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MAR 03, 2016

Court of Appeals
Division III
State of Washington

NO. 32507-5

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

JOHNATHON FLORES

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. There is not a basis to support Ineffective assistance of counsel based on CrR 3.1 or lack of objections at trial.
2. Any claimed errors were harmless based on the overwhelming evidence
3. Appellant lacks standing to challenge RCW 43.43.7541
4. The court should not reach the merits of the claim because it is not ripe for review
5. The alleged errors are not manifest constitutional errors and should not be reviewed under rap 2.5
6. Appellant fails to show that the DNA fee statute violates due process
7. The DNA fee statute does not violate equal protection
8. The trial court properly ordered DNA collection where Appellant neither objected to collection, nor established that a sample had already been given
9. The trial court did not err in imposing financial obligations at the time of sentencing.

B. STATEMENT OF THE CASE

1. Substantive Facts

On May 16, 2013, at approximately 6:00 pm, Omak Police Officers responded to a 911 call of a reported stabbing at 216 North Birch in Omak, WA. RP 129. Officer Shane Schaefer, Detective Russ Tallant, and Sgt. Jeff Koplin all responded. RP 129, 130, 158. The officers initially staged away from the residence because they were unsure if the scene was secure. RP 140, 203.

Sgt. Koplin observed the victim, Jeff Weitman, outside the residence with a large amount of blood coming from Mr. Weitman's right leg. RP 139. Sgt. Koplin contacted Mr. Weitman and called for an ambulance. RP 140, 203.

Officers spoke with Jeffrey Weitman while he was simultaneously being treated by ambulance personnel for the injury to his leg. RP 131. Officers learned there were three people (two male, one female) who had run from the area. RP 130-131. Mr. Weitman identified and described the two males as "Spanky" and "Jesse", and identified the female as Faith Flores. RP 131,140, 205-06. Mr. Weitman did not know if the suspects were still in 216 North Birch Street. RP 140, 205-06.

Officers went to the 216 North Birch. RP 140. They made contact with Sandra McCorkle, who told officers an altercation had taken place inside her residence. RP 141. The officers cleared the residence and did not find anyone else still inside the residence. RP 142, 157. Ms. McCorkle told officers that Faith Flores and Mr. Weitman had been in a verbal argument at McCorkle's house the night before, and that Mr. Weitman may have pushed her. RP 132. Faith Flores said she would be back with her brothers to have a talk with Mr. Weitman. RP 132. Ms. McCorkle told the officers that the suspects came back to her house today, that Mr. Weitman was invited to the house, but she was told that they were not going to hurt Mr. Weitman RP 132-133.

Ms. McCorkle stated that during the altercation, she heard glass breaking, and when she came out Mr. Weitman was gone and the three others were in the living room discussing what they were going to do. RP 133, 134. The three suspects ran out the front door, but Ms. McCorkle did not know which direction they went. RP 142. She indicated "Spanky" was Johnathon (John) Flores, and the other was a Hispanic male named Jesse. RP 134,287-88. The information about John Flores was used to create a photomontage. RP 134.

Sherriff's deputies arrived to assist Omak PD. RP 142. Deputies began trying to track the suspects. RP 158. They were unable to locate the suspects at that time. RP 158.

Sgt. Koplin then went to the hospital shortly after Mr. Weitman was transported from the scene and contacted Mr. Weitman in the emergency room. RP 143. Sgt. Koplin observed numerous injuries to Mr. Weitman, including a stab wound to the leg, and scrapes and scuffs to his forehead and knees. RP 144-45. There were no observable fresh injuries to Mr. Weitman's hands. RP 145.

Mr. Weitman believed that Spanky's name was Johnathon, and he did not know the other subject that was with him. Mr. Weitman indicated it was the Hispanic suspect, who inflicted the stab wound to him, but both of them had assaulted him. RP 147-148. Mr. Weitman also thought the two suspects were Faith Flores' brothers. RP 147.

Det. Koplin tried to make contact Faith Flores at her residence at 110 West Fourth in Omak. RP 148. Faith Flores' pickup truck was at the residence, but Det. Koplin was only able to speak with a female who said she had been there since about 2:30 pm, and Faith Flores was supposedly gone grocery shopping. RP 148. Offers were unable to locate Faith Flores at that time or during another attempt later that night. RP 149. Officer Schaefer later located Faith Flores during a traffic stop. RP 135.

Det. Tallant photographed the scene at Ms. McCorkle's residence. RP 158, 203. The back door off the kitchen did not have an interior doorknob, just a dead bolt. RP 160-161, 163. Near the dishwasher in the kitchen, Det. Tallant found Mr. Weitman's eyeglasses on the floor. RP 165. Det. Tallant also found Mr. Weitman's cell phone on the floor near the back door. RP 165-66, 169. Mr. Weitman's keys were located in the freezer portion of the refrigerator. RP 167.

Det. Tallant interviewed Mr. Weitman after he was released from the hospital. RP 169. During his initial testimony, Det Tallant was not asked questions about specific statements of Mr. Weitman made during that interview. The State stopped Det. Tallant's testimony in order to call the hospital records custodian, Mr. Weitman, Ms. McCorkle, and Faith Flores. RP 170, 173, 178, 243, 281.

Jeff Weitman testified that he lived with Ms. McCorkle of and on for approximately ten years, but was not living with her on May 16, 2013, the date of

the assault. RP 179, 281. Mr. Weitman knew Faith Flores, and stated the Ms. Flores came to Ms. McCorkle's regularly. RP 181. Mr. Weitman and Ms. Flores did not get along. RP 181, 283-84. Mr. Weitman testified on direct that he had a previous gross misdemeanor conviction for attempted taking of a motor vehicle in the second degree 2007. RP 181.

On May 15, 2013, Ms. Flores confronted Mr. Weitman about a Facebook page Mr. Weitman had left open on a cellular phone that contained a message between Mr. Weitman and another woman. RP 182-183, 186-86. Mr. Weitman grabbed the phone from Ms. Flores and logged off of Facebook. Ms. Flores told Mr. Weitman that he had messed up and that she was going to call her brothers. RP 184, 285. Ms. Flores called her brother John Flores while Mr. Weitman was still at the residence and was heard telling her brother that Mr. Weitman had hurt her and was disrespectful. RP 185-85, 287, 305. Ms. Flores then handed the phone to Mr. Weitman. The defendant John Flores told Mr. Weitman that he wanted to talk to him when he got to town. RP 185, 206. Mr. Weitman gathered his personal items and left Ms. McCorkle's residence. RP 183-84, 185.

Later that day, Mr. Weitman saw Ms. Flores at a gas station. Ms. Flores threatened to blow Mr. Weitman's kneecaps out, to take his car, and steal his money. RP 186, 251, 274-75, 288.

On May 16, Mr. Weitman was working and called Ms. McCorkle to borrow a weed eater. RP 187, 291-92. Mr. Weitman saw Ms. Flores' truck at Ms.

