

NO. 49166-4-II

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

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STATE OF WASHINGTON

Respondent,

v.

PAMELA S. BENBERG,

Appellant.

Appeal from the Superior Court of Cowlitz County  
Cause No. 16-1-00174-0  
The Honorable Michael H. Evans

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. Ms. Benberg was denied effective assistance of counsel that prejudiced her right to a fair trial before an impartial jury when her attorney failed to move for a mistrial, seek a curative instruction, or dismissal of the venire after multiple prospective jurors expressed vitriolic opinions on Ms. Benberg's physical appearance as a perceived user and dealer of methamphetamine in front of the entire prospective panel.
2. The court erred in denying Ms. Benberg's motion for a new trial based on the tainted jury panel that impacted her right to trial by an impartial jury.
3. The court failed to inquire into Ms. Benberg's ability to pay legal financial obligations prior to their imposition.
4. The court imposed legal financial obligations without making a finding that Ms. Benberg had the current or future ability to pay.

### **Issues Pertaining to Assignments of Error**

1. Whether Ms. Benberg's trial counsel's performance was deficient under *Strickland v. Washington* and progeny where counsel failed to seek any timely remedy to a tainted jury pool, and whether prejudice can be presumed to have followed the impanelling of this tainted jury that impacted Ms. Benberg's right under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to trial by an impartial jury?
2. Where Ms. Benberg had a right under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to trial by an impartial jury, and where prospective jurors made personalized, vitriolic, quasi-expert comments, the trial court should have presumed prejudice pursuant to *Mach v. Stewart* and granted the defense motion for mistrial/new trial?

3. Whether this court should review this matter under RAP 2.5 where the trial court failed to undertake any meaningful inquiry into Ms. Benberg's present or future ability to pay legal financial obligations pursuant to *State v. Blazina*?
4. Whether the trial court erred in imposing legal financial obligations upon Ms. Benberg without a sufficient factual basis pursuant to *State v. Blazina* and *City of Richland v. Wakefield*, and whether the required remedy is remand for the appropriate inquiry to be undertaken?

## II. STATEMENT OF THE CASE

### 1. Introduction

Through inflammatory, personalized comments and innuendos by prospective jurors that verged into expert opinion during *voir dire*, Pamela Sue Benberg was effectively labeled a muscle-wasted, rotten-toothed, "meth" abuser and dealer before her entire venire. The scarlet letter of methamphetamine abuser and all its profoundly negative connotations unfairly marked Ms. Benberg and effectively undercut the presumption of innocence throughout her jury trial.

The taint upon their view of Ms. Benberg was inseparable from the jury's verdict. Ms. Benberg's defense counsel failed to contemporaneously recognize the damage to Ms. Benberg's right to a fair trial, failed to seek an instruction or dismissal of the panel, and moved for a mistrial only after the verdict and immediately prior to sentencing. The court denied the post-verdict motion and proceeded to sentencing.

At sentencing, the trial court imposed legal financial obligations upon Ms. Benberg without any individualized inquiry into her present or future ability to pay.

## *2. Nature of the Case*

Pamela Sue Benberg was charged by information with one count of Violation of the Uniform Controlled Substances Act (VUCSA)- Delivery of Methamphetamine with a School Zone Enhancement<sup>1</sup> and one count of VUCSA-Possession of Methamphetamine. CP 1-2 (Information at Clerk's No. 5); CP 20-21 (Amended Information at Clerk's No. 19). Ms. Benberg pled guilty to the count of possession before trial. RP 9; CP 22-32 (Statement of Defendant on Plea of Guilty at Clerk's No. 20). Ms. Benberg proceeded to jury trial on the remaining delivery charge. RP 4.

The delivery count involved a friend of Ms. Benberg's, Robert Lang, who, unbeknownst to Ms. Benberg, was also acting as a confidential informant for law enforcement. RP 169. Law enforcement officers each testified to their experiences with other 'controlled buy' situations. RP 154; 166; 196. This 'controlled buy' was alleged to have occurred on December 30<sup>th</sup>, 2015, with the exchange presumed to have occurred during an embrace between Ms. Benberg and Mr. Lang. RP 159, lns. 18-20; RP 169; RP 203-204. Mr. Lang returned from his meeting with Ms.

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<sup>1</sup> Pursuant to RCW 69.50.435(1)(c) and RCW 9.94A.533(6).

Benberg and turned over to detectives a bag containing suspected methamphetamine. RP 184. This was tested with a positive result for the drug. RP 124. Nobody actually saw a hand-to-hand transaction of any kind, only the hug. RP 204, lns. 1-8; RP 207, ln. 25; RP 208. Detective Brent was permitted to opine that it is almost never the case that a hand-to-hand transaction is seen in a drug-buy scenario. RP 209, lns. 8-25.

Additionally, evidence was presented the delivery occurred within one thousand feet of a school bus stop. RP 226-227; RP 232. Apart from the school district director of transportation and a county employee used by the State to establish the school zone enhancement, the only testifying witnesses were law enforcement personnel. RP 152; RP 165; RP 194; RP 206.

### *3. Irregularity of Jury Selection Resulting in Tainted Panel*

The jury selection process in this matter was irregular. The process became repetitively personalized and suffused with quasi-expert opinion about both the effects of methamphetamine and the behavior of its users and dealers. Prospective jurors also repeatedly proclaimed Ms. Benberg's guilt. Predictably enough, prospective jurors expressed intensely negative opinions about the subject matter of the case from the very beginning of the process.

