

32564-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DANIEL ARTEAGA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress.
2. Mr. Arteaga was denied his constitutional right to effective assistance of counsel when his attorney failed to object to the admission of evidence regarding transactions on the eBay account.
3. The trial court erred in allowing evidence of the "controlling issues" and the "ketchup incident" contrary to ER 404(b).
4. The trial court erred by setting a monthly minimum payment of \$25 per month for Legal Financial Obligations without considering the total amount of restitution owed: Mr. Arteaga's present, past, and future ability to pay, and any assets he may have.
5. The judgment and sentence erroneously classifies the crime of conviction as a domestic violence crime.
6. The judgment and sentence erroneously states that domestic violence was pled and proved.

## II. ISSUES PRESENTED

1. Is the record sufficient for this court to determine if the defendant's trial lawyer was ineffective by not filing a suppression motion regarding certain DNA evidence?
2. Would a pretrial motion to suppress have been granted by the trial court based upon the limited record presented at the time of trial which is a necessary component to establish an ineffective assistance of counsel claim?
3. Was the defendant's lawyer ineffective because he did not object to the admission of testimony regarding an eBay account?
4. Did the trial court abuse its discretion by allowing evidence of the dynamics of the relationship between the defendant and the murder victim during its six-and-a-half year span?
5. Did the defendant fail to preserve any LFO issue for appeal by not first raising the issue in the trial court?
6. If the LFO imposed by the trial court is a mandatory LFO, is it exempt from inquiry under RCW 10.01.160(3)?
7. Should this court strike the domestic violence designation contained within § 2.1 of the judgment and sentence if it was not pled in the amended information?

### III. STATEMENT OF THE CASE

The defendant/appellant, Daniel Arteaga, was charged by amended information in the Spokane County Superior Court with one count of murder in the first degree with a firearm allegation. CP 29. He was found guilty by a jury as charged by the State. CP 67; CP 69.

#### 1. Crime Scene.

On January 1, 2012, Deputy Robert Cunningham, Detective Kirk Keyser, and other law enforcement of the Spokane County Sheriff's Office responded and entered into the residence located at 37 East Regina in northeast Spokane at approximately 5:00 p.m. RP 363. The entry was initiated at the request of the defendant. RP 363. Initially, Toni Schmidt,<sup>1</sup> mother of the victim Kimberly Schmidt, went to the victim's home on January 1, 2012, because the victim was not responding to any telephone calls. RP 313-14. Toni entered the victim's residence and found the victim in her bedroom. RP 317. Toni called the defendant requesting he call 911 on behalf of her daughter. RP 318; RP 364.

Ms. Schmidt was located in her residence by law enforcement in a bedroom face up with the covers to the bed disheveled. RP 365; RP 532; RP 594. A blood soaked pillow was observed on top of Ms. Schmidt's

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<sup>1</sup> Toni Schmidt will be referred to as "Toni" to differentiate with the victim Kimberly Schmidt.

face. RP 317; RP 599. She was declared dead at the scene by paramedics. RP 365.

Detectives processed the crime scene. A pistol was found inside a sock near the victim's left shoulder. RP 545-47; RP 550-553; EX. 47. The barrel of the gun protruded through the end of the sock when it was found at the crime scene. RP 557.

Several days after the crime scene was processed, the victim's mother boxed up the victim's clothing and other belongings and took them to her residence. RP 609. During this time period, the defendant and the victim's mother, Toni Schmidt, had several conversations. RP 322. During one of those conversations, the defendant asked Toni if she observed an "Aubrey" sock at the crime scene. RP 322. Thereafter, Toni looked for and found an Aubrey sock matching the crime scene sock taken from the laundry area near the washing machine at the victim's residence. RP 322-23; RP 591. She subsequently gave the sock to law enforcement. RP 578-79. Detective Keyser stated the sock collected by Toni in the laundry area of the victim's residence appeared to match the sock removed from the barrel of the murder weapon. RP 591.

At autopsy, the medical examiner observed petechial hemorrhage, which typically occurs with constriction to the neck or severe

injury. RP 454. The medical examiner ultimately determined Ms. Schmidt died from a contact gunshot wound to her head. RP 468.