McCorkle's residence earlier in the day, but did not see it there when he went later to pick up the weed eater. RP 189. Mr. Weitman did not believe anyone but Ms. McCorkle was home. He spoke with Ms. McCorkle after entering the front door, and then proceeded to the kitchen and opened the freezer to get ice water. RP 189-90, 293.

When he closed the freezer door, the defendant John Flores and Jesse Flores were standing there. RP 191. John Flores accused Mr. Weitman of being disrespectful to women, and then Faith Flores took Ms. McCorkle into a back room. RP 192, 194, 195, 201, 297.

Mr. Weitman was familiar with John Flores and knew him by his nickname - Spanky. RP 190-91, 208. He had never seen John Flores at Ms. McCorkle's house before. RP 200 He did not know Jesse Flores at the time. RP 191, 200. Mr. Weitman backed up to the dishwasher as they approached him. RP 194, 264, 294-95.

Jesse Flores had a black knife displayed and Mr. Weitman was told to take everything out of his pockets. RP 195, 196, 197, 204. Mr. Weitman estimated the blade was less than six inches in length. RP 205. Mr. Weitman emptied his pockets of $80, an MP3 player, his wallet, and his keys, into a basket as directed by the suspects. RP 195, 196, 199, 209, 262-63.

Mr. Weitman tried to get out of the house through the backdoor, but was unable to do so. RP 195, 200. John Flores was near the door and put his foot in

front of the door to prevent Mr. Weitman from leaving. RP 195, 302. Mr. Weitman indicated the deadbolt on the back door was newly installed within the last day or two. RP 193.

As Mr. Weitman tried to escape, he was hit and kicked by both suspects and fell down to one knee. RP 195, 197, 198, 216, 265, 274. Mr. Weitman got up and then tried to escape toward the front door, but was pushed into chair, breaking the nearby china cabinet. RP 195-96, 198, 215-16, 298. Mr. Weitman noticed he was bleeding from his leg. RP 196. Mr. Weitman suffered a stab wound to his leg, inflicted by Jesse Flores. RP 203-04, 209, 265-66. Mr. Weitman was bleeding heavily and the suspects pushed him out the back door, and kept his property. RP 198-99, 265-66. Mr. Weitman went to a nearby residence and called 911. RP 202-203, 299-300.

On June 12, 2013, Sergeant Gene Davis from Okanogan Sheriff's office stopped a vehicle driven by Jesse Flores for possible DUI. RP 235-36, 346. During the investigation, Sgt. Davis located a black handled switchblade knife with a blade of approximately 4 to 5 inches in length. RP 238-39. Two other folding knives with black handles were also found on the defendant's person. RP 239, 346.

Mr. Weitman identified the defendant, John Flores, from a photomontage. RP 201-202, 308-310. John Flores was taken into custody by the Department of Corrections in Spokane based on Det. Tallant's investigation. RP 316.

At trial, Faith Flores testified John Flores was her brother. RP 243. She pled guilty to assault in the second degree and robbery in the second degree for the assault and robbery of Mr. Weitman. RP 244-45.

Ms. Flores said Mr. Weitman had shoved her when he took the phone from her, on May 15, and that she shoved him back. RP 247, 253, 286. She called her brother John Flores, who was going to come over and "talk" with Mr. Weitman; she also gave the phone to Mr. Weitman so John Flores could speak with him. RP 248, 250. Ms. Flores stated she wanted Mr. Weitman beat up. RP 255. Mr. Flores showed up at Faith Flore's residence that night (May 15) with Jana Mason. RP 255-56. John Flores came back to Ms. Flores' apartment on May 16, and Ms. Flores, Jesse Flores, and John Flores were driven to Ms. McCorkle's residence by Jana Mason. RP 258, 289-89. Ms. Flores left her truck at her apartment, because she believed Mr. Weitman would not show up if it were parked at Ms. McCorkle's residence. RP 258. Ms. Flores stated they did not believe Mr. Weitman would come to Ms. McCorkle's house if he knew they were there. RP 249, 259. Ms. Flores, John Flores, and Jesse Flores remained out of sight when Mr. Weitman arrived. RP 260-261, 292. They confronted Mr. Weitman in the kitchen. RP 261-62.

After the attack on Mr. Weitman, the three suspects fled from the residence on foot. John Flores called Jana Mason, who picked them up and drove them from the area. RP 266-67, 299-300, 357.

Mr. Weitman also testified that prior to the trial he was contacted about the case by Michaela Flores (the defendant's wife) and that he told her that he probably would not show up for court, in an effort to end contact with her. RP 204.

In October 2013, John Flores placed a call from the Okanogan County Jail to Jana Mason, and asked her to write a statement on his behalf stating that she was present the whole time. He indicated he would send her a letter telling her what to put in her statement. RP 317-18

During the State's case, defense counsel crossed Mr. Weitman on the demeanor and actions of Jesse Flores before and during the attack; in comparison to the defendant's demeanor and actions. RP 207-212.

Defense counsel crossed Ms. McCorkle about not seeing the assault or hearing threats being made. RP 301-304

Ms. Flores was crossed on the differences in her statements, her plea agreement to testify, and asked questions to try and establish that Jesse Flores was the primary actor in the physical assault on Mr. Weitman. RP 270-271, 276-77.

The defense called Jesse Flores. He testified Faith Flores called him May 15. He said that prior to that call he did not have any knowledge of Mr. Weitman, but called Weitman told him to stay away from Faith Flores. RP 340,354. He testified that John Flores showed up on that same day. RP 355.

Jesse Flores stated they were all dropped off at McCorkle's house on May 16. RP 356. He testified that John Flores was near him when he took out his knife, opened it, and demanded that Mr. Weitman empty his pockets. RP 360-61. He stated he stabbed Mr. Weitman and that he told Mr. Weitman to remove items from his pocket. RP 340, 341. He stated that when they confronted Mr. Weitman he tried to get out the house several times, and that John Flores was close by. RP 341,361-363.

Jesse Flores claimed that John Flores did not know what was going to happen. RP 342. Yet, after the robbery, Jesse said that John went back to Spokane, because Jesse did not want John to violate his DOC conditions. RP 358

Defense also sought to call investigator Bob Gaines to attempt to impeach Mr. Weitman claiming inconsistent statements. RP 365 Defense provided a written statement from Mr. Gaines. RP 365. The State objected to calling Mr. Gains, noting there were no substantive differences between Mr. Weitman's testimony and the statement from Mr. Gains. RP 365-366. In addition, defense did not inquire of Mr. Weitman on cross about his interview with Mr. Gains. The State and the court pointed out that there were no relevant inconsistencies between the testimony and the proffered statement necessary to offer it as impeachment. RP 365-369, 370. The court pointed out it was also not inconsistent with Ms. McCorkle's own testimony RP 370.

Defense also sought to call Michaela Flores, claiming she had conversations with Mr. Weitman about the incident involving the defendant, to allege Mr. Weitman told her the defendant did not do it. RP 378. However, defense indicated that were *not* seeking to offer her testimony for impeachment. RP 375-76.

The State objected on hearsay grounds and the court sustained the objection. RP 376, 379-80.

