

**NO. 49166-4-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**PAMELA BENBERG,**

**Appellant.**

---

**RESPONDENT'S BRIEF**

---

**RYAN JURVAKAINEN**  
**Prosecuting Attorney**  
**AILA R. WALLACE/WSBA 46898**  
**Deputy Prosecuting Attorney**  
**Representing Respondent**

**HALL OF JUSTICE**  
**312 SW FIRST**  
**KELSO, WA 98626**  
**(360) 577-3080**

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>I. RESPONSE TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>II. STATEMENT OF FACTS.....</b>	<b>1</b>
<b>III. ARGUMENT.....</b>	<b>3</b>
<b>A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING FOR A MISTRIAL OR SEEKING A CURATIVE INSTRUCTION.....</b>	<b>3</b>
<b>I. THE DEFENDANT CANNOT SHOW THAT HER ATTORNEY FAILED TO EXERCISE THE CUSTOMARY SKILLS AND DILIGENCE OF A REASONABLY COMPETENT ATTORNEY BY NOT REQUESTING A MISTRIAL OR CURATIVE INSTRUCTION; NOR CAN THE DEFENDANT SHOW PREJUDICE. ....</b>	<b>4</b>
<b>B. THE COURT DID NOT ERR IN DENYING THE DEFENSE’S MOTION FOR A MISTRIAL AFTER THE VERDICT.....</b>	<b>6</b>
<b>C. THE STATE CONCEDES THAT THE TRIAL COURT DID NOT INQUIRE INTO THE DEFENDANT’S ABILITY TO PAY LFOS.....</b>	<b>8</b>
<b>IV. CONCLUSION .....</b>	<b>10</b>

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Mach v. Stewart</i> , 137 F.3d 630, 632 (1997) .....	6, 7, 8
<i>State v. Barragan</i> , 102 Wn. App. 754, 9 P.3d 942 (2000).....	3
<i>State v. Bertrand</i> , 165 Wn. App. 393, 237 P.3d 511 (2011).....	9
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (2013).....	9
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997) .....	6
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	6
<i>State v. Guzman Nunez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011).....	9
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012) .....	9
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	3
<i>State v. Kirkpatrick</i> , 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007).....	9
<i>State v. Kuster</i> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	9
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	6
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	3, 5
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976).....	4
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	6
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	3
<i>State v. Visitacion</i> , 55 Wn. App. 166, 776 P.2d 986 (1989).....	4
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 (1984) .....	3, 4

**Rules**

RAP 2.5..... 9

RAP 2.5(a) ..... 9

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. Trial counsel was not ineffective; her decision to not request a mistrial was a strategic one.
2. The trial court did not err in denying the defendant's motion for a new trial, as no statements made in the presence of the entire jury panel were sufficient to taint the jurors that sate on the case.
3. The State concedes that the court did not inquire into the defendant's ability to pay legal financial obligations and imposed the LFOs.

## **II. STATEMENT OF FACTS**

The defendant's trial began on June 2, 2016. During the beginning of jury selection, the defendant appeared to be under the influence. The State conducted its voir dire. At no point did the State question or address the jury about the defendant's appearance. The court asked the jury to leave the courtroom and questioned the defendant about her appearance. RP 78. The defendant denied being under the influence and was able to repeat comments the State and jurors had made during voir dire. RP 79. The court then brought the jury back into the courtroom and allowed defense counsel to conduct her voir dire.

At the beginning of defense counsel's voir dire, she began to question the jurors about the defendant's appearance. The State interrupted this inquiry and requested a side bar. RP 89. After the side bar, defense counsel continued to question the jurors about the defendant's appearance and whether they could be fair and impartial. RP 90. Numerous potential

### III. ARGUMENT

#### A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING FOR A MISTRIAL OR SEEKING A CURATIVE INSTRUCTION.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978), citing *State v. Myers*, 86 Wn.2d 419, 424,

545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer “failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

- i. The defendant cannot show that her attorney failed to exercise the customary skills and diligence of a reasonably competent attorney by not requesting a mistrial or curative instruction; nor can the defendant show prejudice.*

Looking at the entire record in this case, trial counsel gave effective representation. Her decision not to request a mistrial or curative instruction was a strategic or tactical one. The record indicates that the defendant was acting strangely during the State’s voir dire, including putting her head down nearly to the table. RP 78–79. Apparently some of the jurors noticed this, as Juror 11 mentioned that the defendant was “fidgeting and gazing around and not paying attention.” RP 89. The trial attorney then made the

strategic decision to explain that the defendant had sciatica, and asked questions of the jurors to determine if they were going to be biased due to the defendant's appearance. This questioning led to one juror saying that whether the defendant was high during the trial was not at issue, since she was charged with delivery of drugs, not using them. RP 94. Many jurors ultimately said they could be fair and impartial; those that were concerned or felt that they could not be fair were excused for cause. Because some jurors had already noticed that there seemed to be something amiss with the defendant, the attorney's decision to determine which jurors could set that aside and decide the case only on the facts was a strategic one. Failing to request an instruction or a mistrial did not constitute conduct falling below that of a reasonably competent attorney.

