NFS would not have been normal, and her symptoms would have been obvious. 7RP 354. Breland gave her opinion that NFS's injuries were not accidentally caused. They were inflicted by someone. 7RP 369.

On cross examination, defense counsel established that Breland relied on Des Rochers for NFS's medical and social history. 7RP 363. Des Rochers was not honest in her reporting, telling Breland that that night was the first time NFS had ever seen her father. Moreover, the rib fracture was left unexplained. 7RP 367.

NFS died on July 18, 2014. 8RP 395. The autopsy revealed a small fracture on the skull with a large amount of bleeding in the brain, indicating that the scalp was impacted by a large, blunt surface with some degree of force. 8RP 397-98. There was also a subdural hemorrhage and hemorrhaging along the optic nerve and within the eyes, or retinal hemorrhaging. 8RP 401.

Thomas Clark, the medical examiner, testified that there is a strong association between retinal hemorrhage and intentionally inflicted injury. The most common cause of retinal hemorrhaging is shaking, which also causes subdural hemorrhaging. 8RP 402. Clark said, "There was a study published years ago that associated shaking infants with retinal

hemorrhage and subdural hemorrhage.” 8RP 402. When asked why shaking would cause subdural and retinal hemorrhaging, Clark responded,

There are several proposed mechanisms. One of them is that the shaking causes sudden acceleration and deceleration injury within the brain; breaking off neurons causing brain swelling, increasing the pressure within the brain and making it difficult for the blood to return from the eyes.

There are also probably instances in which blood vessels in the eyes are directly damaged by the sudden deceleration. The blood vessels themselves break. And these are mostly capillaries. So they bleed and the blood accumulates within the retina.

There are things that can cause retinal hemorrhage as a result of other injuries that are not directly related to the eye. For example, a car crash that causes a sudden deceleration can cause the brain to swell and cause retinal hemorrhages to appear sometime after the initial incident.

It is also possible that something that causes a cardiac arrest that isn't even traumatic, a natural process can cause the brain to swell and can cause retinal hemorrhages.

There is thought to be a difference between the types of retinal hemorrhages, or at least the extent of retinal hemorrhages. Retinal Hemorrhages that are not traumatic are often smaller and more likely to be located close to the optic nerves. Traumatic retinal hemorrhages are thought to be more widespread and can be located far from the optic nerve and can be, and typically are, much heavier.

8RP 402-03. Clark testified that the retinal hemorrhages in this case were heavy, extensive, and bilateral. He concluded that this strongly “supports the theory that these retinal hemorrhages were caused by trauma, by injury that resulted from blunt force entry to the head or shaking of the head.”

8RP 403-04.

Clark testified that NFS died as a result of the extensive head/brain injuries. She was alive at the time they were inflicted, and in his opinion, “the child would not have been normal following the infliction of these injuries.” 8RP 406. Clark testified that symptoms would have appeared very quickly after the injuries, if not instantly:

The child would have been not necessarily completely unresponsive but would have been noticeably different following these injuries. And then over a period of a short number of minutes, the child would have become progressively unresponsive, progressively sleepy to the point of being unresponsive.

8RP 406. He repeated that the symptoms would have appeared quickly, and “onset would be measured in a small number of minutes...[o]r even seconds.” 8RP 408.

On cross examination, defense counsel established that Clark could not say whether NFS was conscious or unconscious at the time of the blunt force injury to the back of the head which caused her death. 8RP 409. Clark said again that symptoms from the head injury would have been noticeable right away, although she might not have been unconscious right away. When asked whether she could have gone two to four hours before becoming unconscious, Clark said, “I don’t think I can answer that, and I don’t think anybody could.” 8RP 409. He repeated that there would have been a noticeable difference measured in a small number of minutes. The time to unresponsiveness would probably also be measured in

minutes, although it could conceivably go out to an hour. 8RP 410. Upon further questioning Clark said he could not exclude the possibility that she could have gone two to three hours before becoming unconscious, but he did not think that was very likely, and there would have been noticeable change immediately after the trauma to the head. 8RP 410.

Clark also testified that while shaking can cause the hemorrhaging seen here, that is not the only possible explanation. Swelling in the brain resulting from blunt force trauma could also cause the hemorrhaging. 8RP 411-12.