2. Procedural Facts

The defendant was charged by information as a principal or as an accomplice with the crimes of robbery in the first degree and assault in the first degree. CP 149-151.

Attorneys Melissa MacDougall and Mubarak Raheem were attorneys associated with the defendant's case. Ms. MacDougal appeared and filed both pre-trial pleadings and post-conviction pleadings. CP 8-26, CP 47-50, RP 506-547. The record is silent on whether or not Ms. MacDougll was present in the courtroom during trial.

Attorney Raheem filed certificates of compliance with CrR 3.1, including April 3, 2014, March 3, 2014, and December 3, 2013. CP 183.

After the notice of appeal was filed, Attorney Raheem sent a declaration to appellate counsel claiming he had not met the requirements of CrR 3.1 and SID

14.2.[1] However, Mr. Raheem's declaration indicates he entered practice in December 2011, and came to work for MacDougall Prince, LLC, in December 2013. Mr. Raheem also declared he had handled significant portions of three felony cases submitted to a jury, including primary or sole trial counsel on two class B felony cases. CP 152-153.

On its face, the declaration appears to satisfy guidelines of CrR 3.1 and SID 14.2. Despite the concluding paragraph, the declaration does not establish how Mr. Raheem was not qualified under CrR 3.1 or SID 14.2.[2]

In pre-trial motions, the court ruled that admission of crimes of dishonesty would be admitted if the victim testified. RP 9. Similarly, the court ruled if Faith Flores testified her robbery second and the assault second convictions would be admissible. RP 10.

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[1] SID 14.2(B) states:

> Adult Felony Cases--Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
> i. The minimum requirements set forth in Section 1; and
> ii. Either:
> > a. has served two years as a prosecutor; or
> > b. has served two years as a public defender; or two years in a private criminal practice; and
>
> iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

[2] SID 14.2 does not limit experience to solely private or solely public practice. The presence or lack of relevant experience cannot not be inferred from the attorney's declaration. The declaration is silent on work performed prior to being employed by MacDougall Prince LLC. Even if Mr. Raheem had actually declared that he lacked prior criminal experience before joining MacDougall Prince, then he arguably would not have met the experience guideline for trial in *any* felony case under SID 14.2. Curiously, there is no indication Mr. Raheem filed any similar declaration in any of his other felony trial cases; that he advised the court in this case, or any other case, that he believed he was non-compliant with CrR 3.1; or that he ever corrected or amended his certifications filed with the court.

The case proceeded to jury trial. The jury was instructed on accomplice liability in jury instruction #15.[3] RP 412. On March 19, 2014, the defendant was convicted of robbery in the first degree, assault in the first degree, and found to be in possession of a deadly weapon during the commission of the robbery. RP 469-70.

C. ARGUMENT

1. There is not a basis to support Ineffective assistance of counsel based on CrR 3.1 or lack of objections at trial.

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure.[4] In the context of ineffective assistance of counsel, however, "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). While

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[3] Instruction 15. A person who is an accomplice in the commission of a crime is guilty of that crime whether resent at the scene or not. A person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime he or she either: One, solicits, commands, encourages or requests another person to commit the crime; or Two, aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However more than more presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. RP 412-13.

[4] For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, *see Connally v. Gen. Const. Co.*, 269 U.S. 385, 393, 46 S. Ct. 126, 70 L. Ed. 322 (1926), coercing a confession, *see Brown v. State of Mississippi*, 297 U.S. 278, 286, 56 S. Ct. 461, 80 L. Ed. 682 (1936), or withholding exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

the United States Supreme Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment, this expansion of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). That purpose is to ensure that counsel's representation does not "so undermine" the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result". *Strickland*, 466 U.S. at 686.[5] The integrity of the criminal justice system is threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U.S. at 693-694. Ineffective assistance litigation is a heavy burden on the criminal justice system. *Strickland*, 466 U.S. at 690. To place some limits on the proliferation of such claims, *Strickland's* standard for judging the reasonableness of the attorney's conduct must be precisely and narrowly construed. An ineffective-assistance claim can function as

[5] Under *Strickland*, courts do not presume prejudice unless the trial "loses its character as a confrontation between adversaries," *State v. Carson*, 184 Wash. 2d 207, 226, 357 P.3d 1064, 1074-75 (2015) (quoting *State v. Webbe*, 122 Wash. App. 683, 694–95, 94 P.3d 994 (2004)), as when there is (1) a complete denial of the assistance of counsel, (2) the State's interference with counsel's assistance, or (3) an actual conflict of interest. See *Webbe*, 122 Wash. App. 683; *Strickland*, 466 U.S. at 692; *In re Davis*, 152 Wash. 2d 647, 674, 101 P.3d 1 (2004).

a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689-690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence". *Strickland*, 466 U.S. at 689. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms", not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. at 690.

In answering this question, courts are reminded that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Strickland*, 466 U.S. 668. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688.

"To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (quoting *Strickland*, 466 U.S. at 689). In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that the "[prevailing] norms of practice as reflected in American Bar Association Standards and the like... are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688. Contrary to Appellants assertion, these guidelines are not inexorable commands with which all defense counsel must fully comply. *Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009). This is evident even in the preamble to the Washington Standard for Indigent Defense, that states in part:

> The Court adopts additional Standards beyond those required for certification ***as guidance for public defense attorneys*** in addressing issues identified in *State v. A.N.J.*, 168 Wash. 2d 91, 225 P.3d 956 (2010)...(emphasis added).

WA R STDS INDIG DEF Preamble.

The State Supreme Court recognized that opinions can differ regarding whether a defendant's interests are best served by one strategy or another. The decision, therefore, of what strategy to pursue must rest exclusively in trial counsel. *State v. Mode*, 57 Wash. 2d 829, 833, 360 P.2d 159 (1961). Counsel is

also entitled, in the exercise of his professional talents and knowledge, to decide whether to lodge an objection. *State v. Lei*, 59 Wash. 2d 1, 6, 365 P.2d 609 (1961). Even when counsel's decisions, in retrospect, appear to have been errors in judgment or trial strategy, incompetence is not established. *Lei*, 59 Wash. 2d 1; *Mode*, 57 Wash. 2d at 833 (Mistakes or errors of judgment do not establish the violation of a constitutional right.). It is only when the incompetence or neglect of a lawyer, either appointed or employed to defend one charged with crime, reduces the trial to a farce is the constitutional right violated. *Mode*, 57 Wash. 2d at 833.

Ineffective assistance claims are judged by the same standard whether counsel is retained or appointed. *See Cuyler v. Sullivan*, 446 U.S. 335, 344-345, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Appellant appears to argue that this Court should reject its reliance on the *Strickland* standard and replace it with a completely opposition presumption, in which any deviation from the Standards of Indigent Defense guidelines creates a presumption that the attorney was not competent. The State Supreme Court rejected a similar assertion in *In re Gomez*, 180 Wash. 2d 337, 351-52, 325 P.3d 142, 149-50 (2014). In *Gomez,* the defendant argued his attorney's experience fell below an objective standard of reasonableness because he failed to meet the standards that were subsequently adopted as the Standards for Indigent Defense. The *Gomez* court reiterated *Strickland's* positon that prevailing professional standards may serve as guides for determining what is reasonable but may not

serve as a checklist for evaluating attorney performance. *See*, *In re Gomez*, 180 Wash. 2d at 351 (rejecting argument the attorney fell below objective standard where attorney's experience roughly met the prevailing professional standard).

