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Court of Appeals
Division II
State of Washington
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No. 51994-I-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODNEY TAYLOR FRANCK

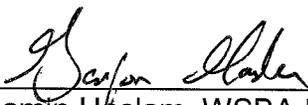
Appellant.

Appeal from the Superior Court of Washington for Pacific County

Respondent's Brief

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The Defendant was sentenced properly.
2. There was no state mismanagement, nor was the Defendant placed in a Hobson's Choice.
3. Defendant's trial counsel was not ineffective and he was not denied a right to a fair trial and the presumption of innocence.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Defendant's offender score was correctly calculated; unfettered searches are not approved, and; the imposition of the \$100 DNA fee was proper.
2. The state did not mismanage the case. Any delay was caused by or requested by the Defense in order to decide which serious matter continued to trial first: the homicide matter in Clark County, the bail jumping trial in Pacific County, or this matter. The Defendant elected which of his matters went to trial first.
3. The Defendant's right to effective assistance of counsel was not violated by the stipulated admission of the video, as there were legitimate tactics that justified stipulating to admissibility; admission of the video did not infringe on the Defendant's right to a fair trial and to be presumed innocent, and; statements in the video were either non-testimonial, or opinion testimony that was reliable.

III. STATEMENT OF THE CASE

On October 30, 2015, Franck appeared out of custody for arraignment, but requested two additional weeks to retain an attorney and the matter was set for November 30, 2015. RP 5-6. On

November 30, 2015, Franck appeared without counsel and the court appointed Franck an attorney at public expense, and the matter was set over to November 20, 2015. RP 12-14. On November 20, 2015, Franck appeared with his court appointed attorney and entered a not guilty plea and he also entered a time for trial waiver through May 30, 2016, and requested a March trial date. RP 16-18. The next hearing, a pre-trial conference, was conducted on February 5, 2016 and the state requested a continuance. RP 21. Franck joined in the motion and asked for a trial well into May, because Franck “had recently been charged with a crime that allegedly occurred before this crime in another county, and it’s going to be in his best interests [sic] to have that other county case resolved first.” RP 21. Franck requested a trial as close to the terminal date as possible and trial was set for May 24-25th. RP 22. The next pre-trial was set for April 15, 2016 whereby Franck again waived his time for trial rights through September 1, 2016, again citing a delay being in Franck’s “best interest” because of the pending matter in Clark County.¹ Trial was stricken at Franck’s request and the matter was set to July 1, 2016, for trial setting. RP 26. On July 1, 2016, Franck’s counsel

¹ Originally Franck was charged in Clark County with first degree assault. RP 25. The victim subsequently died and the charges were amended to murder. RP 29.

requested the matter be set to August 19, 2016, because the Clark County case had been amended from first degree assault to second degree murder. RP 29. On August 19, 2016, Franck requested his trial be set to November 1, 2016, to accommodate his Clark County trial. RP 32-33. The next hearing, October 7, 2016, Franck indicated his second degree murder case had not resolved and, in fact, had been continued and he asked for new dates in this matter, providing a time for trial waiver through April 1, 2017, and the matter was continued. RP 35-37. On December 16, 2016 additional dates were scheduled, including a March 21st and 22nd trial and a review hearing for February 17, 2017. RP 39-41. On February 17, 2017, Franck again announced his "goal" was to have the Clark County matter go "first" as "it's the greater charge." RP 43. Franck again moved to strike his trial and executed another time for trial waiver through November 30, 2017. RP 44. The matter was continued until April 7, 2017, for trial setting, but Franck failed to appear and a warrant issued, but the court agreed not to sign the warrant if Franck appeared the following Friday, April 14, 2017. RP 46-47. Franck appeared on April 14, 2017, and the trial court reset Franck's pre-trial date to May 19, 2017. On May 5, 2017, Franck appeared and requested appointment of new counsel. RP 56. Franck's counsel