Soon into the selection process, Juror 36 stated he had custody of his

daughter, as her mother was hooked on methamphetamine. RP 30, Ins. 19-21. Juror 36 had been lied to, stolen from, and didn't care for people that are around methamphetamine. RP 31, Ins. 4-7. Due to Juror No. 15's experiences with an ex-husband, just hearing about methamphetamine made her "blood boil." RP 31, Ins. 23-25; RP 32, Ins. 12-14. Juror 37's son had stolen a car, a computer, and other things from them as a result of the drug. RP 33, Ins. 22-25. When asked about Ms. Benberg, this juror indicated "I guess I wouldn't hold it against her." RP 34, Ins. 11-12. Juror 42 had many negative experiences as a result of a son being addicted to methamphetamine. RP 35. Juror 27 had an ex-wife who was into methamphetamine, stole from family, and sold the drug to nieces and nephews. RP 37, Ins. 21-25. Juror 21 had a niece on methamphetamine and witnessed how she treated her children. RP 40, Ins. 20-24. Juror 30 seemed to summarize the opinions many prospective jurors expressed beyond the above examples, by stating: "I just feel that methamphetamines destroy people and lives and families, and I take it very personal. I think it's something that needs to be stopped." RP 36, Ins. 24-25; RP 37, Ins. 1-2.

Additionally, prospective jurors had professional experiences with the drug. Juror 35 had professional experience on a daily basis relating to methamphetamine as the Dental Director of Cowlitz County. RP 42, Ins.

2-5; RP 43, Ins. 1-4. He estimated pulling 20 teeth a week due to methamphetamine. RP 43, Ins. 9-10. Juror 11 was a paramedic for 24 years in Cowlitz County, and knew well the signs and symptoms of the addicted, and expressed a bias against users. RP 47, Ins. 16-19.

Against this backdrop, Ms. Benberg's appearance and behavior were particularly notable to everyone in the courtroom. Soon after an early break (during which the prospective jurors were excused), the court commented on Ms. Benberg acting oddly<sup>2</sup> during *voir dire*. RP 78, ln. 12-15. It was explained Ms. Benberg was not under the influence of drugs, but rather suffering from sciatica symptoms. RP 78, Ins. 16-25. The court, however, observed Ms. Benberg to be (at one point) "putting her head down within an inch, half inch of the paper." RP at 79, Ins. 8-10. Ms. Benberg also told the court she had taken a Benadryl and was sleepy. *Id.* at Ins. 11-13. Ms. Benberg answered affirmatively when asked by the court if she was following the proceedings and able to participate in her defense. RP 80, Ins. 3-13. Beyond just her unusual behavior, Ms. Benberg's physical appearance (seen by all prospective jurors and the court) was described as displaying "muscle-wasting and many missing teeth". RP 114-116. An indelible impression had been made upon the venire, which was easily detectable in comments made by prospective

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<sup>2</sup> Earlier the court had already noted Ms. Benberg to be closing her eyes during her plea. RP 10, Ins. 3-4.

jurors.

*Voir dire* became overtaken with inflamed conjecture on the part of prospective jurors upon Ms. Benberg's physical appearance and behavior, which was perceived to be that of a drug user. Juror 15 was already "pretty angry" at Ms. Benberg because this was a methamphetamine case. RP 88, lns. 1-2. Juror 11 (the paramedic) was biased against Ms. Benberg "because of her behavior and the way she is this morning." RP 89, lns. 1-5. Juror 11 stated what he meant by this: "fidgeting and gazing around and not paying attention to what's going on about her life gives me a clue." *Id.* at lns. 7-9. When asked by trial counsel what it gave him a clue about, Juror 11 replied, "That she's already--" (the juror was then interrupted by the prosecutor). RP 89, lns. 10-13. After a brief sidebar, defense counsel inquired of the panel whether Ms. Benberg's behavior and appearance, just referred to by Juror 11, had impacted other prospective jurors. RP 89, lns. 24-25; RP 90, lns. 1-2. It had.

Juror 2 had some friends on meth, and saw similarities to Ms. Benberg. RP 91, lns. 11-14. Juror 2 said she had observed Ms. Benberg, and if she continued to behave in this way, she could not be fair. RP 92, lns. 18-24. Juror 5 thought it looked as though Ms. Benberg was "high right now". RP 93, lns. 3-5. Juror 5 thought she looked guilty. *Id.* at lns. 19-21. Juror 16 spoke of a dealer in their neighborhood and seeing a lot of

this person reminded her of the way Ms. Benberg was looking, fidgeting, and acting. RP 95, lns. 12-21. Juror 24 couldn't look past the charges, or Ms. Benberg's actions in court, and believed she was guilty. RP 97, lns. 3-11. Juror 40 stated:

“Well, she has all the classic signs of a long-time user, whether she's guilty of, you know, sale or whatever or there's evidence that supports that. Can I be impartial? I really don't know. I already have, you know, visuals against her already, so.”

RP 98, lns. 13-17.

After the exchange with this juror, the selection process turned back to Juror 35, who previously identified himself before the entire panel as the Dental Director of Cowlitz County who pulls twenty teeth a week because of methamphetamine. RP 99. The dental director stated in front of everyone: “I'm not sure how much I can say without prejudicing everyone in the room.”<sup>3</sup> *Id.*, lns. 13-15. Juror 41 stated, “my dad has sciatica, my dad doesn't act like that.” RP 100, lns. 6-8. This juror opined Ms. Benberg looked like a long-term user, and “very rarely are users and distributors different people”. *Id.* at lns. 8-12. “She's guilty to me sitting right here now.” *Id.* at ln. 16-17.