On redirect, Clark testified that the injury to the back of NSF's skull was consistent with being hit with a flat surface or slammed against a flat surface. The skull fracture could not have been the result of accidental impact with the baby carrier. 8RP 419. Clark believed the incident started with significant blunt force injury to the head that resulted in brain swelling, probably neuronal shearing and bleeding, and retinal hemorrhages that would have caused progressive lethargy until breathing stopped. 8RP 420-21. He stated that "It is possible that ... certain accidents could have caused these injuries. They would have to be extreme such as a car crash or falling off of a second floor deck. The chance of ordinary, daily activities leading to these injuries is very small." 8RP 421.

The State's theory at trial was that Saavedra-Ruiz assaulted his daughter causing the extensive brain damage that led to her death. 9RP 558. The State argued that the injury occurred when Saavedra-Ruiz was alone with NFS after taking her to visit his co-workers, because the baby had been fine when he left with her. 9RP 563, 566. The State relied on medical testimony that the symptoms would have appeared immediately or within minutes of the injury. 9RP 567-68. The State further argued that the injuries would not have been caused accidentally but were consistent with shaking or swelling of the brain because of an inflicted head injury. 9RP 571.

Defense counsel argued that the evidence did not really show what happened. 9RP 589. The child could have become unconscious because of something Des Rochers did as she was waiting in the car for Saavedra-Ruiz to finish work or when she was strapping the child into car seat while high on methamphetamine. And the skull fracture could have occurred after the child was unconscious. Des Rochers might have shaken the baby or injured her when trying to revive her, or she might have let the baby fall off the bed, since she said she never put the baby on the floor, but she was on the floor when Raber went into the bedroom to perform CPR. 9RP 602, 612, 616-19.

C. ARGUMENT

1. THE STATE’S RELIANCE ON MISLEADING EXPERT TESTIMONY DENIED SAAVEDRA-RUIZ A FAIR TRIAL AND VIOLATED DUE PROCESS.

It is well-established that a conviction that rests on false or misleading testimony violates due process. See Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The Supreme Court has long emphasized “the special role played by the American prosecutor in the search for truth in criminal trials.” Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). As an officer of the court, the prosecutor has a duty to see that the accused receives a fair trial, and only a fair trial is a constitutional trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. While a prosecutor “may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

One of the bedrock principles of our democracy, “implicit in any concept of ordered liberty,” is that the State may not use false evidence

to obtain a criminal conviction. Napue, 360 U.S. at 269. It does not matter whether the prosecutor intended or even knew that the testimony was false: “whether the nondisclosure [of the truth] was a result of negligence or design, it is the responsibility of the prosecutor.” Giglio, 405 U.S. at 154. Due process is also violated when the State introduces misleading testimony. Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005).

If there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury” the conviction must be set aside. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976). Under this materiality standard, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Hall v. Director of Corrections, 343 F.3d 976, 983-84 (9th Cir.2003) (per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995)).

In this case, the prosecutor presented medical expert testimony based on outdated science, which was prejudicially misleading. Reliance on this misleading testimony material to the State’s case denied Saavedra-Ruiz a fair trial and violated his right to due process.

There has been a paradigm shift in the medical community's understanding of shaken baby syndrome (SBS) and head trauma in children. Previously, many medical professionals believed that if a child presented with cerebral edema, subdural hematoma, and retinal hemorrhages, the only possible diagnosis was that the child had been violently shaken, and these symptoms would manifest immediately. Deborah Tuerkheimer, The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts, 87 Wash. U.L. Rev. 1, 4 (2009). The understanding of these findings has expanded greatly since the mid-1990s, however, and now includes a variety of accidental and natural causes. Tuerkheimer, 87 Wash. U.L. Rev. at 10-12. Moreover, contrary to what was previously understood, research has established that children who suffer trauma, whether accidental or non-accidental, can remain lucid for three days or more after the trauma occurs. Tuerkheimer, 87 Wash. U.L. Rev. at 5.

In the past, defendants prosecuted for SBS were identified by the certainty of doctors that the perpetrator of the abuse was necessarily the person with the infant immediately prior to the loss of consciousness. Studies have since shown, however, that children suffering fatal head injury may be lucid for more than 72 hours before death. Tuerkheimer, 87 Wash. U.L. Rev. at 18. Because the prospect of a lucid interval lessens

the ability to pinpoint when the injury occurred, without other evidence the identity of the perpetrator cannot be established. Id. Furthermore, new research shows that relatively short distance falls may cause fatal head injury that looks much like the injury previously diagnosed as SBS. Id. at 21.

Courts have recognized this shift in medical understanding of traumatic head injury in children. Since the mid-1990s there has been a shift in the medical community around SBS, so that

a significant and legitimate debate in the medical community has developed ... over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome.