again discussed their "goal" of having the more serious offense resolved before trial on this matter. 57. New counsel was appointed and a pre-trial set for May 26, 2017, and trial was set for August 1st with a June 30, 2017, pre-trial. RP 63. On June 30, 2017, Franck again asked that trial be continued with a time for trial waiver so that Franck can "address the more serious crime that he's dealing with over in Clark County involving homicide." RP 67. The matter was continued to July 28, 2017, and Franck failed to appear; dates were stricken and a warrant issued. RP 71, 73. Franck appeared on his warrant on August 7, 2017, where he was held on bail and the matter set for August 11, 2017, for the state to amend the information to include one count of bail jumping. RP 86. Trial was scheduled for September 26 and 27 with an August 25th pre-trial. RP 94. On August 25, 2017, the matter was set to September 8, 2017, for Defendant's motion to sever the bail jumping charge from the assault matter, which was granted. RP 100-106. At that hearing Franck again asked to continue the assault matter, but refused to waive his time for trial right. RP 109. Thus, trial counsel requested, over his client's objection, additional time to interview the witnesses in the assault matter; however, the trial court delayed its decision until September 15, 2017, to determine if trial counsel's conflicting matter would

resolve. RP 112. On September 15, 2017 trial counsel noted that communication had broken down and requested Franck be appointed a fourth attorney, resetting the time for trial to December 14, 2017. RP 118-120. Trial was scheduled for December 13-14, 2017, with a trial readiness hearing for December 1, 2017. RP 127-128. On December 1, 2017, the State moved to amend to include an additional count of second degree assault. RP 141. The trial court permitted the amendment and took into consideration that the state had discussed this with the several defense attorneys, the new victim was mentioned in the original probable cause and police reports, and the fact that the case had to be moved due to trial court congestion, with Franck out of custody, an in-custody matter involving homicide by abuse was required to be tried before Franck's matter. RP 141, 143-144. Trial was therefore continued to January 3, 2018.

On December 29, 2017, Franck moved to dismiss pursuant to *Knapstad* (citation omitted), a motion to dismiss pursuant to CrR 8.3. RP 148. The State moved to continue to accommodate two state's witnesses who were the care providers for a dying mother who was on Hospice Care and could not be left alone. RP 149. Franck objected to the continuance. RP 151. The trial court determined there was good cause and that both witnesses were material to the state's

case and granted the continuance. RP 153-154, 161, 165. The trial was continued to February 14, 2018.

On February 2, 2018, allegations were filed against the State's medical expert. RP 187. The prosecution first learned of these allegations on February 9, 2018, and informed the defense that same day. RP 189. The State also disclosed recently learned information concerning a history of crimes of dishonesty of State witnesses on that day. RP 183. On February 14, 2018, the trial date was continued at the request of Franck's trial counsel, so he could gather further information about the allegations against the State's medical expert.

The case finally proceeded to trial on May 29, 2018. At trial, the State produced four law enforcement officers to testify: Captain Chadwick, Deputy Rick Goodwin, Sergeant Michael Ray, and Reserve Deputy Ben Woodby. Dr. Mark Waliser testified as the State's medical expert. In addition, Amy Mehas, Richard Mehas, and Daniel Finlay testified. Franck's trial counsel stipulated to the admissibility of a video which was made as part of the television show Rugged Justice, which was accompanying Department of Fish and Wildlife Captain Dan Chadwick on the day of the assaults. RP 380-81; CP 143-44.

Following the two-day trial, the jury returned verdicts of guilty on both counts of assault in the second degree.

At sentencing, the trial court indicated “I don’t believe in my thirty-nine years in practicing of law that I’ve ever seen a better cross-examination of a star witness than was down that day. And I think by the time that cross-examination was over, it was pretty clear that most of the jurors probably— probably didn’t believe that ... eye witness.” RP 103. The trial court continued, “the cross-examination by your attorney for the officer, Goodwin, regarding his failure to seize evidence; the failure to obtain names of the other people involved in this terrible event; the failure to take photographs . . . [was] truly impressive.” RP 104.

When the State asked the trial court to address imposition of legal or financial obligations, the trial court asked no questions, nor did it review or reference any prior determination of income,² nor inquire of the Defendant his current or future employment options, and instead merely said, “they’re waived.” RP 105.

² There is no record to be provided as it appears despite the trial court’s obligations pursuant to RCW 10.101.020 to both conduct such inquiry and maintain a written record, there is no such record, nor on-the-record review of Franck’s financial circumstances.

IV. ARGUMENT

A. DEFENDANT'S OFFENDER SCORE WAS PROPERLY CALCULATED AND SENTENCING CONDITIONS WERE APPROPRIATE

Appellant raises three issues under this subsection: (a) offender score miscalculation; (b) unfettered Department of Corrections (DOC) searches; and (c) imposition of the \$100.00 DNA fee. Each are addressed below.