A sample of Ms. Schmidt's blood, taken at autopsy, was sent to the Washington State Patrol toxicology laboratory for analysis. The analyst discovered a high dose of diphenhydramine in Ms. Schmidt's blood.<sup>2</sup> RP 406-07. This drug causes drowsiness and sleepiness. RP 407. It also slows reaction time and causes distraction. RP 407.

2. The relationship between the defendant and the victim, and the events surrounding the murder.

Prior to the date of the murder, the victim and the defendant were in an intimate relationship for approximately six years. RP 691; RP 710-11; Supp. RP 9.<sup>3</sup> At the time, the defendant was married.<sup>4</sup> RP 692; RP 697.

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<sup>2</sup> This drug is typically found in over-the-counter medication such as Tylenol. RP 406. A therapeutic dose is typically 0.05 milligrams per liter. RP 407. The level in Ms. Schmidt's blood was 0.43 milligrams per liter. RP 407. The drug quantity in the blood was not at a toxic level. RP 469.

<sup>3</sup> Several interviews were conducted with the defendant. The first interview was January 1, 2012. A follow up interview was conducted by detectives with the defendant on August 7, 2012. This report of proceedings has been titled "Verbatim Report of Compact Discs" containing transcription of the State's exhibit #146. Portions of the video interview were ordered redacted by the court as not relevant. RP 136. A redacted compact disc containing the video/audio of the interview was played for the jury. RP 918.

<sup>4</sup> The victim was aware of the defendant's marriage. RP 710.

Detective Michael Drapeau of the Spokane County Sheriff's Office responded to the crime scene on January 1, 2012. After conducting several preliminary matters, the defendant approached him outside of the victim's home. RP 877-78. Detectives eventually interviewed<sup>5</sup> the defendant in a neighbor's home across from the crime scene, and later at the Public Safety Building. RP 880. When the defendant arrived at the crime scene, he appeared calm and helpful to law enforcement. RP 392.

The defendant advised he had been in a relationship with the victim for approximately six and a half years. RP 880; Supp. RP 9.

The defendant indicated on December 31, 2011, he received a text from the victim requesting the defendant pick up a washing machine and transport it to her house. RP 881; Supp. RP 14. The defendant had a key to the victim's residence. Supp. RP 17. He stated he was with Ms. Schmidt until approximately 3:00 a.m. New Year's Day. RP 881.

The defendant claimed it was customary for him and the victim to read each other's texts. RP 882; Supp. RP 26. He also stated there was not a sexual relationship with the victim since approximately October, 2011, and they ended their relationship in

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<sup>5</sup> A CrR 3.5 hearing was conducted, and after the hearing, the trial court held the statements made by the defendant to law enforcement at the crime scene and in August, 2012 were admissible at the time of trial. CP 91; RP 86-141.

November, 2011. RP 883-84.<sup>6</sup> The defendant stated he read texts on New Year's Eve sent by Mr. Regalado to the victim over the evening – reading the last one around midnight. RP 882; RP 887-88; RP 913; Supp. RP 26.<sup>7</sup> However, according to the records, the last text read on the victim's phone was at 11:00 p.m. RP 916. The victim had advised the defendant that she wanted to attend a party at Mr. Regalado's house that evening. RP 882. He believed the victim was going to have sex with Mr. Regalado that evening. RP 882. The defendant told detectives it did not bother him that the victim started a relationship with Mr. Regalado. Supp. RP 69.

The defendant claimed he and the victim had sex several times on New Year's Eve. RP 884; RP 886; Supp. RP 23-24. He also maintained the victim was feeling poorly that evening; that her stomach was upset. RP 887; Supp. RP 28. He then maintained that during this same time

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<sup>6</sup> The victim had sent the defendant a text in November, 2011, stating she did not want a sexual relationship anymore; she wanted to remain friends only. RP 912. That she was moving on from their relationship. Supp. RP 20.

<sup>7</sup> The texts sent by Mr. Regalado that evening to Ms. Schmidt, and her texts to him, had been deleted from her phone prior to processing by law enforcement. RP 897. However, detectives obtained the text exchanges from Mr. Regalado's phone. RP 897. One of the texts from the victim to Mr. Regalado that evening was to the effect that she was upstairs watching football and the defendant was downstairs with the washing machine and that was bad. RP 914. She further exclaimed in the text "LMAO," which is slang for "laughing my ass off." RP 914. There were several other texts that evening between the victim and Mr. Regalado that were sexual in nature. RP 914-15.

period, around 7:00 p.m. on New Year's Eve, he and the victim had an approximate two and a half hour long conversation – laughing and crying – and then they had sex for the second time that evening. Supp. RP 29. He then contended the victim lost a bet between them and they had sex for a third time that evening – still asserting the victim did not feel well at the time. Supp. RP 33.

