

No. 48227-4-II

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

STATE OF WASHINGTON, RESPONDENT

V.

RITA E. MADRIGAL, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Daniel L. Goodell, Judge

No. 15-1-00292-9

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. In this case the victim's statement to police was read into the record after the victim claimed a lack of memory as the events described in the statement. Madrigal contends that the admission of this evidence was error, but her claim of error is premised upon the mistaken assertion that the testimony was offered as impeachment evidence rather than as substantive evidence under ER 803(a)(5). The State contends that trial counsel was not ineffective, because any objection to testimony about the victim's statement to police would have failed because the testimony was admissible as a recorded recollection under ER 803(a)(5).
2. Madrigal asserts that the trial court erred by ordering her to pay discretionary legal financial obligations (LFOs) as a condition of sentencing without first engaging in an on-the-record inquiry into her ability to pay them. However, the State contends that in this case the trial court did engage in an on-the-record inquiry into Madrigal's ability to pay LFOs and that the record supports a finding that Madrigal has the ability to pay the moderate amount of LFOs ordered in this case

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, with the exception of the additional facts provided below and contradictory facts provided in the argument section of the State's brief, the State accepts Madrigal's statement of facts. RAP 10.3(b).

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C. ARGUMENT

1. In this case the victim's statement to police was read into the record after the victim claimed a lack of memory of the events described in the statement. Madrigal contends that the admission of this evidence was error, but her claim of error is premised upon her mistaken assertion that the testimony was offered as impeachment evidence rather than as substantive evidence under ER 803(a)(5). The State contends that trial counsel was not ineffective, because any objection to testimony about the victim's statement to police would have failed because the testimony was admissible as a recorded recollection under ER 803(a)(5).

When officer's responded to the scene of the crime to investigate this case, one of the officers, Deputy Ripp, asked the victim, Otiel Pena, to give a written statement about what had occurred. RP 69-70. Because Mr. Pena was unable to write his own statement, Deputy Ripp wrote out the statement for him. RP 70-71. Deputy Ripp testified that although Mr. Pena could not write English, he nevertheless read what Deputy Ripp wrote. RP 72. Mr. Pena then initialed each factual assertion in the statement and signed the statement, adopting the statement written out by Deputy Ripp, and adopting the language indicating that he (Mr. Pena) was giving the statement under penalty of perjury. RP 36, 71. The fact that Mr. Pena had the ability to read the statement even though it was in

English is corroborated by his ability to read it in court when he testified.

*See, e.g.*, RP 35.

When Mr. Pena testified, he said that because he had recently had a head injury he did not remember very much about the incident alleged by the State. RP 28. The prosecutor then offered the written statement into evidence as a “prior recollection recorded” under ER 803. RP 28-30; Ex. 6. When the trial court inquired of an objection, defense counsel asked for a sidebar. RP 30. After the sidebar, the prosecutor then resumed his questioning of Mr. Pena and, without publishing the written statement, questioned Mr. Pena in some detail about the factual assertions in the statement, including the language asserting that Mr. Pena was providing the statement under penalty of perjury. RP 30-36. Defense counsel then cross-examined Mr. Pena. RP 36-40. The cross-examination included a brief cross-examination about the written statement. RP 39-40.

Later in the trial, after the court excused the jury for a recess, the trial court judge made a record of the sidebar conference, as follows:

THE COURT: Please be seated. We need to address on the record the side bar which occurred during this last segment. And there was an initial request under ER 803 to admit a document. And that was objected to, and there was a discussion at side bar that that document would not be requested to be admitted today, and potentially would be requested to be admitted tomorrow

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morning, after counsel has had an opportunity to research this issue. And instead the colloquy that occurred was more in the lines of impeachment. Is there anything that I'm missing from that side bar, Mr. Richards?

MR. RICHARDS: I think it sums it up pretty good, your Honor.

THE COURT: And Mr. Jones.