1. Franck's offender score was properly calculated

a. Standard of Review.

While there is authority for the proposition that a defendant cannot take issue with his offender score on appeal where he has stipulated to an offender score (*State v. Huff*, 119 Wash.App. 367, 372–73, 80 P.3d 633 (2003)), additional authority indicates a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time. *State v. Foster*, 140 Wash.App. 266, 166 P.3d 726 (2007).

To establish ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, i.e., that the representation "fell below an objective standard of reasonableness based on consideration of all the circumstances" and (2) that the

deficient performance prejudiced him, i.e., “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, 334–35, 899 P.2d 1251 (1995). Such a determination is based upon the entire trial record. *Id.*

There is a strong presumption that trial counsel was effective and great judicial deference is afforded trial counsel’s performance. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *McFarland*, 127 Wn.2d at 335.

The imposition of legal financial obligations is reviewed for an abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015).

b. Franck stipulated to his offender score, and it was properly calculated.

Franck, who stipulated to his offender score, now seeks review of his sentence asserting, incorrectly, that his juvenile residential burglary and first degree theft were the same course of conduct and should not have been included as one full point in his offender score.³ CP 216. Pursuant to *State v. Huff*, 119 Wash.App. 372–73, the State asserts Franck should not be permitted to assert

³ Appellant’s brief at 11

this issue here. Regardless, Franck was properly sentenced as addressed below.

Contrary to the record below, Franck now asserts he “never agreed to the State’s articulation of his criminal history....”⁴ However, as noted in CP 216, Franck told the trial court he “agrees with the standard range calculation of the state,” but requested a downward deviation from the standard range, claiming “the Defendant acted with no apparent predisposition to commit the offense” and “that he was induced by others to participate in the crime.” *Id.*, RP 94. Thus, his assertion now that he did not agree to his offender score is unsupported by the record.

Regardless, Franck was properly scored and his offender range would not change as there is one additional juvenile point which was not included in calculating his offender score. Therefore, this issue is moot.

Franck’s asserts his offender score should be 4, because his residential burglary and first degree theft should have been evaluated to determine whether they were the same course of conduct.⁵ However, it is not necessary to consider this issue because

⁴ Brief of Appellant at 10

⁵ Brief of Appellant at 11

Franck's juvenile history consists of 5 offenses. That means that one offense was not included in his offender score.

Franck's criminal history includes one adult felony (second degree malicious mischief), and 5 juvenile felony offenses. Thus, even if the first degree theft were not included, Franck's first residential burglary conviction in 2007, along with his second degree burglary, residential burglary and either the theft 1 or taking a motor vehicle without owner's permission would result in 2 full points. 2 points, added to his uncontested adult felony offense (second degree malicious mischief), and the additional second degree assault conviction (which counts as two points pursuant to RCW 9.94A.525), results in an offender score of 5 and a sentence range of 22-29 months.

Throughout his brief Franck takes issue with trial counsel's performance, including here that the stipulation to an offender score was ineffective. However, it is clear the stipulation was not only permitted, trial counsel would not have been candid to the tribunal if he had argued in opposition to the well-supported criminal history. Nothing short of a dismissal of one of the two second degree assaults could have changed Franck's offender score. Arguing to the contrary would have been a disservice to his client and the profession.

2. Imposition of DOC searches was not a grant of “unfettered” authorization to search.

Franck challenges the provision of the Judgment and Sentence which permit “DOC home visits to monitor compliance with supervision.” CP 230. While *State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2018), makes it clear that there must be a nexus between the conduct and the search, the language Franck complains about does not invest DOC with the authority to conduct an unfettered search of his residence. Moreover, Franck has not suffered such a search. Because appellate review is limited to deciding whether a trial court abused some discretion, determination of whether particular language, without demonstration of harm, is not yet ripe for review and should not be undertaken here. *State v. Massey*, 81 Wash.App. 198, 200, 913 P.2d 424 (1996). Further, because DOC’s search language has been clarified by *Cornwell*, it is moot.

