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Feb 22, 2016

Court of Appeals
Division III
State of Washington

33210-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN CARLOS ARANDA-SARABIA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	1
V. <u>ARGUMENT</u>	7
A. <u>Defense Counsel’s Performance Was Not Deficient For Failing To Object To The Admission On An Excited Utterance Which Was Duplicative Of Other Identification Testimony</u>	7
B. <u>The Court Did Not Abuse Its Discretion in Imposing Mandatory LFO's</u>	15
VI. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

State Cases

	Page No.
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006)	16
<i>Nielsen v. Washington State Dep't of Licensing</i> , 177 Wn. App. 45, 309 P.3d 1221 (2013)	16
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	15
<i>State v. Duncan</i> , 180 Wn. App. 246, 327 P.3d 699 (2014)	15
<i>State v. Foster</i> , 140 Wn. App. 266, 166 P.3d 726 (2007)	8
<i>State v. Hacheney</i> , 160 Wn.2d 503, 158 P.3d 1152 (2007)	13
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992)	9
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989)	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	8
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007)	8
<i>State v. Ohlson</i> , 162 Wn.2d 1, 168 P.3d 1273 (2007)	10-13
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	8
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	9
<i>State v. Stoddard</i> , No. 32756-6-III (Wn. App. filed Jan. 12, 2016)	16

United States Supreme Court Cases

	Page No.
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	11, 11n
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)	10, 11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	7

Statutes and Rules

ER 803	10, 13
RAP 2.5	9, 10
RCW 7.68.035	7
RCW 10.01.160	17
RCW 43.43.7541	15

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the Defendant receive effective assistance of counsel when his attorney did not object to Ms. Vibanco's excited utterance identification which duplicated that of four other witnesses?
2. Did the court abuse its discretion in imposing the mandatory \$100 DNA fee?

IV. STATEMENT OF THE CASE

On February 12, 2013, at about six or seven in the evening, the Defendant Juan Carlos Aranda-Sarabia knocked on Alfredo Mejia's apartment door on Oregon Avenue in Pasco, Washington. 1RP¹ 195-

¹ 1 RP refers to the trial transcript produced by Renee Munoz; 2 RP refers to the

96, 329-30, 334. The Defendant was a stranger to Mr. Mejia, who identified him at trial. 1RP 334, 339. The Defendant said he was looking for someone, but had made a mistake, so he left. 1RP 334-35, 340-42.

Angelica Vibanco and her children were then visiting with Mr. Mejia for a few days on their way to California. 1RP 331, 341-42. After the Defendant left, Ms. Vibanco's attitude changed. 1RP 335, 343. She was nervous and texting, maybe angry or upset. *Id.* The Defendant knocked on the door again, and this time Ms. Vibanco answered. *Id.* The Defendant was holding a weapon which he aimed at Mr. Mejia's chest. 1RP 336, 347 ("this cannon"). As Mr. Mejia pushed the barrel down, the Defendant fired. 1RP 336-37.

Mr. Mejia suffered life threatening injuries that required a full trauma team. 1 RP 236-37. He had wounds to his pelvis where the large blood vessels join the leg. 1RP 236, 238. His intestines were perforated and his hip bone was deformed by a comminuted or fragmented fracture. *Id.* Mr. Mejia spent over a year in the hospital recuperating from his injuries. 1RP 338. While hospitalized, he picked the Defendant out of a photo lineup without any difficulty. 1RP

304-07.

Araceli Mazon left the apartment building shortly before the shooting took place. 1RP 271. She saw the Defendant with a dog and something which he held behind his side away from her. 1RP 271-72. Something about him frightened her, and she drove off immediately with her children. 1RP 272. A few minutes later, her sister Angela Mazon, who was still at the apartment building, called her to report what had taken place. 1RP 274. Araceli Mazon identified the Defendant at trial despite his change in hair style. 1RP 276.

Neighbors Curtis Gresser (apt. 5) and Angela Mazon (apt. 3) heard the gunshot and immediately looked outside. 1RP 213-14, 216-17, 247-49. The only person on the street was the Defendant trying to re-enter Mr. Mejia's apartment. 1RP 216-18, 248-49. Ms. Mazon saw him first; he was holding a gun. 1RP 249-50. He gestured at her as if to ask what she was doing, she retreated to her apartment taking her children and mother to hide in the bathroom. 1RP 250, 252.