A large number of prospective jurors expressed clear bias in front of

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<sup>3</sup> Outside of the presence of other jurors, Juror 35 later noted Ms. Benberg had hardly any teeth, muscle-wasting, and explained why this was indicative both of methamphetamine use and “cooking” based upon his professional expertise as a dentist. RP 114-116.

the panel.<sup>4</sup> Ultimately, jurors that articulated specifically they could not be fair were excused for cause. *Id.* Jurors who had been present for the comments and innuendos composed Ms. Benberg’s jury. *See* RP 128-130 (jury assembled and sworn); CP 3 (Jury Panel at Clerk’s No. 16). On June 3, 2016, this jury found Ms. Benberg guilty of delivery of methamphetamine with a special verdict returned in the affirmative that she had committed the delivery within 1,000 feet of a school bus route stop. CP 49-50 (Verdict forms at Clerk’s Nos. 22 and 23).

*5. Post-Verdict Motion for Mistrial*

On June 6, 2016, Ms. Benberg filed a motion for mistrial or, in the alternative, to grant a new trial based upon the jury panel that was tainted from the comments made during *voir dire*. CP 53-55 (Motion for Mistrial at Clerk’s No. 28). The State responded. CP 56-60 (State’s Response at Clerk’s No. 29). The motion was argued at Ms. Benberg’s sentencing hearing on June 21, 2016. RP 302. Defense counsel explained she felt compelled to file the motion when she thought about what she had observed, what had happened, and whether she could have appropriately cured it by her questions in jury selection. RP at 302, lns. 10-15. Trial counsel argued she did not believe it was possible that the resulting “jury

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<sup>4</sup> Nos. 2, 3, 6, 10, 11, 12, 13, 15, 16, 18, 20, 21, 22, 24, 25, 27, 28, 29, 30, 31, 32, 34, 35, 36, 40, 41, 42, 43, and 44 were all ultimately excused for cause, the majority of which related to clearly expressed bias. RP 85-86; 117-124; 127-28.

was able to put the taint aside, the chatter and the back-and-forth about her appearance and if she abuses drugs...” RP at 302, lns. 16-22. The State responded that the jurors who affirmatively indicated bias or prejudice were removed for cause, and that defense counsel extensively questioned each of the members of the jury pool who expressed an opinion on Ms. Benberg’s physical appearance. RP at 303, lns. 3-12. Additionally, the State argued the ones who remained did not indicate bias, and both sides agreed to the jury absent any motion for mistrial at that time. *Id.* at lns. 13-24.

The court noted the case was “somewhat unusual” in jury selection, and that “basically it was the elephant in the room<sup>5</sup>.” RP at 304, lns. 1-8. Nonetheless, the court found “the elephant in the room” had been thoroughly and appropriately examined. *Id.* The court further found *Mach v. Stewart*<sup>6</sup>, a 9<sup>th</sup> Circuit case that addressed inflammatory and expert-like comments by prospective jurors as presumptively tainting the pool, to be distinguishable. RP 304 at lns. 24-25; 305 at lns. 1-19. The trial court denied the motion for mistrial and proceeded immediately to sentencing. RP at 305, lns. 20-21.

#### 6. Sentencing

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<sup>5</sup> The ‘it’ in this context presumably refers to Ms. Benberg’s physical appearance and behavior as indicative of a drug abuser.

<sup>6</sup> 137 F.3d 630 (9<sup>th</sup> Cir. 1997).

At sentencing, Ms. Benberg agreed to an offender score of '2'. RP 306, ln. 6. Her standard range was 12 months-and-a-day to 20 months. RP 306. Additionally, there was a 24-month enhancement based upon the jury's special verdict of the school bus stop location in the case. *Id.* Effectively, the standard range on Count I was 36 to 44 months. *Id.* Count II (to which Ms. Benberg pled prior to trial) carried a range of 0-6 months. *Id.* at lns. 14-15. Community custody was 12 months due to the prison range of the sentence for count I. RP 307 at lns. 22-24.

Following the sentencing presentations of the parties, the court imposed 38 months with 12 months on community custody. RP at 313, lns. 5-13. The court imposed legal financial obligations in the amount of \$850. CP 61-73 (Judgment and Sentence at Clerk's No. 31) at p. 68. Specifically, the court imposed a \$500 crime victim assessment, a \$100 DNA collection fee, and a \$250 jury fee. *Id.*

There were no specific findings whatsoever made of Ms. Benberg's present or future ability to pay, in spite of boilerplate language in the uncompleted section 2.5 of the Felony Judgment and Sentence that such an inquiry had been undertaken. CP 66 (Judgment and Sentence at Clerk's No. 31). There were no questions whatsoever about Ms. Benberg's employment (or lack thereof), expenses, or her source(s) of income. *See* RP 302-315 (sentencing hearing). Ms. Benberg had appointed trial

counsel from the Cowlitz County Office of Public Defense, and was found indigent for purposes of this appeal. CP 4-19 (Motions *in Limine* at Clerk's No. 17 containing caption 'Cowlitz County Office of Public Defense'); CP 75-88 (Notice of Appeal at Clerk's No. 33); CP 89-91 (Motion & Order of Indigency at Clerk's No. 35).

### III. ARGUMENT

#### A. **Trial counsel was ineffective in failing to contemporaneously move for a mistrial or to seek a curative instruction where potential jurors' comments before the entire panel imperiled Ms. Benberg's right to a fair trial before an impartial jury.**

##### *i. Ineffective assistance of counsel*

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33, 246 P.3d 1260. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the trial would have been different. *Id.* at 34, 246 P.3d 1260. To prevail on an ineffective assistance of counsel claim, Ms. Benberg must show both deficient performance and

resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If an ineffective assistance of counsel claim does not support a finding of either deficiency or prejudice, it fails. *Id.* at 697.