3. Inclusion of the \$100 DNA Fee not in error.

While we are obliged to concede this issue, the State would indicate there are three issues here which were improperly addressed. First, it appears the trial court failed to comply with the requirements of RCW 10.101.020. Secondly, announcing “they’re waived” without conducting a *Blazina* (citations omitted) inquiry, is

not permitted.⁶ RP 105. Finally, there is no objective proof that Franck's DNA was ever collected as a result of his 2014 conviction. Nor is there proof that his DNA was ever collected. Thus, ordering the cost stricken here without proof that DNA was collected seems contrary to the public policy established by the legislature to fund the Washington State Patrol Crime Lab. Waiving fees as the Crime Lab drowns in a backlog of cases is contrary to established public policy.

B. THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S CrR 8.3(b) MOTION.

Franck asserts the trial court erred when it rejected his motion to dismiss wherein he asserts he was materially prejudiced when the trial court granted several continuances due to witness unavailability.⁷

Franck further asserts the State's "discovery violations, late amendments to the charging documents, continuances for State witness unavailability and court room congestions worked together [to] delay trial for almost 3 years" thereby prejudicing Franck and demonstrating government mismanagement.⁸

⁶ The State acknowledges it did not seek review of this issue, but hopes this Court will be mindful of how far the pendulum has swung.

⁷ Brief of Appellant at 18, 22.

⁸ Brief of Appellant at 16

The record does not support these contentions, primarily as it was Franck who repeatedly requested continuances so he could address his more serious on-going murder charge which was pending in Clark County at the same time as these matters. Franck focuses his argument on the period between December 1, 2017, and February 14, 2018, referencing the sole occasion the State requested a trial continuance in this matter. However, he conveniently ignores the repeated requests for trial continuances by Franck before and after this period, which were the reason trial was delayed for almost 3 years. RP 21; 67; 110; 124; 137; 170; 191; 243.

1. Standard of Review

A trial court's denial of a motion to dismiss pursuant to CrR 8.3(b) is reviewed for manifest abuse of discretion. *State v. Williams*, 193 Wash.App. 906, 373 P.3d 353 (2016). Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *Id.* A decision is based on untenable grounds if it rests on facts unsupported in the record. *Id.*

When it comes to a substantive due process claim of arbitrary governmental action, a reviewing court will uphold the State's actions

so long as they are grounded in a rational basis, unless the claimant alleges a violation of fundamental rights. *State v. Watson*, 120 Wash.App. 521, 533, 86 P.3d 158 (2004). This determination accords with the only other Washington case to discuss arbitrary action under CrR 8.3(b), *State v. Worthey*, 19 Wash.App. 283, 576 P.2d 896 (1978). In *Worthey*, Division Two of this court recognized that when it comes to CrR 8.3(b), an arbitrary action is one that is discriminatory or done “without reasonable justification.” *Id.* at 288.

Interpreting “arbitrary action” in this light, it is apparent CrR 8.3(b) allows the State considerable leeway. To overcome a charge of arbitrariness, the State need not show its actions were legally required. In addition, given the prohibition on judicial second-guessing, the State's choice need not represent the best possible means of furthering its objectives. Unless the accused's fundamental rights are implicated, a claim of arbitrary action must fail so long as the prosecutor can articulate a plausible, nondiscriminatory reason for the government's action.

2. Purported discovery violations did not prejudice

Franck

Franck cites to purported discovery violations as one basis why dismissal under CrR 8.3(b) was appropriate. Specifically, Franck points to the disclosure, 3 court days before trial, of the fact of a medical licensing review of the State's medical expert, and criminal history of prospective State witnesses. RP 183.

First, regarding the State's medical expert, the disclosure was only in regards to allegations, rather than a finding or conviction. RP 187-88. Moreover, these allegations were filed on February 2, 2018, RP 187, and discovered by the prosecution on February 9, 2018, during a phone call with the witness. RP 189. The prosecution immediately notified Franck's counsel that day when this information was learned. RP 189-90. Franck's counsel acknowledged this did not constitute mismanagement. RP 190. Rather, Franck's counsel asserted this new information was a basis for his request for a trial continuance, RP 191, which was granted by the trial court over the State's objection. RP 204, 211.

Second, as to the criminal history of prospective State witnesses, Franck asserted he needed additional time to obtain certified copies of the Judgment and Sentence for these convictions, and to research the facts underlying the disclosed convictions. RP 184-86. However, the State stipulated to the disclosed criminal

history. RP 184. The trial court properly concluded that there was no prejudice to Franck from the late disclosure of this information, since Franck could only properly inquire as to the fact of these convictions to impeach the witness. RP 185-86. Therefore, since no prejudice resulted to Franck from disclosure close to the trial date, the court's denial of the extraordinary remedies of suppression or dismissal as requested by Franck was appropriate. RP 186.