Failing to gain entry to Mr. Mejia's apartment, the Defendant

went around the corner followed by Mr. Gresser. 1RP 218-20. He had removed his sweater and wrapped it around the gun. 1RP 220-21, 249-50. The Defendant gestured with the covered gun and approached Mr. Gresser who retreated to his apartment. 1RP 220-21, 254-55. Mr. Gresser observed the police arrest the Defendant. 1RP 222. Ms. Mazon also identified the Defendant after his arrest and again at trial despite changes in his attire, hair, and facial hair. 1RP 249, 254-55.

Police located and arrested the Defendant outside the apartment building with his dog. 1RP 154-55, 196-98. He was four to six feet from Mr. Mejia's apartment looking at the door. 1RP 155. He gestured toward the bushes and police located the Defendant's dog there. 1RP 160, 197-98. When he was ordered to kneel, he did so directly on top of a black sweater which was covering a shotgun. 1RP 162-67, 208, 291. A single shotgun casing was recovered by the front door of Mr. Mejia's apartment. 1RP 294. It matched the live buckshot shells still in the shotgun, all Remington of the same gauge. 1RP 298-99.

When police arrived, Ms. Vibanco was in a state of agitation and emotional distress, terrified to open the door even to police. 1RP

203-05, 286 (“freakin’ out”), 356. She was shaking and crying; her children were bawling and screaming. 1RP 205. She appeared to be in shock and could not stand still. 1RP 356, 358. Mr. Mejia lay on the floor before her with a gunshot wound to his stomach. 1RP 205, 355-56. She said the shooter was a Hispanic male with a small dog. 1RP 356.

Police wanted to remove her from the scene so she could calm down. 1RP 357. But Ms. Vibranco was reluctant to exit the apartment and clearly afraid even though she was surrounded by police. 1RP 207. “She just peeked out enough to peek around the corner, and then she immediately ducked back and said, ‘Yeah. Yeah. That’s him.’” *Id.* She had identified the Defendant. *Id.*

The Defendant told police that people had been trying to hurt his family and he had come to Pasco from his home in Burbank “because there were people there or something was bothering him” or alternatively to go shopping with his family. 1RP 169, 173-74, 408. He denied the shotgun was his, saying that he must have fallen on it, although his sweater covered in his dog’s hair had been wrapped around the weapon. 1RP 171, 408-09 (“How could I have fallen with the gun in the middle?”). He denied suffering any memory problem at

the time of the shooting or being drunk, on drugs, or insane. 1RP 409.

Ms. Vibanco would not cooperate the prosecution, claiming that she was scared for her life. 1RP 412-13. She did not testify.

The Defendant was convicted by jury of attempted murder in the first degree with a firearm enhancement. CP 26-27, 42, 43. The jury's other conviction, assault in the first degree with a firearm enhancement, merged for purposes of sentencing. CP 29, 41, 44; 3RP 7-8. The standard range with enhancement was 240-300 months. CP 28. The prosecutor recommended a low end sentence. 3 RP 3-4. The Defendant was sentenced to 240 months. CP 33.

Defense counsel asked the court not to impose discretionary legal financial obligations, because his client would not have "the ability to earn anything within the next 20 years to apply to the legal financial obligations." 3RP 5. Counsel did not object to the imposition of mandatory LFO's or restitution. 3RP 6. The Defendant told the judge "Whatever decision you will make, that will be the right one." 3 RP 8.

The Defendant had testified at trial that he supported his wife and two sons, working in construction, doing sheetrock, interior and

exterior work, flooring, and carpeting. 1RP 514-15. However, the sentencing judge did NOT find that the Defendant has the ability to pay legal financial obligations (LFO's). CP 29. The judge was concerned about mandatory restitution, which was significant, and the twenty year term of imprisonment.

Because you will be in prison until approximately age 50, that, combined with this extraordinarily high restitution amount, I cannot find that you will ever have the ability to pay the non mandatory legal financial obligations; and so, I will not assess any of those, nor will I assess the fine because it's not mandatory.

But I will assess a \$500 victim assessment and a \$100 felony DNA collection fee because both of those are mandatory.

3RP 9-10. Accordingly only mandatory LFO's were imposed, i.e. the \$500 victim assessment under RCW 7.68.035 and the \$100 DNA fee under RCW 43.43.7541. CP 30. The court imposed restitution in the amount of \$233,697.29. CP 30.

V. ARGUMENT

A. DEFENSE COUNSEL'S PERFORMANCE WAS NOT DEFICIENT FOR FAILING TO OBJECT TO THE ADMISSION ON AN EXCITED UTTERANCE WHICH WAS DUPLICATIVE OF OTHER IDENTIFICATION TESTIMONY.