The request to abandon the decades-long adherence to *Strickland's* presumption of competency should also be denied under the doctrine of stare decisis. Under this doctrine, this Court will reverse itself on an established rule of law only upon a showing that the rule is incorrect and harmful. *State v. Ray*, 130 Wash. 2d 673, 678, 926 P.2d 904 (1996). A decision is harmful when it has a detrimental effect on the public interest. *State v. Siers*, 174 Wash. 2d 269, 276, 274 P.3d 358 (2012).

The standards are merely guidelines and do not create a new presumption of ineffective assistance of counsel.[6] This is also apparent from the fact that the guidelines do not apply to all attorney's representing defendants in felony criminal matters, but only public defense attorneys. To find otherwise would negate the *Strickland* standard in only a unique subset of cases.[7]

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[6] The *Strickland* court appropriately stated: The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. *Strickland*, 466 U.S. at 690.

[7] Similarly, any argument that the use of the guidelines as the standard for effective assistance of counsel is consistent with the Supreme Court's inherent power to maintain appropriate standards of professional conduct, ignores the fact that the Court has previously indicated that violations of

To make a determination of prejudice, the court considers the totality of the evidence before the jury. *Strickland*, 466 U.S. at 695. To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. *State v. Johnson*, 189 Wash. App. 1046 (2015); *Strickland*, 466 U.S. at 687.

To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." *State v. McNeal*, 145 Wash. 2d 352, 362, 37 P.3d 280 (2002). The failure to establish *either* prong of the test is fatal to an ineffective assistance of counsel claim. *Johnson*, 189 Wash. App. 1046; *Strickland*, 466 U.S. at 700.

The totality of the evidence presented in the case does not support a claim of ineffective assistance. Appellant complains about the length of cross. Defense counsel generally conducted more sustained cross-examination of Mr. Weitman and Faith Flores than of law enforcement officers. The decision to not attempt extensive cross a law enforcement witness testifying about objective

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Rules of Professional Conduct should be addressed through the disciplinary process rather than as a basis for relief in criminal matters. *See, State v. Lord*, 117 Wash. 2d 829, 887, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992) (denying the defendant's motion to reverse the conviction and stating that "the remedy for a claimed violation of the RPC is a request for discipline by the bar association").

observations, is a valid trial decision to avoid providing the opportunity for more damaging testimony or subjective observations to be admitted.

Appellant also complains about lack of objections to alleged leading questions. Even if questions are leading, the decision not to object is also a tactical decision, especially when the evidence would likely be admitted by rephrasing the question, the answered expanded, and evidence reinforced.

Courts are reluctant to find ineffective assistance of counsel except in the most extreme cases. Scrutiny of counsel's performance is highly deferential and courts must indulge in a strong presumption of reasonableness. *State v. Thomas*, 109 Wash. 2d 222, 226, 743 P.2d 816 (1987). This is particularly true where, as here, the alleged deficient performance consists of an attorney's failure to object. The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wash. App. 754, 763, 770 P.2d 662 (1989). Further, "[w]here a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained". *State v. Fortun-Cebada*, 158 Wash. App. 158, 172, 241 P.3d 800 (2010).[8]

[8] Appellant cites to *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423, 428 (1995), but that case further undercuts their argument. If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *See Neidigh*, 78 Wn. App. 71, 77-78, 895 P.2d 423, 428 (1995) (defense counsel's failure to object to clearly improper questions on

Appellant cannot show that hypothetical objections would have been sustained. Even if defense counsel in this case had objected, proper grounds to admit the evidence existed.

a. There was not impermissible hearsay, and any absence of objection did not support a claim of ineffective assistance.

An appellate court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. *E.g., State v. Powell*, 126 Wash. 2d 244, 258, 893 P.2d 615, 624 (1995). An appellate court may uphold a trial court's evidentiary ruling on the grounds the trial used, or on any other proper grounds upon which the trial court's admission of evidence may be sustained. See *Powell,* 126 Wash. 2d at 259.

Not all out of court statements constitute hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. The courts have held that a statement is not hearsay if it is offered as background (typically explaining why a person did or said something) or to supply a context for some other statement that is admissible. *Johnson*, 189 Wash. App. 1046. Usually these cases involve statements implicating the defendant in a criminal case, but offered for the limited purpose of explaining actions taken by police and others. *Johnson*, 189 Wash. App. 1046

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cross of defendant may have been strategic, and counsel may have concluded that it was preferable to let the jury hear the confident answers rather than to stop the questions).

Additionally, a trial court may admit an out-of-court statement by a third person to supply context for a statement by the defendant or non-hearsay purpose. *Evidence Law and Practice*, 5B Washington Practice § 801.13, 347- *State v. Moses*, 129 Wash. App. 718, 732, 119 P.3d 906 (2005)48; *State v. Moses,* 129 Wash. App. 718, 732, 119 P.3d 906 (2005) (in prosecution for murder, statements of victim who told social worker about defendant's tendency toward violence in the home, were not hearsay because they were not offered to prove the truth of the matter asserted, but offered for non-hearsay purpose, to show why CPS was contacted).

In the present case, the testimony related to statements provided by the victim and witness that were context for the actions the officers took in response to the 911 call and their efforts to locate the suspects.[9] Moreover, the statements provided by the victim and the witness (Ms. McCorkle) were admissible as excited utterances and present sense impression[10]. ER 803(a) that provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

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[9] The statement provided by the woman Sgt. Koplin contacted at Faith Flores' apartment was not offered for the truth of the matter asserted, rather to show the false information provided while they were trying to locate Ms. Flores.

[10] Additionally statements attributed to the defendant, Jesse Flores, and Faith Flores would not have been hearsay pursuant to ER 801(d) as a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(2) *Excited Utterance*. 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.

Although ER 803(a)(1) and (a)(2) are less restrictive than the common law exception recognized in *Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939)*[11], courts interpret them in a sufficiently restrictive manner as to prevent their application where the factors guaranteeing trustworthiness are not present. *State v. Dixon*, 37 Wash. App. 867, 873, 684 P.2d 725 (1984).

The admissibility of a statement of a present sense impression is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant. See 5A K. Tegland, Wash.Prac., *Evidence* at 205 (2d ed.1982). The rule requires that the statement be made while the declarant was perceiving the event, or immediately thereafter. Present sense impressions statements must grow out of the event reported and in some way characterize that event. *State v. Martinez*, 105 Wash. App. 775, 783, 20 P.3d 1062

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[11] These discrete exceptions are based on the common law res gestae exception to the hearsay rule set forth in *Beck v. Dye*, 200 Wash. 1.

(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Beck v. Dye, at 9–10, 92 P.2d 1113.

(2001) overruled by *State v. Rangel-Reyes*, 119 Wash. App. 494, 81 P.3d 157 (2003).