3. Allowing the State to amend the Information was not abuse of discretion

Franck also cites to the court granting permission for the State to file an amended Information adding a second count of assault in the second degree on December 1, 2017. At that time, trial was set for December 13, 2017. However, prior to ruling on this issue, the trial court had already concluded that a trial continuance for up to 30 days was necessary due to court congestion. RP 141-42. Further, the trial court noted that the victim of the second count of assault in the second degree charge was described in the original probable cause statement and police reports. RP 144. The trial court concluded that it would not allow the amendment if the trial were proceeding as scheduled, but because Franck's case had to be

continued due to court congestion anyway, there was no prejudice to Franck. RP 145. Therefore, the trial court did not abuse its discretion in denying Franck's motion to dismiss.

4. Continuances for convenience of witnesses and court congestion were not abuse of discretion

Franck also alleges that several trial continuances materially prejudiced his ability to obtain a fair trial. The first trial continuance Franck takes issue with was granted due to court congestion on December 1, 2017. RP 141-42. As the trial court noted, Pacific County has one courtroom and one judge, and with 2 other trials on the docket with defendants in custody, it was a necessity to reschedule this trial. RP 142. This trial continuance was not because of the State's amendment adding a new felony, as Franck contends. RP 142. Rather, that issue was addressed after the trial court had already determined the trial needed to be continued because of court congestion.

The next trial continuance Franck takes issue with was granted on December 29, 2017, at the State's request, and over Franck's objection, due to witness unavailability. Specifically, one of the witnesses had indicated that her mother was in hospice care and

expected to pass imminently, and that neither she nor her husband, one of the victims of a charged assault, could be present for trial as it was then set, for January 3, 2018. RP 149. The case had already been continued numerous times at Franck's request by this time, which had greatly inconvenienced the State and the witnesses. RP 150. The court found that both the witnesses were material, and that the wife's mother being under hospice care and their location was a compelling circumstance. RP 154. These findings are not challenged by Franck, and are therefore verities on appeal.

Lastly, Franck takes issue with the trial continuance granted on February 14, 2018. This trial continuance was granted at Franck's request due to a desire to obtain additional information about the allegations against the State's medical expert. RP 191. Again, these allegations were first filed on February 2, 2018, and came to the prosecutor's knowledge on February 9, 2018. RP 189. Franck's counsel acknowledged this did not constitute mismanagement. RP 190. The State objected to this requested continuance. RP 204. There was no failure by the State that caused Franck to have to make this request, and therefore the State did not cause any prejudice.

In sum, none of the continuances Franck complains of constitute governmental mismanagement, nor did they warrant dismissal under CrR 8.3.

C. DEFENSE COUNSEL WAS NOT INEFFECTIVE

Franck asserts trial counsel was ineffective because it stipulated to the admissibility of a video which showed Franck being arrested; contained improper opinions; that “blood opinion testimony was unreliable;” and that if “any of the sentencing arguments were waived by the failure of defense counsel to object, Mr. Franck received ineffective assistance of counsel.”⁹

1. Standard of review.

A defendant alleging ineffective assistance of counsel must show (1) counsel's representation was deficient, and (2) the deficiency prejudiced the defendant. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “If either part of the test is not satisfied, the inquiry need go no further.” *Hendrickson*, 129 Wn.2d at 78, 917 P.2d 563 (citing *State v. Lord*,

⁹ Brief of Appellant at 26, 28,

117 Wn.2d 829, 894, 822 P.2d 177 (1991)). A reviewing court presumes that counsel's performance was not deficient, but the defendant may overcome that presumption by showing that “no conceivable legitimate tactic” explains counsel's performance. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Judicial review of an attorney's performance is highly deferential, *Strickland*, 466 U.S. at 689, and such performance is not deficient if it can be considered a legitimate trial tactic, *Hendrickson*, 129 Wn.2d at 61, 77–78.