The Defendant challenges the admission of testimony which was not objected to at trial. Brief of Appellant (BOA) at 7. He claims

that, while not preserved for review, its admission rises to the level of manifest constitutional error by reframing it in terms of effective assistance of counsel. BOA at 7, citing RAP 2.5(a)(3).

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d at 334-35. Prejudice exists if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d at 8. If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

As the Defendant explains, an allegation of unpreserved

manifest constitutional error is considered under the four-step test from *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). BOA at 8. The first step asks whether the alleged error suggests a true *constitutional* concern. Almost any assertion can be framed in constitutional terms, but RAP 2.5(a)(3) only permits questions of true constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988).

[P]ermitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.

State v. Lynn, 67 Wn. App. at 344.

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal.

State v. Madison, 53 Wn. App. 754, 762, 770 P.2d 662 (1989), *review denied* 113 Wn.2d 1002 (1989) (refusing to find manifest error in the opinion testimony of a CPS worker).

The second step asks whether the constitutional error is *manifest*.

Here the question is neither of constitutional magnitude, nor manifest. From the notice provided in the State's trial brief, defense counsel would have been well aware of the legal bases for admitting Ms. Vibanco's hearsay statement. CP 124-25. A statement made in response to an ongoing emergency and not in preparation for prosecution is not testimonial so as to raise a constitutional concern. *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). And it is well established that an excited utterance is an exception to hearsay. ER 803(a)(2). Compound that with the multiple other witnesses providing the same testimony, trial counsel's decision to not object to the admission of Ms. Vibanco's statement identifying the Defendant as the shooter is not deficient, not prejudicial, and not manifest constitutional error.

The challenge should be summarily denied under RAP 2.5.

The Defendant argues that Ms. Vibanco's identification was inadmissible as hearsay. BOA at 9. In fact, the statement falls under the established exception to the hearsay rule as an excited utterance. ER 803(a)(2)(a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition). *See also State v. Ohlson*, 162 Wn.2d 1, 8,

168 P.3d 1273 (2007)(a statement is not excluded as hearsay if it is an excited utterance).

The Defendant argues that Ms. Vibanco's statement was inadmissible under the Confrontation Clause as testimonial hearsay. There is no per se rule that excited utterances cannot be testimonial. *State v. Ohlson*, 162 Wn.2d at 17. Rather the court applies the primary purpose test. *Id.*

Under the primary purpose test, a statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 814, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). A statement is not testimonial² if it is made in response to an ongoing emergency. *Michigan v. Bryant*, 562 U.S. at 358. "Where no such primary purpose exists, the admissibility of a statement is the concern of the state and federal rules of evidence, not the Confrontation Clause." *Michigan v. Bryant*, 562 U.S. at 359.

² The Defendant argues that the rule is that any statement made during an interrogation is testimonial. BOA at 12, citing *State v. Lazcano*, 188 Wn. App. 338, 367, 354 P.3d 233, 247 (2015). This is an incorrect statement of law. See *Davis v. Washington*, 547 U.S. at 822 ("statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency").

the primary purpose test requires courts to make an objective appraisal of the interrogation itself. In applying the test to the facts of *Davis* and *Hammon*, the Court discussed four characteristics of the circumstances in which the statements were made: (1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation.

State v. Ohlson, 162 Wn.2d at 11-12.

Here, there does not appear to be any interrogation at all. No question was put to Ms. Vibanco to elicit her reaction.

The Defendant suggests that police pointed Ms. Vibanco at the Defendant in order to obtain her identification statement. BOA at 10. Although this still would not be an interrogation, this interpretation of events is not consistent with the testimony. Police testified that they wanted to remove a hysterical Ms. Vibanco from the apartment where Mr. Mejia lay bleeding. 1RP 205-07, 355-56. They did not know why she was afraid to leave until they saw her reaction to the Defendant outside, whom she immediately identified without any prompting or inquiry.

Ms. Vibanco's primary purpose was to protect herself and her children from the threat on the street. Because her statement was made in a split second, she could not have known at that time

whether the Defendant had been definitively identified and arrested such that she was safe. She was also experiencing a true panic at the time of her outburst. The statement is not testimonial.

The Defendant argues that the State is required to show Ms. Vibanco was unavailable. BOA at 12. It is another incorrect statement of law. *State v. Ohlson*, 162 Wn.2d at 8, quoting *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (“The excited utterance exception does not require a showing that the declarant is unavailable as a witness.”) See also ER 803 (“Hearsay Exceptions: Availability of Declarant Immaterial”).