MR. JONES: Only I -- I believe the issue is going to be moot tomorrow because I think Corporal Ripp's going to be able to authenticate the affidavit as a Smith affidavit and it's going to come in that way.

THE COURT: Okay. Well at this point we'll just deal with it when -- if it's offered, we'll deal with that issue.

RP 61-62. A review of the record reveals no citation where either party again raised the issue, offered Exhibit 6 into evidence, or in any way inquired about or objected to the line of questioning about the details of the statement.

Despite the trial court's earlier, preliminary utterance that the statement was "more in the lines of impeachment" (RP 61), it appears that Mr. Pena did not offer any testimony that could be impeached by the written statement. Mr. Pena testified that he could not remember the events. RP 28. Mr. Pena's written statement, made near in time to the events giving rise to the charge of assault against Madrigal, described the events that, at trial, he claimed not to remember. Ex. 6; RP 30-36.

Because Pena did not testify to any affirmative statement that his written

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statement contradicted, questioning about his written statement was not impeachment. *State v. Delaney*, 161 Wash. 614, 619, 297 P. 208 (1931); *State v. Allen S.*, 98 Wn. App. 452, 460-62, 989 P.2d 1222 (1999).

But the written statement itself was not admitted into evidence; instead, Mr. Pena's prior written statement was only read into the record, and this reading into the record occurred after Mr. Pena testified that he could not remember the events described in the statement. RP 28, 30-36. This process is exactly what ER 803(a)(5) allows, as described by the recent case of *State v. Nava*, as follows:

A recorded statement given to police is inadmissible hearsay unless it qualifies for an exception to the hearsay rule. The exception for "recorded recollections" is one such exception. A record qualifies as a recorded recollection if it is

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.  
ER 803(a)(5). A recorded recollection is admitted as substantive evidence.

*State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013).

Generally, a recorded statement given to police is admissible if the following four factors are shown by a preponderance of evidence:

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(1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately.

*State v. Nava*, 177 Wn. App. 272, 289-90, 311 P.3d 83, 92 (2013). Here, the record shows that Mr. Pena, as the victim of Madrigal's assault, once had knowledge of the assault. RP 28-84. When called to testify, however, Mr. Pena had an insufficient memory of the matter. RP 28. But when Mr. Pena adopted the written statement describing the incident, the incident was fresh in his mind, because he adopted the record immediately after the incident occurred. RP 29, 70. Finally, it appears that Mr. Pena's recorded statement accurately reflects his prior knowledge, because he made it near in time to the events it described and both the physical evidenced and the testimony of Nyguel Pena corroborate Mr. Pena's statement. Ex. 1-5; RP 44-59.

On appeal, however, Madrigal contends that her trial counsel was ineffective...

based upon trial counsel's failure to object when the state used impeachment as a guise for submitting otherwise unavailable substantive evidence to the jury and when the state argued substantively from that impeachment evidence in closing.

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Br. of Appellant at 10. But as argued above by the State, the State did not offer Mr. Pena's recorded statement to police as impeachment evidence, because there was no contradictory testimony for the State to impeach. And, still more, as argued above, because Mr. Pena's recorded statement was not impeachment evidence but was instead admissible substantively as a recorded recollection under ER 803(a)(5), it was not improper for the State to argue substantively from that evidence during closing arguments.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). The State contends that on the facts of this case Madrigal cannot satisfy either prong of this two-part test.

First, the State contends that any objection by defense counsel would have been futile, because, as argued above, Mr. Pena's statement to police was properly admissible substantively as a recorded recollection under ER 803(a)(5). And the second prong of the test is not proved

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because even if Mr. Pena's statement to police were excluded, the evidence provided by Nyguel Pena (RP 45-60) and the observations of responding officers were in themselves overwhelming evidence of the defendant's guilt.