After they allegedly had sex for a third time, the defendant stated the victim asked him to drive to the store shortly before midnight to purchase some Advil because the victim had a stomachache and she could not sleep. Supp. RP 33-34; RP 887.<sup>8</sup> When the defendant returned to her residence, he gave the medication to her. RP 887; Supp. RP 43. A detective confirmed the defendant went to the store. RP 939. The defendant then stated he left her home around 4:00 a.m. after the victim fell asleep on New Year's Day. Supp. RP 44.

A friend of Ms. Schmidt's, Debora Zimmerman, described the defendant as controlling in the relationship.<sup>9</sup> RP 692-94. Ms. Zimmerman

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<sup>8</sup> Previously that evening, the defendant had opened a new bottle of an over the counter medication similar to Ibuprofen and he gave the victim three to four pills. Supp. RP 35-36; Supp. RP 41.

<sup>9</sup> It had been approximately two years since Ms. Zimmerman spoke with the victim. RP 713. She was trying to figure out a way to have contact with the victim. RP 698. So she had hired the defendant to repair the roof of her home. RP 698. Toni Schmidt had also remarked the

testified “[h]e was very rough with her (Ms. Schmidt) when she would step out of line.” RP 694. She gave examples such as telling the victim what she could and could not eat so she would not gain weight as he did not want an “overweight” girlfriend. The defendant also advised Ms. Schmidt that he did not want her to color her hair or to cut it; RP 694.

Ms. Zimmerman recalled an event in 2006 when the defendant, the victim, and a group of friends went out to eat at a restaurant on New Year’s Eve. RP 695. The defendant was upset because he didn’t like the group. RP 695. Hors d’oeuvres were ordered at the restaurant. RP 695. Ms. Zimmerman testified the victim asked the defendant to pass the ketchup at the restaurant. RP 696. Instead of handing it to Ms. Schmidt, the defendant squirted it onto the top of the victim’s head. RP 696.

Ms. Zimmerman tried to convince Ms. Schmidt to end the relationship because of the defendant’s ongoing marriage. RP 697. Within a few days after the murder, the defendant called Ms. Zimmerman and told her he did not commit the crime, claiming he cared for the victim. RP 701. Ms. Zimmerman told the defendant she knew he committed the murder and she asked why he was calling her. RP 701. Normally,

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defendant complained about the victim being independent and strong willed. RP 345.

Ms. Zimmerman and the defendant did not have casual conversations. RP 701.

During cross examination, Ms. Zimmerman stated the defendant was abusive and controlling. RP 710. He kept the victim from her friends, RP 714, and also required that he maintain control of Ms. Schmidt's diving equipment, RP 700.

Joseph Regalado testified he fathered a child with the victim in approximately 1996. RP 616. They remained friends during the child's birth and adolescence. RP 616-19. In October, 2011, he and the victim began communicating more often and assessing whether there would be a romantic involvement. RP 620. In November, 2011, a physical relationship began. RP 20. During that time frame, some joking and sexual communications took place between the two via text messages. RP 621; RP 663. In December, 2011, they were at a point where they were going to openly date in front of their daughter. RP 622. In mid-December, the couple made plans to spend New Year's Eve together. RP 623; RP 625.

On December 31, 2011, the victim and Mr. Regalado were texting each other during the daytime. RP 626. They planned for Mr. Regalado to arrive at the victim's home around 3:00 p.m. RP 629. Those plans were interrupted because the defendant was at the victim's home. RP 629.

Mr. Regalado communicated with the victim until approximately 11:00 p.m. that evening. RP 647. He tried to correspond by text and telephone with the victim after 11:00 p.m., but he was unsuccessful. RP 649.

3. Crime scene analysis and testing.

Glenn Davis, a forensic firearms examiner employed by the Washington State Patrol, identified the murder weapon collected at the crime scene as a Jennings .25 caliber semi-automatic pistol. RP 724. He determined the bullet recovered at autopsy (a Speer Gold Dot jacket hollow point) was fired from the pistol recovered at the crime scene. RP 422; RP 457-58; RP 553-55; RP 726; RP 769. The hole located in the sock found over the barrel of the pistol was a bullet defect. RP 732.