In addition to overcoming the strong presumption of effective assistance, the defendant must also show that she was prejudiced. Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Specifically as to a motion for mistrial, the defendant must show that the motion for mistrial would have been granted. *Id.* That is not shown here. The jurors that expressed an inability to be fair or impartial were excused for cause, and, as will be discussed

further below, nothing that was said in front of the venire as a whole was egregious enough to taint the entire panel. The defendant here cannot show that a request for a mistrial would have been granted. Nor can the defendant show that a curative instruction have changed the outcome of the trial. Therefore, the trial attorney was not ineffective and the defendant was not prejudiced.

**B. THE COURT DID NOT ERR IN DENYING THE DEFENSE'S MOTION FOR A MISTRIAL AFTER THE VERDICT.**

A grant or denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The trial court abuses its discretion when no reasonable person would take the position of the court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A denial of a motion for mistrial will only be overturned "when there is a substantial likelihood the prejudice affected jury's verdict." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Additionally, a motion for mistrial should only be granted when the defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be tried fairly. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

In *Mach v. Stewart*, a child sexual assault case, a prospective juror was a social worker who stated she would have a difficult time being

impartial because of her line of work. 137 F.3d 630, 632 (1997). She told the entire panel that she had a background in psychology, took psychology courses, and worked extensively with psychologists and psychiatrists. *Id.* She stated that, in her experience, sexual assault was confirmed in every case where it was reported and in her three years no child had lied about being sexually assaulted. *Id.* She repeated these statements four times. Mach moved for a mistrial, arguing the entire panel was tainted. *Id.*

The Ninth Circuit found the juror's statements amounted to expert testimony that did taint the jury. The court stated, "[g]iven the nature of the statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times they were repeated," we presume at least one juror was tainted." *Id.* at 633.

The facts in the present case are much different from a social worker, who has the experience and expertise of someone in a position to have knowledge, vouching for a victim's credibility. Here, while numerous potential jurors indicated that they may have issues being impartial, none stated within the presence of the full panel that they had considerable experience with drug users and believed that all people accused of using drugs were automatically guilty. In fact, Juror number 3 indicated that it would not matter if the defendant was using drugs at the time of trial, since she was charged with selling drugs, not using them. RP 94. Juror number

40 said that he would not condemn the defendant for selling drugs unless the State had evidence to prove it. The statements made by the jurors simply did not rise to the level of those made in *Mach*. Juror number 35 made comments *outside the presence of the panel* that indicated he had some experience with drug users. RP 114 – 116. That juror was removed for cause and none of the panel heard his comments. Therefore, the jury was not tainted by these comments. Finally, the jurors that were seated for the jury were instructed that all evidence must come from the witness stand. CP 21.

Trial attorneys frequently tell potential jurors that there are no right or wrong answers – the court and counsel just have to know how people feel so the jury can be fair and impartial. The discussion around the defendant’s appearance led to some jurors saying they could be impartial and others saying they could not. Ultimately, the defendant’s jury was one that could be fair and impartial. The trial court did not abuse its discretion in denying the motion for mistrial.

**C. THE STATE CONCEDES THAT THE TRIAL COURT DID NOT INQUIRE INTO THE DEFENDANT’S ABILITY TO PAY LFOS.**

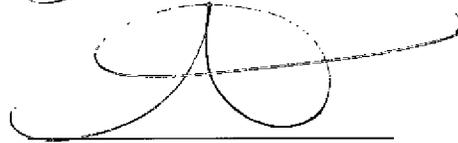
The State concedes that the trial court did not inquire into the defendant’s ability to pay legal financial obligations. However, the general rule for appellate disposition of issues not raised in the trial court is that

appellate courts will not entertain them. RAP 2.5; *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011)). Appellate courts can also refuse to address a RAP 2.5(a) issue sua sponte. *Id.*; *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, this Court has previously declined to review the imposition of legal financial obligations when raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (“Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”). The defendant here was sentenced on June 21, 2016, well after the *Blazina* case was issued. Because the defendant failed to object to the imposition of LFOs at sentencing, this Court should not review the trial court’s imposition of LFOs. However, if this Court finds the imposition was improper, the remedy is to remand so the trial court may strike the relevant LFOs. *State v. Bertrand*, 165 Wn. App. 393, 406, 237 P.3d 511 (2011).

**IV. CONCLUSION**

The defendant's conviction should be affirmed as trial counsel was not ineffective and the trial court did not err in denying the defendant's motion for a new trial.

Respectfully submitted this 23 day of March, 2017.

A handwritten signature in black ink, appearing to read 'Aila R. Wallace', written over a horizontal line.

Aila R. Wallace, WSBA #46898  
Attorney for the State

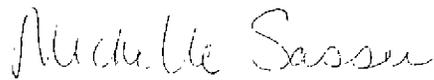
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Zachary W. Jarvis  
Attorney at Law  
2025 First Avenue, Suite 830  
Seattle, WA 98121  
[zjarvis@hartjarvischang.com](mailto:zjarvis@hartjarvischang.com)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 23<sup>rd</sup>, 2017.

  
\_\_\_\_\_  
Michelle Sasser

**COWLITZ COUNTY PROSECUTOR**  
**March 23, 2017 - 1:00 PM**  
**Transmittal Letter**

Document Uploaded: 4-491664-Respondent's Brief.pdf

Case Name: State of Washington v. Pamela 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: Respondent'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.

Sender Name: Michelle Sasser - Email: [sasserm@co.cowlitz.wa.us](mailto:sasserm@co.cowlitz.wa.us)

A copy of this document has been emailed to the following addresses:

[zjarvis@hartjarvischang.com](mailto:zjarvis@hartjarvischang.com)