The events that the victim and witness described occurred immediately before they were contacted by law enforcement. Their description and/or explanation of the events that immediately proceeded (and that were still occurring) at the time of their statements, met the requirements of ER 803(a)(1), and were admissible as present sense impressions.

The excited utterance exception is broader than that for present sense impressions. The principal elements of an excited utterance are a startling event and a spontaneous declaration caused by that event. K. Tegland, at 206–07. Unlike a statement of present sense impression, an excited utterance need not be contemporaneous to the event. Nor must the statement be completely spontaneous; responses to questions may be admissible. *State v. Downey*, 27 Wash. App. 857, 861, 620 P.2d 539 (1980).

> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

Johnston v. Ohls, 76 Wash. 2d 398, 406, 457 P.2d 194 (1969).

The admission of "excited utterances" lies within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *State v. Strauss*, 119 Wash. 2d 401, 832 P.2d 78 (1992); *State v. Hardy*, 133 Wash.

2d 701, 946 P.2d 1175 (1997), reversed on other grounds, (1997). The three requirements to satisfy the "excited utterance" exception are:

> *First*, a startling event or condition must have occurred. *Second*, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. *Third*, the statement related to the startling event or condition.

State v. Chapin, 118 Wash. 2d 681, 686, 826 P.2d 194 (1992); *Hardy*, 133 Wash. 2d 701, *Lord*, 822 P.2d 177. The basic premise of the rule is that the speaker has no opportunity to lie before making the utterance. *State v. Briscoeray*, 95 Wash. App. 167, 172, 974 P.2d 912, 912 (1999). If the witness later recants, the trial court does not err by weighing the witness's credibility against the evidence indicating that the statements were spontaneous and reliable. *Briscoeray*, 95 Wash. App. at 173.

Washington courts have allowed statements made hours after the startling events.[12] In order to qualify as an excited utterance, the startling event or occurrence need not immediately precede the statement. "Although the statement must be made while the declarant is still under the influence of the event, an excited utterance need not be contemporaneous to the event". *State v. Robinson*, 44 Wash. App. 611, 615-16, 722 P.2d 1379 (1986), citing *State v. Doe*, 105 Wash. 2d 889,

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[12] In the *Strauss*, 119 Wash. 2d 401 case, a statement made to a police officer three and one half hours after a sexual assault was upheld as an excited utterance. There the court noted the victim was crying and upset at the time she gave the statement and appeared to be in a state of shock. *Strauss*, 119 Wash. 2d 401. In *Thomas*, 46 Wash. App. 280, a statement made more than seven hours after a sexual assault was upheld as an excited utterance. The *Thomas* court relied on the fact the victim was upset and crying, and her responses were not the product of leading questions. *Thomas*, 46 Wash. App. 280.

719 P.2d 554 (1986). An excited utterance need not be completely spontaneous, and responses to questions may be admissible. *Burmeister v. State Farm Ins. Co.*, 92 Wash. App. 359, 966 P.2d 921 (1998), citing *Robbins v. Greene*, 43 Wash. 2d 315, 321, 261 P.2d 83 (1953).

Even without a defense objection, and the opportunity for the State to respond with additional foundational testimony of law enforcement officers, the record supported admission of the testimony. In the present case, officers arrived in response to a 911 call, minutes after the victim had fled the residence where he had been robbed and stabbed. The victim was bleeding and in need of medical assistance. Ms. McCorkle had been taken to a back room while the attack occurred and had come out after she heard an altercation and breaking glass, only to see the suspects fleeing. The victim and the witness told the officers what happened at the time as the officers were trying to obtain medical treatment for the victim and check the witness' residence for the suspects. The victim and witness were under the stress of excitement caused by the event.

Appellant also complains of "egregious hearsay" offered by Det. Tallant at RP 321-25. See Brief of Appellant at pg. 17. Appellant fails to note that the testimony was offered in response to cross examination where defense questioned the officer about the victim's statement and sought to elicit selected information from the statement out of context. This was apparently to imply that the victim provided a prior inconsistent statement from his testimony. The defendant opened the door.

See e.g. *State v. O'Neal*, 126 Wn. App. 395, 409, 109 P.3d 429, 436 (2005) aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007)(cross exam by defense counsel opened the door to opinion on credibility otherwise forbidden by ER 608); *State v. Jones*, 26 Wash. App. 1, 9, 612 P.2d 404, review denied, 94 Wash.2d 1013 (1980)(court stated: it would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it).

Det. Tallant was properly able to address the statement on re-direct. There was no error when defense counsel did not object to the testimony.

b. There were not impermissible leading questions and any absence of objection did not support a claim of ineffective assistance

The trial court has broad discretion to permit leading questions and will not be reversed absent abuse of that discretion.[13] *State v. Delarosa-Flores*, 59 Wash. App. 514, 517, 799 P.2d 736 (1990); *State v. Hakimi*, 124 Wash. App. 15, 98 P.3d 809 (2004), review denied 154 Wash.2d 1004, 113 P.3d 482. The principal test of

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[13] ER 611 states in part:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment....

(b) Leading Questions. Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony*. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

a leading question is: Does it suggest the answer desired? In order to elicit the facts, a trial lawyer may find it necessary to direct the attention of a witness to the specific matter concerning which his testimony is desired, and, if the question does not suggest the answer, it is not leading. *State v. Scott*, 20 Wash. 2d 696, 698-699, 149 P.2d 152, 153-54 (1944))

Even though the question may call for a yes or a no answer, it is not leading for that reason, unless it is so worded that, by permitting the witness to answer yes or no, he would be testifying in the language of the interrogator rather than in his own. *Scott*, 20 Wash. 2d at 699.

Where the Appellant has complained of leading questions, those questions were routinely followed by detailed answers rather than simple yes or no responses. The questions were not leading, as they did not suggest the answer by merely directing the witness to the particular facts that were being asked about.

Even if it were assumed leading questions had been objected to, and the objection sustained, the information would have been likely been admitted through the next question. Considering the record, the defendant cannot demonstrate that leading questions prejudiced him, and that the form of the questions materially affected the outcome of trial.

c. Evidence of the arrest of the co-defendant was admissible and lack of objection did not support a claim of ineffective assistance.

Appellant also argues trial counsel's failure to object to testimony about the arrest of Jesse Flores was ineffective assistance of counsel. As discussed above, there is no basis to find ineffective assistance based on an alleged failure to object.

There was no basis to exclude testimony regarding the arrest of Jesse Flores. Mr. Flores was one of three identified suspects and was actively being sought by police. He used a knife to stab the victim. The victim described the knife as having a black handle and a blade between approximately 3 to 6 inches in length. At the time of his arrest, Jesse Flores possessed several knives; all of which had black handles, and were similar in size to the one used to stab the victim. The evidence was admissible and relevant to the crime in which Jesse Flores and the defendant were accomplices.

Moreover, the defense called Jesse Flores as a witness. Jesse Flores testified about many of the same facts as the State's witnesses, and added that he was "high" at the time of the attack. He testified to his involvement in the attack and his resulting criminal convictions.