The court will begin its analysis with a strong presumption that counsel's performance was reasonable. *Id.* at 33, 246 P.3d 1260. To rebut this presumption, the defendant must establish the absence of any “ ‘conceivable legitimate tactic explaining counsel's performance.’ ” *Id.* (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260.

- ii. *Trial counsel's failure to contemporaneously move for a mistrial or seek any form of curative instruction was deficient.*

It was not sound strategy or a legitimate trial tactic to invite personal attacks and conjecture upon on a client's physical appearance, or behavior and then not seek to cure the issue in any way if the responses are less than desirable or vitriolic. Trial counsel, by her own admission, was so taken aback by the personal nature of the responses, she did not contemporaneously move to strike the jury venire, move for a mistrial any sooner than after the verdict, or to seek any curative instruction from the

court. *See* CP 53-55; RP 302, lns. 10-22.

The inflammatory nature of the comments should have alerted trial counsel to seek a mistrial. A prospective juror in the case said Ms. Benberg appeared to be “high right now”. RP 93, lns. 3-5. A juror was angry with Ms. Benberg because it was a methamphetamine case. RP 88, lns. 1-2. Ms. Benberg showed all the classic signs of a user to another. RP 98, lns. 13-17. Another said that in their experience, dealers and users were the same individuals (a direct comment on guilt heard by all). RP 100, lns. 6-8. A number of prospective jurors commented even more directly upon her guilt, e.g., “She is guilty right now”. RP 93, lns. 19-21; RP 97, lns. 3-11; RP 100, lns. 16-17. These comments (and others made), which touched upon the issue of guilt, the interchangeability of “dealers” and “users”, and Ms. Benberg’s behavior and physical appearance, cannot have been simply disregarded by those jurors that remained upon the panel. This effect is intensified by what we know from the record of Ms. Benberg’s actual physical appearance and behavior in the courtroom, which was “the elephant in the room” according to the trial judge. *See* RP 304, lns. 1-8.

Additionally, two professionals with significant expertise provided their opinions on the drug and the appearance and behavior of Ms. Benberg. *See* RP 42, lns. 205; RP 43, lns. 104; RP 47, lns. 16-19; RP 89,

lns. 1-9; RP 99, lns. 13-15. Despite, this trial counsel did nothing at the time to cure the issue and actually attempted to draw out even more commentary on her client's physical appearance. *See generally* RP 89-90. It is particularly telling that the State actually had to interrupt a juror's response to defense counsel's question to avoid a comment that would have almost certainly led to a mistrial. RP 89, lns. 10-13. Trial counsel appeared to have been taken aback by the comments and felt compelled to confront the issue only after reflection upon the comments. *See* RP 302; CP 53-55. There is no record to demonstrate trial counsel was acting strategically, or exercising a particular trial tactic. There was no legitimate strategy here in failing to contemporaneously move for a mistrial, move to strike the panel, or to seek a curative instruction where personalized opinions by jurors that touched directly upon the guilt of the accused dominated the selection process. Finally, the defense agreement and consent to a jury composed of jurors exposed to these comments and under these particular circumstances was not strategic, it was inexplicable but for deficient performance. The very existence of the post-verdict Motion for Mistrial (CP 53-55) is a testament to this inescapable conclusion.

iii. *Trial counsel's performance prejudiced Ms. Benberg's right to a fair trial*

Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Legitimate tactics or strategy will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693. As the US Supreme Court observed in *Strickland*:

Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. *Id.*

In this drug-related case, potential jurors stated in front of the entire panel Ms. Benberg matched the profile (to put it mildly) of someone associated with methamphetamine before any evidence was presented. *See, e.g.* RP 98, at lns. 13-17. Several said she was guilty. RP 93. Several thought she was using. *Id.* at lns. 3-5. One opined dealers and users were often the same persons. RP 100. Professionals opined upon methamphetamine in general and in relation to Ms. Benberg. CP 42-43, 47, 88, 89.

Ms. Benberg was guaranteed the right to trial by an impartial jury

under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). This requires that jurors remain “indifferent”<sup>7</sup> or “unbiased and unprejudiced”<sup>8</sup>. If, however, a prospective juror repeatedly makes highly inflammatory, expert-like statements directly concerning guilt in the presence of the entire panel, a court may presume the statements tainted the resulting jury’s impartiality. *Mach v. Stewart*, 137 F.3d 630, 633 (9<sup>th</sup> Cir. 1997). Prejudice in circumstances such as this should be presumed. Ms. Benberg was unequivocally subjected to personalized, repetitive, and hostile comments, which included quasi-expert opinion. The comments touched upon her guilt. Additionally, these statements dovetailed with opinion testimony on the behavior of users and dealers of drugs in controlled buy situations later presented by the State at trial.

Ms. Benberg’s status was established in the mind of each juror before any evidence was presented by the State. The State’s evidence was circumstantial, and the earlier comments by prospective jurors enhanced the quality of the evidence the State presented. That trial counsel waited to address the issue until after the verdict, demonstrates not only the

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<sup>7</sup> *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d (1992) (construing U.S. Const. amend. VI).

<sup>8</sup> *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000) (construing Const. art. I, §22 (amend. 10)).

deficiency of performance, but also the pervasive and unshakeable influence of the comments throughout the entire trial. The issue did not simply evaporate once the jury was sworn. No witness saw Ms. Benberg do anything other than embrace the confidential informant. The juror comments were echoed, affirmed, and given the imprimatur of expertise through law enforcement officers who each later testified about their extensive experiences in other ‘controlled buys’ and what is ‘typical’ behavior of buyers and sellers. RP 209. Trial counsel’s consent to this jury and failure to do anything contemporaneously to cure the issue cannot reasonably be said to have resulted in an indifferent and unbiased and unprejudiced jury. Accordingly, as the irregularities in the jury selection process went to the very core of Ms. Benberg’s right to a fair trial before an impartial jury and presumption of innocence (expanded upon further below in the sections pertaining to the denial of her Motion for Mistrial), the second *Strickland* factor in her claim for ineffective assistance of counsel is established.