State v. Edmunds, 308 Wis.2d 374, 385-86, 392, 746 N.W.2d 590 (Wis.Ct.App.2008) (emergence of “legitimate and significant dispute” in medical community constitutes newly discovered evidence warranting new trial). As in Edmunds, this Court recently granted a personal restraint petition on the ground that this shift in medical understanding regarding child head trauma constitutes newly discovered evidence which would probably result in a different decision. In re Fero, 46310-5-II, 2016 WL 48216 (Wash. Ct. App. Jan. 5, 2016), Slip Op. at 10-11.

Fero was convicted of first degree assault of a child in 2003, after the 15-month-old child had fallen unconscious while in her care, the child presented at the hospital with subdural hemorrhaging, cerebral edema, and retinal hemorrhaging, and all the doctors who testified on the topic said that children suffering those injuries become unconscious almost immediately and those injuries can only be caused by car accidents, long falls, or abuse. Fero, at 1, 3-4. In 2014 Fero filed a personal restraint petition, arguing that newly discovered evidence regarding a paradigm shift in the medical community's understanding of pediatric head trauma would likely change the result of her trial. Fero, at 4. Medical declarations filed with the personal restraint petition established that the now generally accepted medical paradigm recognizes that children can remain lucid for up to three days after suffering similar head injuries and those injuries are now known to be caused by much less extreme circumstances. The shaken baby syndrome theories applied in Fero's case are no longer supported by the scientific literature. Fero, at 5-6.

This Court granted the personal restraint petition. The Court concluded that the result of Fero's trial probably would be different because the medical community's now generally accepted understanding of brain trauma in children directly contradicts the medical theories relied on to convict her. Fero, at 7. Specifically, testimony that the child would

lose consciousness almost immediately after the injury was contradicted by expert declarations that it is now known that children can remain lucid for up to three days after suffering an injury. Further, testimony that the only causes of the injury could have been major accidental trauma or child abuse contrasts with experts' explanations that there are now many acknowledged causes for the type of injuries present in that case. Fero, at 7.

In that case, to establish that Fero had injured the child, the State showed that the child lost consciousness while she was with Fero and compared that fact to medical testimony that the child would have lost consciousness almost immediately, and certainly no more than two hours, after suffering the injuries. Fero, at 8. The State explained to the jury that the injuries had to have occurred when the child was with Fero, because the child was conscious when she was with everyone else that day, and she could not have remained conscious for any substantive amount of time after being injured. Id. The State further argued that Fero inflicted the injuries, relying on medical testimony that the type of injuries involved could only be caused by major trauma, like being thrown from a car or falling several stories, or from child abuse inflicted by an adult. Because there was no allegation the child had been in a car accident or fallen from

a building, the State was able to show that the only possible explanation for the child's injuries was child abuse by Fero. Fero, at 8.

Contrary to the State's theory at Fero's trial, however, the expert declarations supporting Fero's personal restraint petition explained that the medical community's generally accepted understanding of periods of lucidity after a child's traumatic head injury and the potential causes for serious head trauma in children have changed dramatically since Fero's trial in 2003. Fero, at 9. Today, the medical community recognizes that children can stay lucid for multiple days after suffering a traumatic head injury, which directly contradicts medical testimony at Fero's trial. Moreover, the medical community now recognizes that these injuries can be caused by short falls and other low-impact accidents, as well as some natural causes. This new medical understanding again contradicts the medical evidence presented at Fero's trial. Fero, at 9.

This Court recognized that other jurisdictions that have considered the current medical paradigm's effect on prior convictions have granted relief to the petitioners. Fero, at 9 (citing Edmunds, 308 Wis.2d 374); Ex Parte Henderson, 384 S.W.3d 833, 833-34 (Tex.App.2012); Del Prete v. Thompson, 10 F.Supp.3d 907 (N.D.Ill.2014); People v. Bailey, 47 Misc.3d 355, 999 N.Y.S.2d 713 (2014)). "Specifically, these courts recognize that doctors now know children can remain lucid for much longer periods of

time after suffering the injury and that doctors now know there are several causes for injuries once thought to be indicative only of abuse.” Fero, at 11.

The jury in this case heard the State’s experts give conclusions based on the same outdated medical research relied on in Fero’s 2003 trial. Relying on these now-discredited theories, the State’s experts gave opinions that NFS’s injuries were intentionally inflicted immediately before she became unconscious. 7RP 354, 369; 8RP 402-04, 445.