There was no prejudice admitting testimony regarding the arrest of Jesse Flores and discovery of the knives.

d. Inability to call impeachment witnesses did not support a claim of ineffective assistance.

Appellant also argues trial counsel's failure to question the victim about previous statements was ineffective assistance of counsel. As discussed above, there is no basis to support a finding of ineffective assistance. Counsel's reliance on *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145, 1152 (2003) is misplaced. In *Horton,* the court found defense counsel could have defused a statement elicited from the victim by presenting evidence of earlier inconsistent statements not to one, but to two, persons whose credibility would have been hard to assail (i.e. a neutral CPS investigator, and the victim's long-time friend). *Horton*, 116 Wn. App. at 922.

That is far from the circumstances in the present case. The victim testified he told Michaela Flores he would probably not show up in court. Defense initially indicated to the court that they did not intend to call the witness Michaela Flores for impeachment purposes. Unlike in *Horton*, the defendant's wife would not have been unassailable. Her alleged allegations were not credible in light of the testimony from the victim, Faith Flores, Sandra McCorkle, Jesse Flores; or in light of the defendant's attempt to construct an alibi witness through Jana Mason.

Moreover, the victim indicated to police at the time of the incident, and at trial, that Jesse Flores was the person who pulled the knife and was the one who inflicted the stab wound. On cross exam, the victim said that Jesse was aggressive to him on the phone prior to the attack, and John Flores was not aggressive when he spoke with him on the phone. RP 207-208.

The allegations attributed to Ms. Flores for potential impeachment, would have been of minimal evidentiary value even if found admissible, and would not have addressed the defendant's clear culpability as an accomplice in the crimes.[14]

Similarly, the proposed statement from Mr. Gains was found not to be inconsistent with the testimony of the victim. It was not proper impeachment.

Although the defense attempt to present impeachment evidence did not proceed as anticipated, it does not give rise to a finding of ineffective assistance of counsel.

2. Any claimed errors were harmless based on the overwhelming evidence.

Generally, when an error is constitutional, the State must show that the error was harmless beyond a reasonable doubt. *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663, 670 (2003). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). If error is not one of constitutional magnitude, reversal is not required unless the defendant can show that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Roche*, 75 Wash. App. 500, 509, 878 P.2d 497, 502 (1994)

[14] Arguably, where accomplice liability is asserted, a claim that the defendant "didn't do it" would be an impermissible legal conclusion under ER 701.

(quoting *State v. Ray*, 116 Wash.2d 531, 546, 806 P.2d 1220 (1991); *State v. Smith*, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)).

Even if the Court were to find error, the evidence was so overwhelming that it would lead to a finding of guilt. Here the defendant was alleged to have acted as a principal or accomplice. Even fully accepting the defendant's theory of the case the defendant was guilty as an accomplice. The defendant encouraged, requested, and/ or aided Jesse Flores and Faith Flores in planning and committing the crime, with knowledge that it would promote or facilitate the crime. The defendant told the victim he was coming to "talk" to him, he arranged transportation to and from the crime scene, knew Jesse Flores possessed and threatened the victim with a knife before stabbing him, and prevented the victim from escaping until he had given up his property. Those facts established more than mere presence.

However, the totality of evidence presented at trial went far beyond those facts conceded to by defense. Any claimed error was harmless.

3. Appellant lacks standing to challenge RCW 43.43.7541.

Appellant asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the $100 fee. Because Appellant has not been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. *State v. Lundquist*, 60 Wash. 2d 397, 401, 374 P.2d 246 (1962). To establish standing, Appellant must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. *Branson v. Port of Seattle*, 152 Wash. 2d 862, 875-76, 101 P.3d 67 (2004). The injury must be "fairly traceable to the challenged conduct and likely to be redressed by the requested relief". *State v. Johnson*, 179 Wash. 2d 534, 552, 315 P.3d 1090, *as amended* (Mar. 13, 2014), *cert. denied,* 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014) (quoting *High Tide Seafoods v. State*, 106 Wash. 2d 695, 702, 725 P.2d 411 (1986)). The injury must be "(a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *United States v. Vasquez-Landaver*, 527 F.3d 798, 811 (9th Cir. 2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim, *Johnson*, 179 Wash. 2d at 552 (citing *Org. to Pres. Agr. Lands v. Adams Cty.*, 128 Wash. 2d 869, 896, 913 P.2d 793 (1996)).

Appellant does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee without regard to his ability to pay unfairly subjects him to the possibility of future

punishment if he is unable to pay due to indigence. Indeed, "the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." *Johnson*, 179 Wash. 2d at 552 (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)).

In *State v. Blank*, 131 Wash. 2d 230, 930 P.2d 1213 (1997), our supreme court clarified the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden. It is at the point of enforced collection that a defendant may assert a constitutional objection on the ground of indigency.[15] *Curry*, 118 Wash. 2d 911. Even at the point of collection, it is only if the defendant is "constitutionally indigent" that a constitutional violation occurs. *Johnson*, 179 Wash. 2d at 553.

While there is no precise definition of constitutional indigence, "*Bearden* essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine." *Johnson*, 179 Wash. 2d at 553. A finding of statutory indigence does not establish constitutional indigence. *Johnson*, 179 Wash. 2d at 553, 555. Thus, in *Johnson*, 179 Wash. 2d 534, our supreme court rejected a challenge to the driving while license suspended statute based on a claim of

[15] As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Appellant's claim unripe.

indigence because Johnson, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the *Johnson*, 179 Wash. 2d at 555.

It is up to the party seeking review of an issue to provide an adequate record for review. *City of Spokane v. Neff*, 152 Wash. 2d 85, 91, 93 P.3d 158 (2004). The record contains no evidence demonstrating *constitutional* indigence. The relevant "constitutional considerations protect only the constitutionally indigent"; Appellant can demonstrate no injury in fact and therefore lacks standing. *Johnson*, 179 Wash. 2d at 555. This Court should decline to address the merits of his claims.

4. The court should not reach the merits of the claim because it is not ripe for review.

Even if Appellant has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, "challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." *State v. Lundy*, 176 Wash. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. *Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).[16]

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[16] Our supreme court adhered to this position in *Blank*, 131 Wash. 2d 230, when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. *Lundy*, 176 Wash. App. at 109. Because the issue is unripe, this Court should decline to reach its merits.

5. The alleged errors are not manifest constitutional errors and should not be reviewed under rap 2.5.

Appellant did not object to the DNA collection or to imposition of the DNA fee in the trial court. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); *State v. McFarland*, 127 Wash. 2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. *McFarland*, 127 Wash. 2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. *State v. O'Hara*, 167 Wash. 2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

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obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. *Blank*, 131 Wash. 2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" *Blank*, 131 Wash. 2d at 242. "If at that time defendant is unable to pay through no fault of his own, *Bearden* and like cases indicate constitutional principles are implicated". *Blank*, 131 Wash. 2d at 242.