- B. The trial court erred in denying the defense motion for mistrial made after the verdict where the vitriolic and personalized comments made during jury selection tainted the panel**
  - i. Ms. Benberg had a right to a trial before an impartial jury free from inflammatory, personalized attacks.*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to trial by an impartial jury. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). This requires that jurors remain “indifferent”<sup>9</sup> or “unbiased and unprejudiced”<sup>10</sup>.

To ensure this constitutional right, the trial court will excuse a juror for cause if the juror's views would preclude or substantially hinder the juror in the performance of his or her duties in accordance with the trial court's instructions and the jurors' oath. *State v. Gonzales*, 111 Wn. App. 276, 277–78, 45 P.3d 205 (2002). When a defendant does not receive a trial by an impartial jury, the remedy is reversal. *Id.* at 282, 45 P.3d 205. The presence of *any* biased juror cannot be harmless, and allowing a biased juror to serve on a jury requires a new trial without a showing of prejudice. *See State v. Irby*, 187 Wn.App. 183, 193, 347 P.3d 1103 (2015).

This court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. *Greiff*, 141 Wn.2d at 921, 10 P.3d 390. A trial court

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<sup>9</sup> *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d (1992) (construing U.S. Const. amend. VI).

<sup>10</sup> *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000) (construing Const. art. I, §22 (amend. 10)).

abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997). An appellate court will overturn the trial court's decision on a motion for mistrial only if there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921, 10 P.3d 390 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

Although a motion for mistrial is distinct from a motion to strike the jury venire because during *voir dire* trial has not yet begun, courts and attorneys often conflate the two concepts and treat a motion to strike an entire prospective jury panel as a motion for mistrial. *See, e.g., State v. Berty*, 136 Wn. App. 74, 77, 147 P.3d 1004 (2006); *In re Det. of Griffith*, 136 Wn. App. 480, 482, 150 P.3d 577 (2006). Similarly, appellate courts review a trial court's denial of a motion to strike a prospective jury panel for abuse of discretion. *See State v. Roberts*, 142 Wn.2d 471, 518-19, 14 P.3d 713 (2000) (citing *State v. Tingdale*, 117 Wn.2d 595, 599-600, 817 P.2d 850 (1991)); *State v. Guthrie*, 185 Wash. 464, 474, 56 P.2d 160 (1936); *State v. Killen*, 39 Wn. App. 416, 418-19, 693 P.2d 731 (1985)). In deciding whether an inadvertent remark at trial requires reversal, a court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an

instruction the jury is presumed to follow. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A mistrial should be granted “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Here, prospective members of the jury directed no fewer than seven personalized, inflammatory comments at Ms. Benberg in front of the entire panel.<sup>11</sup> Multiple comments touched directly upon her guilt. *See, e.g.*, RP 93; RP 100. Trial counsel did nothing about this until the post-verdict motion for mistrial. CP 53-55. No curative instruction, which the

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<sup>11</sup> Juror 15 was already “**pretty angry**” at Ms. Benberg because this was a methamphetamine case. RP 88, Ins. 1-2 (emphasis added). Juror 2 had some friends on meth, and saw similarities to Ms. Benberg. RP 91, Ins. 11-14. Juror 2 said she had observed Ms. Benberg, and if she continued to behave in this way, she could not be fair. RP 92, Ins. 18-24. Juror 5 thought Ms. Benberg was “**high right now**”. RP 93, Ins. 3-5 (emphasis added). Juror 5 thought she looked guilty. *Id.* at Ins. 19-21. Juror 16 spoke of **a dealer in their neighborhood and seeing a lot of this person reminded her of the way Ms. Benberg was looking, fidgeting, and acting**. RP 95, Ins. 12-21 (emphasis added). Juror 24 couldn’t look past the charges, or Ms. Benberg’s actions in court, and believed she was guilty. RP 97, Ins. 3-11. Juror 40 stated:

“Well, she has all the classic signs of a long-time user, whether she’s guilty of, you know, sale or whatever or there’s evidence that supports that. Can I be impartial? I really don’t know. I already have, you know, visuals against her already, so.”  
RP 98, Ins. 13-17.

Juror 41 stated, “my dad has sciatica, my dad doesn’t act like that.” RP 100, Ins. 6-8. This juror opined Ms. Benberg looked like a long-term user, and “**very rarely are users and distributors different people**”. *Id.* at Ins. 8-12 (emphasis added). “She’s guilty to me sitting right here now.” *Id.* at ln. 16-17.

jurors would be presumed to have followed, would likely have been sufficient given the sheer accumulation of statements. Additionally, two jurors with significant professional expertise opined in front of the panel about the scourge of methamphetamine and its effect upon users.<sup>12</sup> The court also noted Ms. Benberg's unusual behavior and demeanor. RP 78-79. The jury that sat on Ms. Benberg's trial saw and experienced all of the above, and cannot reasonably be said to have disregarded it.