In any case, the record does establish her unavailability. 1RP 412-13. A witness is considered unavailable if the prosecution has made a good faith effort to obtain her presence at trial. *State v. Hacheney*, 160 Wn.2d 503, 521, 158 P.3d 1152 (2007). The trial court’s determination regarding the reasonableness of the prosecution’s efforts is deserving of discretion. *State v. Hacheney*, 160 Wn.2d at 522.

The Defendant argues that the prosecutor failed to inform the defense of Ms. Vibanco’s unavailability until the close of the State’s case. BOA at 14, citing RP 411-14. This is an incorrect recitation of

the record. The prosecutor filed a trial brief before trial began which informed the defense of the witness' refusal to cooperate. RP 412, ll. 4-5 ("As we indicated in our trial brief, she's not cooperative"); CP 124 ("At the current time, she is not cooperative with the prosecution.").

The Defendant argues that the State did not make timely or good faith attempts to procure her presence. BOA at 14, citing RP 411-14. It is another false statement of the record. Det. Aceves explained that police had reason to believe Ms. Vibanco was living in a trailer in Richland. RP 412. They found that her son lived there in someone else's trailer. *Id.* After making contact, police received an angry phone call from a male stating Ms. Vibanco did not live there and police should not return. *Id.* The caller represented that he did not associate with Ms. Vibanco. *Id.* And yet when police asked the caller to pass along a message to Ms. Vibanco if he should come across her by chance, she called police an hour later from a blocked number claiming to be in Granger. RP 412-13. She informed police that she was scared for her life and did not want to testify. RP 413. She would not provide police with an address, instead promising to appear at the police station to pick up her subpoena. *Id.* She did not come to the station and did not answer repeated police phone calls to

the number she provided. *Id.*

The Defendant argues that Ms. Vibanco's statement identifying him as the shooter was prejudicial. BOA at 15. This is not tenable. The Defendant was identified by four (4) other witnesses including Mr. Mejia. The challenged testimony is only duplicative.

Because the testimony was admissible, counsel's performance was not deficient. Because the admission of the duplicative statement could not have affected the outcome at trial, there was no prejudice. The Defendant received effective assistance of counsel.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING MANDATORY LFO'S.

The Defendant challenges the imposition of the \$100 DNA fee. There was no objection made at the time of sentencing. 3RP 6. As such, this Court may decline review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015) (it is well settled that a defendant who fails to object at sentencing is not entitled to review); *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014) (refusing to review unpreserved challenges to the imposition of LFO's).

The Defendant alleges that he is indigent or otherwise unable

to pay the \$100 DNA fee. BOA at 19, 21. This is irrelevant, because the fee is mandatory. Trial courts must impose such fees regardless of a defendant's indigency. *State v. Stoddard*, No. 32756-6-III (Wn. App. filed Jan. 12, 2016) (refusing to hear a challenge to the constitutionality of a statute when the challenge was not raised below).

The Defendant challenges the constitutionality of RCW 43.43.7541 as applied to him. BOA at 19. Substantive due process protects against arbitrary or capricious government action. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). The collection of a mere \$100 after a guilty plea or finding of guilt beyond reasonable doubt of a felony in order to support a criminal database is not arbitrary or capricious government action. Substantive due process requires that deprivations of property be substantively reasonable, supported by legitimate justification, and rationally related to a legitimate state interest. *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). The Defendant acknowledges that the State has a legitimate interest in collecting the fee, but argues that imposition upon defendants who cannot pay does not rationally serve that interest. BOA at 19. The

collection of a small fee from convicted criminals in order to police those same criminals is rationally related to a state interest. The Defendant acknowledges the \$100 fee is “such a small amount that most defendants would likely be able to pay.” BOA at 20.

The Defendant argues that because the fee is not prioritized, it *could* be the cause for the accumulation of significant interest. BOA at 20. An appeal cannot be based on a hypothetical. The appellant must be actually aggrieved. RAP 3.1. However, *if* down the road a payment of \$100 comes to impose a manifest hardship on the Defendant, the legislature and the courts have provided a mechanism for relief. Under RCW 10.01.160(4), a defendant may petition for remission of any portion of unpaid costs, including interest, if it imposes a hardship on the defendant or his immediate family. The court has created court forms CR 08.0800 and CR 08.0810 to assist a defendant in filing such a petition. And legal aid offices have additional forms for this purpose. The law has provided for this hypothetical should it come into existence.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

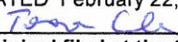
DATED: February 22, 2016.

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<p>Susan Marie Gasch gaschlaw@msn.com</p> <p>Juan C. Aranda-Sarabia (#381422) Washington State Penitentiary 1313 North 13th Avenue Walla Walla WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED February 22, 2016, Pasco, WA</p> <p> _____ Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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