Here, Appellant's constitutional claims depend on his present and future inability to pay the mandatory DNA fee. However, as discussed above, there is no evidence in the record to show whether Appellant is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a). Similarly, Appellant's claim that the trial court erred by requiring him to submit a DNA sample because he had given one before (discussed more below) relies on the proposition that he had in fact submitted a sample in the past. That is not evident in the record either, so that alleged error is also not manifest.

State v. Blazina, 182 Wash. 2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. *Blazina*, 182 Wash. 2d at 834. Because Appellant failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

6. Appellant fails to show that the DNA fee statute violates due process.

Appellant presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Appellant cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transp.*, 142 Wash. 2d 328, 335, 12 P.3d 134 (2000).

The federal and Washington State Constitutions guarantee that an individual is not deprived of "life, liberty, or property, without due process of the law". U.S. Const, amends. V, XIV; Wash. Const. art. I, § 3. The state and federal due process clauses are coextensive; the state's provision offers no greater protection. *State v. McCormick*, 166 Wash. 2d 689, 699, 213 P.3d 32 (2009). The Due Process Clause confers both procedural and substantive protections. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571, 574 (2006). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Nielsen v. Washington State Dep't of Licensing*, 177 Wash. App. 45, 53, 309 P.3d 1221 (2013) (quoting *Amunrud*, 158 Wash. 2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. *Nielsen*, 177 Wash. App. at 53 (citing *Amunrud*, 158 Wash. 2d at 219). Where no fundamental right is at issue, as in this case, the rational basis standard applies. *Amunrud*, 158 Wash. 2d at 222. Rational basis review merely requires that a challenged law be "rationally related to a legitimate state interest." *Nielsen*, 177 Wash. App. at 53 (quoting *Amunrud*, 158 Wash. 2d at 222). This deferential standard requires the reviewing court to "assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and

a legitimate state interest." *Nielsen*, 177 Wash. App. at 53 (quoting *Amunrud*, 158 Wash. 2d at 222).

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. Wash. Rev. Code Ann. § 43.43.753 (West). The legislature identified such databases as "important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts". *Amunrud*, 158 Wash. 2d 208 To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a $100 DNA collection fee with every sentence imposed for specified crimes "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: "Every sentence ... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account". *Amunrud,* 158 Wash. 2d 208 Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database[.]" RCW 43.43.7532.

Requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database.

Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant's ability to pay. *Lundy,* 176 Wash. App. at 102. The appellants in

Curry, 118 Wn.2d at 917, *Bearden*, 461 U.S. at 667-68, argued that the statute could operate to imprison them unconstitutionally if they were unable to pay the penalty. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. *Bearden*, 461 U.S. at 667-68. The *Curry* court found the sentencing scheme includes sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

> Under RCW 9.94A.200,[17] a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*, RCW 7.21.010(1)(b). Thus, no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.

Curry, 118 Wash. 2d at 918 (citing *State v. Curry*, 62 Wash. App. 676, 682, 814 P.2d 1252 (1991) *aff'd,* 118 Wash. 2d 911, 829 P.2d 166 (1992)) (emphasis in original).

While *Curry* addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. *See Lundy*, 176 Wash. App. at 102-03; *State v. Kuster*, 175 Wash. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in *Curry*, 62 Wash. App. 676 remain in effect today.

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[17] Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in "contumacious default" may seek relief "at any time ... for remission of the payment of costs or any unpaid portion thereof on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2)(a), (c).

As in *Curry*, 62 Wash. App. 676, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Appellant cites *Blazina* to support his due process claim. *Blazina* held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant's ability to pay before imposing discretionary costs. *Blazina*, 182 Wash. 2d at 38.

Appellant's reliance on *Blazina*, 182 Wn.2d at 38, is misplaced. First, *Blazina* involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, *Blazina* concerned *discretionary* LFOs, not mandatory fees like the one involved here. Nothing in *Blazina* changes the principle articulated in *Curry* that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so

long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Appellant fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. If this Court reaches the merits of this issue, it should affirm.

7. The DNA fee statute does not violate equal protection.

Appellant contends that RCW 43.43.7541 violates equal protection when applied to defendants who have already provided a sample and paid the $100 DNA collection fee. Because there is a rational basis to impose the fee every time an offender is sentenced for a new offense, Appellant's claim fails.

Under the equal protection clause of the Wash. Const. art. I, § 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Harmon v. McNutt*, 91 Wash. 2d 126, 130, 587 P.2d 537 (1978). The first question in evaluating an equal protection claim is whether the person claiming the violation is similarly situated with other persons. *State v. Osman*, 157 Wash. 2d 474, 484, 139 P.3d 334 (2006). "A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination." *Osman*, 157 Wash. 2d 474

There are two tests for analyzing an equal protection claim and "whenever legislation does not infringe upon fundamental rights or create a suspect classification", the rational relationship test is used. *State v. Smith*, 93 Wash. 2d 329, 336, 610 P.2d 869 (1980). Equal protection challenges to the DNA statute do not implicate fundamental rights or create a suspect classification and are thus subject to a rational basis standard of review. *State v. Olivas*, 122 Wash. 2d 73, 94-95, 856 P.2d 1076 (1993). Under that test, "a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective". *State v. Schaaf*, 109 Wash. 2d 1, 17, 743 P.2d 240 (1987) (internal quotation omitted).

The party challenging the statute has the burden to show that a legislative classification is purely arbitrary. *State v. Coria*, 120 Wash. 2d 156, 172, 839 P.2d 890 (1992). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate State goal, not that the means be the best way of achieving that goal. *Coria*, 120 Wash. 2d at 173. "[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest." *State v. Ward*, 123 Wash. 2d 488, 516, 869 P.2d 1062 (1994).

Appellant has not established that, as a repeat offender, he is "similarly situated" to those who have been convicted and sentenced only once. See *Osman*, 157 Wash. 2d at 484. In countless ways, from increased punishment for

higher offender scores, to first time offender sentencing alternatives, the law rationally distinguishes between first-time offenders and those with more elaborate criminal histories. Because Appellant fails to show that he is "similarly situated" to first-time offenders, this Court should reject his equal protection claim.

Even assuming Appellant is similarly situated to all others subject to the DNA testing statute, his claim fails because there is a rational basis for imposing the fee every time a person is convicted and sentenced. The original purpose of the statute is to investigate and prosecute sex offenses and violent offenses. Laws of 1989, ch. 350, § 1. In 2002, the legislature expanded on its purpose:

> DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA database and DNA data bank containing DNA samples submitted by persons convicted of felony offenses....

RCW 43.43.753.

The statute imposes a $100 fee for "every sentence" imposed under the act, but does not require an additional DNA sample from an individual if the Washington State Patrol Crime Laboratory already has a sample. RCW 43.43.7541; RCW 43.43.754(2).