Given the sheer accumulation and seriousness of bias in the room directed at Ms. Benberg, the inadequacy of any curative instruction (were it sought or given), and the underlying irregularity of the circumstances, reversal is here an appropriate and necessary remedy. Each of the factors that require reversal identified in *Weber*<sup>13</sup> are established. The trial court

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<sup>12</sup>Juror 35 had professional experience on a daily basis relating to methamphetamine as the Dental Director of Cowlitz County. RP 42, lns. 2-5; RP 43, lns. 1-4. He estimated pulling 20 teeth a week due to methamphetamine. RP 43, lns. 9-10. This juror also described the physical appearance of Ms. Benberg that the other jurors would have presumably seen. *See* RP 114-116. The dental director stated in front of everyone: "I'm not sure how much I can say without prejudicing everyone in the room."<sup>12</sup> RP 99, lns. 13-15.

Juror 11 was a paramedic for 24 years in Cowlitz County, knew well the signs and symptoms of the addicted, and expressed a bias against users. RP 47, lns. 16-19. Juror 11 (the paramedic) was biased against Ms. Benberg "because of her behavior and the way she is this morning." RP 89, lns. 1-5. Juror 11 stated what he meant by this: "fidgeting and gazing around and not paying attention to what's going on about her life gives me a clue." *Id.* at lns. 7-9. When asked by trial counsel what it gave him a clue about, Juror 11 replied, "That she's already--" (the juror was then interrupted by the prosecutor). RP 89, lns. 10-13.

<sup>13</sup> 99 Wn.2d at 165-66.

erred by denying Ms. Benberg's motion for mistrial where her right to a trial before an impartial jury was substantially prejudiced and where this prejudice should have been presumed.

*ii. This court may presume Ms. Benberg's jury pool and the verdict were tainted.*

In *Mach*, the government charged Mach with sexual conduct with a minor. *Mach*, 137 F.3d at 631. During jury selection, a prospective juror said she had a psychology background, currently worked for child protective services, and had confirmed child sexual assault in every case where a client reported it. *Mach*, 137 F.3d at 631-32. The juror repeatedly stated that in her three years as a social worker, she never found a case where a child lied about sexual assault. *Mach*, 137 F.3d at 632. The court denied the motion for a mistrial. *Mach*, 137 F.3d at 632. The Ninth Circuit reversed. *Mach*, 137 F.3d at 634.

The *Mach* court held the juror's statements tainted the jury. The statements were "highly inflammatory and directly connected to Mach's guilt." *Mach*, 137 F.3d at 634. The juror's comments had an "expert-like" quality given the juror's years of experience and degree of certainty. *Mach*, 137 F.3d at 633. The court reversed because the outcome of the trial was "principally dependent on whether the jury chose to believe the child or the defendant." *Mach*, 137 F.3d at 634. The court concluded the juror's

repetition of the statements created an especially high risk they would affect the jury's verdict. *Mach*, 137 F.3d at 633. The court held:

Given the nature of [the juror]'s statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused.

*Mach*, 137 F.3d at 633.

In reviewing *Mach*'s claims, the Ninth Circuit observed that certain trial errors are "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Mach*, 137 F.3d at 632 (quoting *California v. Roy*, 519 U.S. 2, 3, 117 S. Ct. 337, 338, 136 L. Ed.2d 266 (1996)). The *Mach* court further observed: "The existence of such defects[ . . . ] requires automatic reversal of the conviction because they infect the entire trial process." 137 F.3d at 632 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 1717, 123 L. Ed.2d 353 (1993)).

The *Mach* court concluded that the error was "arguably" a structural error requiring automatic reversal. 137 F.3d at 633. However, the *Mach* court determined that the error required reversal even under a harmless-error standard, and did not resolve whether the trial court's denial of a mistrial was such a "structural" error. 137 F.3d at 634.

Washington cases (the vast majority of which are unpublished) that

have directly confronted *Mach* each found it factually distinguishable. For example, in *State v. Strange*, 188 Wn. App. 679, 354 P.3d 917 (2015), Strange argued that his right to a fair trial by an impartial jury was violated because of prospective jurors' statements concerning their own prior experiences with child molestation, either in their families or among friends or acquaintances, which tainted the entire jury venire. *Id.* at 684-85. Strange argued this circumstance was factually similar to *Mach*. *Id.* at 685. This court disagreed, and concluded *Mach* did not control the outcome. *Id.* at 687. This court cited two principal reasons the facts were distinguishable:

First, unlike the social worker in *Mach*, here there were no jurors claiming expertise. Although, at least two of the prospective jurors were teachers and one was an elementary school principal, and each of these prospective jurors admitted that they feel more instinctively protective of children, none of them claimed to speak authoritatively about whether a child is being truthful when she alleges that she is a victim of molestation. Therefore, the Ninth Circuit's concern about a prospective juror with more credible, authoritative knowledge tainting the rest of the venire is not present here.  
*Id.* at

In Ms. Benberg's circumstance two jurors claimed expertise and provided credible, authoritative knowledge before the entire panel in the form of quasi-expert opinion.

This court went on to discuss the conditional and isolated nature of the statements in *Strange* as a second distinguishing factor:

Secondly, none of the prospective jurors stated multiple times that, in their experience, child molestation victims never lie about being molested. Most

jurors were merely questioned about their experiences with child molestation and asked if they could remain impartial. Some jurors admitted to a potential bias, most said that they thought that they could apply the court's instructions impartially, and two prospective jurors asked for individual voir dire, preferring not to talk about their experiences in front of the rest of the venire. Even juror no. 54—the prospective juror whose statements Strange identifies particularly—said only that he thinks child molestation is “not an easy accusation to make” and that, in his limited experience, people do not make accusations of molestation “for no reason.” 1A RP at 72. But juror no. 54's statement is different from the social worker's in *Mach* because he qualified his statement, prefacing it by saying, “I don't have a ton of experience.” 1A RP at 72. In contrast, the social worker in *Mach* relied on her experience and her credentials to add weight to her much more unequivocal claim that victims of child molestation never lie. 137 F.3d at 632–33. *Id.* at 686–87.