2. Madrigal asserts that the trial court erred by ordering her to pay discretionary legal financial obligations (LFOs) as a condition of sentencing without first engaging in an on-the-record inquiry into her ability to pay them. However, the State contends that in this case the trial court did engage in an on-the-record inquiry into Madrigal's ability to pay LFOs and that the record supports a finding that Madrigal has the ability to pay the moderate amount of LFOs ordered in this case.

Madrigal contends that the trial court erred by ordering her to pay discretionary legal financial obligations (LFOs) without first undergoing an inquiry into her ability to pay them as required by RCW 10.01.160(3). However, contrary to Madrigal's contention, in this case the trial court did undergo an inquiry into Madrigal's ability to pay LFOs. RP 137-38.

At sentencing, the trial court judge addressed Madrigal's trial counsel and inquired as follows: "I need to inquire as to Ms. Madrigal's ability to pay. Does she have anything that prevents her from earning an income?" RP 137. Madrigal's counsel responded as follows:

She's not currently employed, your Honor. She does earn child support and is trying to essentially single parent a couple of

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children, although not during these next six months obviously. And so there is at least some limitation on her ability to pay. It's not a physical or mental disability.

RP 138.

After this inquiry, the trial court ordered Madrigal to pay \$1,912.00 for LFOs. RP 138; CP 28-29. Madrigal offered no objection. RP 137-140. Of these LFOs, \$800.00 represents the victim, filing, and DNA fees, which are mandatory fees. RCW 7.68.035; RCW 36.18.020(2)(h); RCW 43.43.7541. The remaining \$1,112.00 represents discretionary LFOs, as follows: \$100.00 domestic violence assessment (RCW 10.99.080); \$162.00 sheriff's service fees (RCW 10.01.160); \$250.00 jury fees (RCW 10.46.190); and, \$600.00 court appointed attorney fees (RCW 10.01.160).

Madrigal's assertion that she was unemployed says nothing about her ability to work or obtain employment. Counsel asserted that Madrigal "does earn child support" (RP 138). However, the State contends that when assessing Madrigal's ability to pay discretionary costs, child support is not an *earning*; nor is it discretionary income from which Madrigal should pay legal costs related to her criminal conviction. Instead, child support is money provided for support of children. Additionally, while

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counsel asserted that Madrigal received child support and was a single parent for two children, it is unclear that she actually had or would continue to have custody of those children. RP 139-40.

The State contends that, as regards her ability to pay LFOs, the most relevant factual assertion that Madrigal made in response to the trial court's inquiry into her ability to pay LFOs was Madrigal's assertion that she has no "physical or mental disability." RP 138. The trial court is required to inquire into Madrigal's *ability* to pay. RCW 10.01.160; RCW 9.94A.760(2); *State v. Curry*, 118 Wn.2d 911, 914-16, 829 P.2d 166 (1992). The trial court fulfilled its duty here. Even if Madrigal has no savings and no current income, the lack of any disability shows that she has the ability to acquire \$1,112.00 in the future to pay for the costs that she has incurred in this case.

Finally, the State contends that because Madrigal did not preserve the issue of LFOs with an objection in the trial court, this court should decline to decide the issue for the first time on appeal. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

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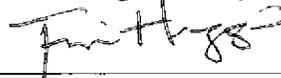
D. CONCLUSION

Madrigal misconstrues the victim's recorded recollection as impeachment testimony and mistakenly asserts that the State offered this so-called impeachment testimony as a guise. But the victim testified only to a lack of memory of the events that were memorialized in his statement to police. Thus, there was no trial testimony for the State to impeach with the victim's recorded recollection. As a recorded recollection, the victim's recorded statement to police was admissible substantively under ER 803(a)(5). Therefore, trial counsel was not ineffective for failing to object to testimony about the victim's recorded statement to police.

Finally, because the trial court did engage in an on the record inquiry into Madrigal's ability to pay LFOs, and because the record shows that Madrigal has the ability to pay the LFOs, the trial court did not err by imposing the amount of discretionary LFOs ordered in this case.

DATED: April 19, 2016.

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# MASON COUNTY PROSECUTOR

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