The evidence showed that NFS suffered a skull fracture to the back of the head, a subdural hematoma at the top of her head, cerebral edema, and retinal hemorrhaging. 7RP 343-44, 349. The State presented expert medical testimony that these injuries were most likely caused by non-accidental trauma, child abuse, or shaken baby syndrome, 8RP 443, that these injuries occur with violent acceleration/deceleration, 7RP 347-48, that there is a strong association between retinal hemorrhage and intentionally inflicted injury, that the most common cause of such injuries is shaking, 8RP 402, and that only extreme accidents such as a car crash or falling off a second floor deck could have caused the injuries, 8RP 421.

Moreover, the State’s medical experts testified that with NFS’s injuries, symptoms would have appeared immediately after the shaking occurred, and the symptoms would have been obvious. 7RP 353-54; 8RP

406. The medical examiner testified that the symptoms would have appeared very quickly after the injuries, if not instantly. The child would have been noticeably different, and within a short number of minutes, she would have been unresponsive. 8RP 406. He repeated that the symptoms would have appeared quickly, and “onset would be measured in a small number of minutes...[o]r even seconds.” 8RP 408. On cross examination he conceded that the time to unresponsiveness could conceivably go out to two or three hours, but he repeated that he did not think that was likely, and there would have been noticeable change immediately. 8RP 410.

The State presented no evidence qualifying these medical opinions in light of the substantial body of research undermining their scientific bases. While the medical testimony was consistent with accepted medical understanding ten to 15 years ago, current understanding in the medical community refutes that testimony. It is now known that a child can remain lucid for three days or longer following head trauma. Thus it is impossible, without evidence other than the existence of the injuries, to pinpoint when the injuries occurred. Current research and understanding of traumatic head injury in children further establishes that injuries such as those sustained here can be the result of lower-impact accidental trauma. Thus it is impossible to determine, without further evidence, the cause of the injury, contradicting the certainty of the medical experts at trial that

the injuries had to have been inflicted, and the State's argument that they could only have been inflicted by Saavedra-Ruiz.

For convictions resting on expert opinion, the unreliability of expert testimony clearly implicates due process. Han Tak Lee v. Glunt, 667 F.3d 397, 403 (3d Cir. 2012). The presentation of unreliable, and thus misleading, expert testimony was particularly significant in this case because, beyond the State's expert's conclusions from the physical evidence, the State's case rested on the credibility of Des Rochers. This key State witness admittedly lied repeatedly to avoid trouble, however. No one saw Saavedra-Ruiz assault his daughter, and there were multiple possibilities for how and when the head injuries occurred. If the jury had learned that medical science now recognizes that children can remain lucid for up to three days after a head injury occurs, it would have had serious reason to doubt the State's theory that Saavedra-Ruiz must have caused NFS's injuries because he was the only person with her when she lost consciousness. There is no justification for the State's reliance solely on outdated science. In doing so, the State presented misleading evidence which denied Saavedra-Ruiz a fair trial and violated his right to due process. His conviction must be reversed and the case remanded for a new, fair trial.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

At sentencing, the court below imposed only the minimum legal financial obligations required by law. 11RP 17; CP 176. The court also entered an order of indigency finding that Saavedra-Ruiz was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 184-85.

- a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.

Our supreme court in Blazina recognized the “problematic consequences” legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of

recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The Blazina court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and

retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Saavedra-Ruiz has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244,

246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” Blazina, 182 Wn.2d at 832, n.1. Blank’s questionable foundation has been thoroughly undermined by the Blazina court’s exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to “look to the comment in GR 34 for guidance.” Blazina, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The Blazina court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Blazina, 182 Wn.2d at 839. This court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the “court of appeals . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts

have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Saavedra-Ruiz respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. Alternatively, this court should remand for superior court fact-finding to determine Saavedra-Ruiz's ability to pay.

In the event this court is inclined to impose appellate costs on Saavedra-Ruiz should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Saavedra-Ruiz to assist him in developing a record and litigating his ability to pay.

If the State is able to overcome the presumption of continued indigence and support a finding that Saavedra-Ruiz has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion

of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

For the reasons addressed above, this Court should reverse Saavedra-Ruiz's conviction and remand for a new trial. This Court should also exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED March 29, 2016.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I mailed a copy of the Brief of Appellant in *State v. Hector*

Saavedra-Ruiz, Cause No. 47572-3-II as follows:

Hector Saavedra-Ruiz DOC# 382514
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

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



Catherine E. Glinski
Done in Port Orchard, WA
March 29, 2016

GLINSKI LAW FIRM PLLC

March 29, 2016 - 1:59 PM

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