Ms. Benberg's situation is distinct of *Strange* and more aligned to *Mach*.

There were repeated personalized comments aimed directly at the defendant. *See* fns. 11-12 above. Many touched directly upon her guilt.

*Id.* The comments also touched upon the subject of testimony by professional law enforcement witnesses that was later presented in the trial, specifically the ‘typical’ behavior of methamphetamine users and dealers in a ‘controlled buy’ scenario. *See generally* RP 209. Finally, the jury pool heard opinions by the county dental director and a veteran retired paramedic informed by their professional expertise on several occasions. *See* fn. 12 above. This matter is distinguishable from *Strange*, where the comments were isolated, conditional, and generalized in relation to the jurors *own* experience with child molestation. The trial court erred in finding *Mach* distinguishable and in denying the defense motion for

mistrial/new trial.

*iii. The taint created by the prospective juror's accusations about Ms. Benberg could not be cleansed merely by individual challenges for cause or full use of peremptory challenges*

In order to preserve a defendant's presumption of innocence before a jury, the defendant is "entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (quoting *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)).

Here, the accumulation of the remarks (absent any curative measure) prejudiced Ms. Benberg in several ways. First, the remarks were extremely personal and afforded her the status of a drug-affected person in a drug case. This was highly prejudicial and impacted her presumption of innocence. *See, e.g. State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010) (use of a space other than a courthouse for a criminal trial, particularly when that space is a jailhouse infringed upon the defendant's right to a fair and impartial trial); *State v. Gonzalez*, 129 Wn. App. 895, 120 P.3d 645 (2005) (trial court denied defense's motion for a mistrial based on the trial court's preliminary jury instructions that informed the jury that Gonzalez was in jail because he could not post bail, and that he was going to be transported in restraints, and that he was under guard in the courtroom);

*See also, e.g., Gholston v. State*, 620 So.2d 715, 716 (Ala. Cr. App. 1992) *aff'd*, 620 So.2d 719 (1993) (when defendant's incarceration is brought to jury's attention "there is a danger that the jury will convict on general principles" and the presumption of innocence is in danger of "going out the window").

Second, the jurors' remarks touched upon guilt both implicitly and explicitly. *See, e.g.,* RP 93; RP 100; *See also* fn 11-12 above. The right to a fair trial includes the right to the presumption of innocence. *Williams*, 425 U.S. at 503; *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could "undermine the fairness of the fact-finding process." *Williams*, 425 U.S. at 503. Courts must evaluate the likely effects of an alleged violation "based on reason, principle, and common human experience." *Williams*, 425 U.S. at 504.

Third, the prejudice was further intensified by professed expert opinion from prospective jurors. The panel had knowledge that Juror 35 and Juror 11 were professionals with expertise in the drug, users, and its effects. Because Juror 31 identified himself as such, the jurors were likely

to accord respect and weight to his opinions. *See State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (police officers' testimony carries an "aura of reliability"). As in *Mach*, here two potential jurors whose professional experience gave them special expertise and knowledge tainted the entire jury panel by stating prejudicial facts and opinions. As in *Mach*, the jury panel here was likely to accord Juror 35 and Juror 11's opinion significant weight that would not and did not simply dissipate and float into the ether upon their removal for cause.

The jury panel was subjected to highly prejudicial remarks against Ms. Benberg. The numerous and repetitive remarks of the prospective jurors tainted the jury pool, and encouraged other jurors to give credence to the State's as-yet unheard and unproven case because she embodied the caricature (real or imagined) of a methamphetamine user or dealer described in the juror's comments.<sup>14</sup> The effect of these comments prejudiced the jurors who ultimately deliberated in Ms. Benberg's trial and enhanced the circumstantial evidence presented by the State. For all of these reasons, the trial court erred and reversal is required. *Mach*, 137 F.3d at 633; *Gonzales*, 111 Wn. App. at 282 (When a defendant is denied his or her constitutional right to a fair and impartial jury, the remedy is reversal).

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<sup>14</sup> One prospective juror's opinion was that dealers and users are frequently one and the same. RP 100, Ins. 6-8.

**C. The trial court erred by imposing legal financial obligations on Ms. Benberg absent a sufficient inquiry into her present or future ability to pay**

The imposition of legal financial obligations on persons who cannot pay has resulted in what the Washington Supreme Court previously described as a “broken system” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Imposition absent consideration of the ability to pay has resulted in “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* Additionally, in granting review even though the issue was not preserved, the court noted the “significant disparities” which have resulted in greater fees being imposed for drug-related offenses, offenses resulting in trial, Latino defendants and male defendants. *Id.* The Washington Supreme Court further analyzed imposition of discretionary legal financial obligations in *City of Richland v. Wakefield*, \_\_ Wn.2d \_\_, 380 P.3d 459 (2016) and reiterated the punitive consequences of discretionary legal financial obligations on indigent defendants.

“[O]n average, a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.” Given this reality, trial courts should be cautious of imposing such low payment amounts in the long term for impoverished people.

*Id.* (quoting *State v. Blazina*, 182 Wn.2d 836, 344 P.3d 680 (2015)).

Because the record here indicates Ms. Benberg was not likely to be able to

pay legal financial obligations now or in the future, this court should review this matter under RAP 2.5.