2. Stipulating to the “Brawl on the Beach” video does not establish ineffective assistance

Franck contends that his trial counsel stipulating to the admissibility of a video was ineffective assistance of counsel. This argument fails for several reasons. First and foremost, there are myriad legitimate reasons Franck’s trial counsel may have stipulated to the admission of the video. Primarily, without a good faith basis to object to admission, stipulating to admissibility was appropriate. Also, the video aided Franck’s trial counsel in cross-examination of the State’s key witnesses. The video reflected limited identification of Franck by victims, depicted the dark and chaotic scene, and showed Franck denying culpability. There were numerous

conceivable legitimate tactics which explain Franck's trial counsel stipulating to the video's admission.

a. The video's depiction of Franck being restrained did not infringe on his right to a fair trial

Franck contends that the fact that he is depicted in restraints in the video unconstitutionally infringed on his right to a fair trial and to the presumption of innocence. All of the cases cited by Franck address the situation of defendants appearing in court in restraints. *See, e.g., State v. Williams*, 18 Wash. 47, 50 P. 580 (1897). Situations involving a defendant's physical appearance before the court, especially before a jury, necessarily implicate a defendant's constitutional rights. *See State v. Damon*, 144 Wn.2d 686, 689-90, 25 P.3d 418 (2001). However, the depiction of defendants in restraints as part of their apprehension and arrest has consistently been permitted, where the video is otherwise admissible. *See, e.g., State v. Fedorov*, 183 Wash.App. 736, 743, 335 P.3d 971 (2014).

Here, Franck was only depicted in restraints for a moment, while he is identified by a witness. Any prejudice to the defendant by this brief display was far outweighed by the probative value of his identification. *See ER 403.*

**b. The video did not contain improper opinions of
guilt**

The video also does not contain improper opinions of guilt. Courts have expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *City of Seattle v. Heatley*, 70 Wash.App. 573, 579, 854 P.2d 658 (1993). The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. *Id.* “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *State v. Wilber*, 55 Wash.App. 294, 298 n. 1, 777 P.2d 36 (1989).

Here, the expressions of the witness contained in the video were unprompted by police, and were clearly made in the context of identifying Franck as the culprit rather than offering an opinion to the jury. Further, these statements were not testimonial in nature. Therefore, they did not intrude on the province of the jury as the fact finder, or act to deny Frack a fair and impartial trial.

Likewise, all the assertions of opinions of fact contained in the video were subject to cross-examination in court, and therefore were not unfairly prejudicial. Franck’s trial counsel cross-examined all the

witnesses concerning their identification of Franck, and to the extent there were such assertions contained in the video, they were substantiated.

c. Opinions contained in the video that the stain on Franck's pants looked like blood were reliable

Lastly, as to specific opinions contained in the video regarding a blood stain, these are merely simple conclusions that the stain looked like blood. Cases addressing laboratory testing of old blood stains are inapplicable, although they actually support the initial visual identification of a blood stain based on training and experience. See *State v. Stenson*, 132 Wn.2d 668, 712, 940 P.2d 1239 (1997). Likewise, ER 701 allows testimony in the form of opinions or inferences by lay witnesses if the testimony is rationally based on the witness' perception and is helpful to a clear understanding of the testimony or the determination of a fact in issue. *State v. Halstine*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). The trial court has wide latitude about admitting such evidence. *Id.*

Here, Deputy Goodwin was cross-examined concerning the blood stain, and testified based on his twenty-one years of experience investigating many assaults with blood present on victims

and suspects. RP 488. It was clearly within his perception to identify the stain as one caused by fresh blood, and the existence of a fresh blood stain on the knee of Franck's pants was clearly helpful to the jury in connecting Franck to the witnesses' descriptions of the suspect kneeling the victim. Therefore, the identification of the blood stain was properly before the jury.

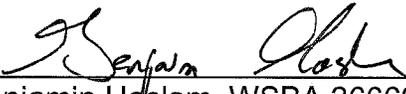
As the contents of the video were properly before the jury, there was no duty of Franck's trial counsel to object. Therefore, Franck's trial counsel stipulating to admission cannot support his claim of ineffective assistance.

V. CONCLUSION

The trial court correctly calculated Franck's offender score, and Franck stipulated to this score. The sentence does not allow unfettered searches, and imposition of the DNA fee was appropriate. The trial court properly denied Franck's motion to dismiss pursuant to CrR 8.3, as there was no prejudice from purported discovery violations, amendment to the information, or from the brief trial continuances that were granted. Lastly, Franck has failed to establish ineffective assistance of his trial counsel. Accordingly, the verdict should not be disturbed.

RESPECTFULLY submitted this 26th day of March, 2019.

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