Appellant argues that if an offender has already submitted a sample pursuant to an earlier qualifying conviction, the fee is unnecessary and imposing it

in subsequent sentences does not rationally relate to the legitimate purpose of the law. The argument presumes that the fee's only purpose is related to the *collection* of the sample. However, the legislative findings demonstrate that the purpose of the statute is much broader. RCW 43.43.753. A defendant's previously submitted DNA sample could and would be used in subsequent cases for the purposes of investigation, prosecution, and detection of recidivist acts. *Id.* Thus, the fee imposed after "every sentence" does not merely fund the collection of the samples, but also contributes to the expense of maintaining the database so that the original sample may be retained and used in the investigation and prosecution of any future offenses the defendant chooses to commit. Those who commit no subsequent offenses need not pay more than once.

The legislature's 2008 amendments further demonstrate that the purpose of the DNA fee extends beyond collection. The act originally provided that the fee was "for collection of a biological sample as required under RCW 43.43.754". Laws of 2002, ch. 289, § 4. In 2008, the legislature removed the language that the fee was for the collection of a biological sample, stating simply that "[e]very sentence imposed under [this act] must include a fee of one hundred dollars." Laws of 2008, ch. 97, § 3. This change suggests that the legislature recognized that the fee was not solely for obtaining the sample, but for expenses involved in the sample's use in later investigations and prosecutions.

The imposition of the $100 fee after "every sentence" is rationally related to the purpose of not only obtaining the original sample, but also for maintaining the database for use in future criminal investigations, prosecutions and detection of recidivist acts. Appellant fails to show that RCW 43.43.7541 violates equal protection. This Court should affirm.

8. The trial court properly ordered DNA collection where Appellant neither objected to collection, nor established that a sample had already been given.

In addition to his constitutional challenges, Appellant contends that the trial court abused its discretion by ordering him to provide a DNA sample when one had already been ordered as part of a previous felony sentence. The Court should reject this unpreserved claim because the record does not establish that Appellant had in fact submitted a sample.

When an individual is convicted of a felony or certain other crimes, a biological sample must be collected for DNA identification analysis unless "the Washington state patrol crime laboratory already has a DNA sample" from the individual for a qualifying offense. RCW 43.43.754(1), (2). If the crime lab already has a sample, "a subsequent submission is not required to be submitted." RCW 43.43.754(2).

Appellant argues that the trial court abused its discretion in ordering DNA collection. While the record establishes a number of prior felony convictions, it

does not establish that DNA collection was ordered in those cases, nor that a sample was actually submitted.[18] Further, the record demonstrates that Appellant agreed to the DNA collection as part of the sentencing and did not challenge it in his sentencing recommendation, making any error in imposing the condition unreviewable invited error.

Even if it is reasonable to infer that Appellant's DNA had been collected previously, the trial court was not required to make that inference and had discretion to require collection regardless. RCW 43.43.754(2). The court did not abused its discretion to order collection of DNA and the defendant did not object.

9. <u>The trial court did not err in imposing financial obligations at the time of sentencing.</u>

At sentencing, the defendant's attorney and the defendant indicated that the defendant was gainfully employed prior to the offense and had worked during a previous prison term. RP 549, 553, 554. The defendant made no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.[19] *Blazina*, 182 Wash. 2d at 832-33. It is well settled that an appellate court may refuse to review any claim of error that was not raised in the trial court.

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[18] Had Appellant objected to DNA collection below, the parties could have introduced evidence on whether he had already submitted a sample. Because he did not object, the claim is reviewable only if it presents a manifest constitutional error. RAP 2.5(a). An error is not manifest where the record is inadequate for review. *O'Hara*, 167 Wash. 2d at 99. This Court should decline to review the issue.

[19] The court imposed total legal financial obligations of $1,110.50. RP 565. Section 4.3 of the J&S reflected this total, but did not include the $250 court in the appointed attorney fee line. CP 31. The clerical error should be corrected pursuant to CrR 7.8(a) and RAP 7.2(e).

Blazina, 182 Wash. 2d 827 (citing RAP 2.5(a)). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *Blazina*, 182 Wash. 2d 827 (citing *State v. Davis*, 175 Wash. 2d 287, 344, 290 P.3d 43 (2012), cert. denied, —— U.S. ——, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).

Blazina held that RCW 10.01.160(3) requires the record to reflect an individualized inquiry into the defendant's current and future ability to pay before the court imposes legal financial obligations. *Blazina*, 182 Wash. 2d 827. RCW 10.01.160(3) states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Appellant argues the court's imposition of legal financial obligations was unsupported by the record. Appellant does not clearly distinguish between mandatory and discretionary costs.

Blazina, 182 Wash. 2d at 38. Nothing in *Blazina* changed the principle that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

A number of fees and costs are mandatory by statute and are therefore not subject to the *Blazina* analysis. Under RCW 9.94A.753(5), restitution is a mandatory assessment. *Lundy*, 176 Wash. App. at 102-03. This is supported by the Supreme Court specifically noting that a trial court should consider restitution in determining the ability to pay discretionary costs. *Blazina*, 182 Wash. 2d at 839. The Crime Victim's Assessment is mandatory under RCW 7.68.035. *Kuster*, 175 Wash. App. at 424; *Lundy*, 176 Wash. App. at 102-03. The DNA collection fee is also mandatory under RCW 43.43.7541. *Kuster*, 175 Wash. App. at 424; *Lundy*, 176 Wash. App. at 102-03. Finally, the criminal filing fee is mandatory under RCW 36.18.020(h). *Lundy*, 176 Wash. App. at 102-03.

Blazina did not hold that an offender who is indigent under GR 34 must have his legal financial obligations waived. It stated that trial courts should look to the comment of GR 34 for guidance and that if someone meets the standards for indigency, the court "should seriously question that person's ability to pay LFO's." *Blazina*, 182 Wash. 2d at 838.

Based on the defendant's statement at sentencing that he was employed, the court could find that he was capable of work in the future. The court had a sufficient factual basis to order payment of non-mandatory legal financial obligations.[20]

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[20] Even while incarcerated there is no basis to show the defendant is unable to make payments toward his legal financial obligations. Under RCW 72.09.111, no more than 20 percent of the defendant's prison wages may be deducted to pay legal financial obligations. Additionally, no

The court should not grant review of the legal financial issues raised for the first time on appeal. If the court does grant review, the Appellant has failed to show that the mandatory or discretionary financial obligations were ordered in violation of RCW 10.01.160(3) where the record sufficiently established the defendant's ability to pay.

D. CONCLUSION

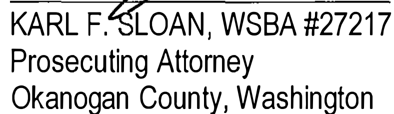
The defendant has not established his claim of ineffective assistance of counsel, based on SID guidelines or the failure to object to questioning or to admit testimony not supported by the rules of evidence.

Defendant does not have standing to challenge DNA statute, and the sentencing record supported imposition of mandatory and discretionary legal financial obligations.

The Appellant's convictions should be affirmed.

Dated this 3 day of March 2016

Respectfully Submitted by:



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deductions for legal financial obligations will be made from the defendant's earnings if he is determined and indigent inmate. RCW 72.09.111. There is no showing that he is unable to make payments toward his financial obligations.

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I, Karl F. Sloan, do hereby certify under penalty of perjury that on March 3, 2016, I provided by email service a true and correct copy of the Response Brief to:

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