- i. Before legal financial obligations may be imposed, the court must make an inquiry into whether a person has the present or future ability to pay.*

The legislature has mandated that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). In *Blazina*, the Supreme Court determined that trial courts must make an individualized inquiry into a defendant’s current and future ability to pay before imposing legal financial obligations. 182 Wn.2d 827, 830, 833–34. “This inquiry . . . requires the court to consider important factors, such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” *Id.* at 839. In so ruling, the *Blazina* court suggested that courts look to the comment in GR 34 for guidance in considering a defendant’s ability to pay.

This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. ***Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.***

*Id.* at 838-39 (citations omitted) (emphasis added).

Even though counsel had not raised the issue below, the court reached this issue under RAP 2.5 because it found that the pernicious consequences of “broken LFO systems” on indigent defendants “demand” that it reach the issue, even though it was not raised in the trial court. *Blazina*, 182 Wn.2d at 833–34.

ii. *The record does not reflect Ms. Benberg’s ability to pay*

The only record with regard to Ms. Benberg’s current or future finances was that she had a court appointed attorney and that she was found indigent for purposes of the instant appeal. CP 4-19; CP 89-91; CP 75-88. In spite of boilerplate language on the judgment and sentence that such an inquiry had been undertaken, there is no record it happened. *See* CP 66. The court also heard that Ms. Benberg had been suffering a number of health issues. *See e.g. RP 300;310-11*. The only reference to employment was that she had been a caretaker for a recently deceased man named “Albert Clone”. RP 311. The affirmation of counsel contained in the Motion and Order for Indigency states Ms. Benberg’s financial circumstances had remained the same or gotten worse since she was found indigent at the time counsel was appointed. CP 89-90.

While the court declined to exercise its discretion in *State v. Lyle* to review an unpreserved legal financial obligation issue, this court need

not decline to do so in every case. *Compare State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015) with *Blazina*, 182 Wn.2d at 833–34 and *State v. Hart*, 188 Wn. App. 453, 353 P.3d 253 (2015). Under RAP 2.5 this Court may reach the issue of legal financial obligations, especially to provide guidance to lower courts on steps to improve the “broken LFO systems” which the Supreme Court found demanded it to reach the issue. *Blazina*, 182 Wn.2d at 833, 34.

Despite no inquiry into Ms. Benberg’s ability to pay, this court may observe that significant questions exist with regard to her financial circumstances. For example, there was no meaningful evidence of employment or income. There were no questions whatsoever about Ms. Benberg’s employment (or lack thereof), expenses, or her source(s) of income. *See* RP 302-315 (sentencing hearing). Ms. Benberg had appointed trial counsel from the Cowlitz County Office of Public Defense, and was found indigent for purposes of this appeal. *See* CP 4-19; CP 89-91; CP 75-88.

This court should require that this matter be returned to the trial court for an inquiry into whether Ms. Benberg has the ability to pay legal financial obligations. *Hart*, 188 Wn. App. at 353.

- iii. *The inquiry into whether a person has an ability to pay must be made before a court may impose any legal financial*

*obligations, and this necessarily includes those the court determines are mandatory.*

Imposing legal financial obligations on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 835. Legal financial obligations accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward legal financial obligations will owe more money ten years after conviction than when the legal financial obligations were originally imposed, even when the minimum amount is imposed by the trial court. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Ms. Benberg’s ability to pay because the statutes in

question use the word “shall” or “must.” See RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 43.43.7541 (every felony sentence “must include” a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

Ms. Benberg was an indigent defendant and absent any record of her ability to pay, legal financial obligations should not have been imposed upon her. The matter should be remanded for a proper inquiry.

#### **IV. CONCLUSION**

This court should reverse Ms. Benberg’s conviction based both upon the ineffective assistance of counsel Ms. Benberg received that prejudiced her right to a fair trial before an impartial jury, as well as the trial court’s error in denying the later motion for mistrial under circumstances of a jury that should have been presumed to have been

tainted similar to those of *Mach v. Stewart*, 137 F.3d 630, 633 (9<sup>th</sup> Cir. 1997).

If Ms. Benberg's conviction is not reversed based upon the tainted jury panel, it is respectfully requested that this court remand the case to the trial court for further inquiry regarding Ms. Benberg's ability to pay legal financial obligations pursuant to *State v. Blazina*, 182 Wn.2d 827.

Finally, should this court reject Ms. Benberg's arguments on appeal, she asks that the court issue a ruling precluding the State from seeking any reimbursement for costs on appeal due to her continued indigency<sup>15</sup>. *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016). This court also recently issued an opinion declining to impose appeal costs. *State v. Grant*, ---P.3d---206 WL 6649269.

Respectfully submitted this 29<sup>th</sup> day of November, 2016.

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Zachary W. Jarvis, WSBA# 36941  
Attorney for Appellant

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<sup>15</sup> CP 89-91 (Motion and Order of Indigency at Clerk's No. 35).

## DECLARATION OF SERVICE

I hereby declare that on November 29th, 2016, I filed APPELLANT'S OPENING BRIEF via Electronic Filing for the Court of Appeals for Division II and delivered via US Mail and E-mail the same to:

Aila Rose Wallace  
Cowlitz Co Deputy Prosecutor  
312 SW 1<sup>st</sup> Ave Rm 105  
Kelso, WA 98626-1799  
WallaceA@co.cowlitz.wa.us

I further declare that I delivered via US Mail the same to:

Ms. Pamela S. Benberg  
9601 Bujacich Rd NW  
Gig Harbor, WA 98332-8300

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

Dated November 29th, 2016.

By \_\_\_\_\_  
Zachary W. Jarvis, WSBA #36941  
Attorney for Appellant

**HART JARVIS CHANG PLLC**

**November 29, 2016 - 8:37 AM**

**Transmittal Letter**

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Case Name: State v. Pamela S. Benberg

Court of Appeals Case Number: 49166-4

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

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