Anna Wilson, a DNA forensic scientist with the Washington State Patrol Crime Laboratory, tested various items of evidence collected at the crime scene and certain reference samples submitted to the lab. RP 823-25. Testing and analysis included the black sock from the barrel of the murder weapon and the matching sock collected by Toni in the laundry area. RP 826; RP 828; RP 851. The black sock was presented to the analyst “inside out.” RP 826. The outside of the sock (which would normally be in the inside of the sock – opposite the original manufacture of the sock) contained the victim’s DNA. RP 830; RP 854. The defendant

and Mr. Regalado were excluded as contributors. RP 830. The inside of the sock (normally the outside of the sock) contained the profiles of both the victim and the defendant. Mr. Regalado was excluded. With regard to the “laundry” sock, the victim’s DNA was identified as a contributor. RP 831. The defendant and Mr. Regalado were excluded as contributors. RP 832-33.

#### **IV. ARGUMENT**

##### **A. THE RECORD IS INSUFFICIENT TO DETERMINE IF DEFENDANT’S TRIAL LAWYER WAS INEFFECTIVE BY NOT FILING A SUPPRESSION MOTION REGARDING CERTAIN DNA EVIDENCE.**

In the present case, the defense did not file a motion to suppress certain DNA evidence in the trial court. The defendant cannot establish such a motion would have been granted by the trial court, which is required to support an ineffective assistance of counsel claim. For the first time on appeal, he argues his trial lawyer was ineffective by failing to challenge the admission of a DNA reference sample taken from him by a detective.

1. There is an incomplete record for this court to decide the defendant’s claim of ineffective assistance of counsel regarding a suppression motion.

Usually, a defendant's failure to raise an issue at trial waives the issue on appeal unless the defendant can show the presence of a “manifest

error affecting a constitutional right.” *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

RAP 2.5(a), in part, states:

**a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:... and (3) manifest error affecting a constitutional right.... A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

Accordingly, this court may refuse to consider an alleged error not brought in the trial court.<sup>10</sup> RAP 2.5(a)(3) is an exception to the general rule as it is not intended to afford criminal defendants new trials whenever they identify a constitutional issue not raised in the trial court. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).<sup>11</sup> In analyzing a

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<sup>10</sup> The purpose of issue preservation is to encourage “the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors avoiding unnecessary appeals. *State v. Robinson*, 171 Wn.2d 292, 304-305, 253 P.3d 84, (2011).

<sup>11</sup> “The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong

claimed constitutional violation, “[this court does] not assume the alleged error is of constitutional magnitude.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

To establish a manifest error affecting a constitutional right, the defendant must establish (1) the error was truly of constitutional magnitude; and (2) the error was “manifest.” *State v. Kalebaugh*, ---P.3d ---, 2015 WL 4136540, 3 (Wash. July 9, 2015); *O’Hara*, 167 Wn.2d at 98; *State v. Love*, 176 Wn.App. 911, 921, 309 P.3d 1209 (2013), *aff’d on other grounds*, *State v. Love*, --- P.3d ----, 2015 WL 4366419 (Wash. July 16, 2015) (No. 89619-4).

“Manifest” under RAP 2.5(a)(3) requires a showing of actual prejudice. *O’Hara*, 167 Wn.2d at 99.

To demonstrate actual prejudice:

[T]here must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim.

*O’Hara*, 167 Wn.2d at 99. (Citations omitted).

“If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not  

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likelihood that serious constitutional error occurred.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

manifest.” *McFarland*, 127 Wn.2d at 333. That standard often cannot be met when the record lacks a factual basis for determining the merits of the claim. *Id.* at 337–338; *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), *aff’d* 127 Wn.2d 460 (1995) (failure to seek suppression constitutes a waiver of the right to have it excluded, and the trial court does not err in considering the evidence).

Thus, to warrant review in the present case, the defendant must demonstrate that on the record before the trial court at the time of trial, it would have suppressed the DNA evidence obtained from him during the investigation. *See, e.g., State v. Contreras*, 92 Wn.App. 307, 312, 966 P.2d 915 (1998). He cannot meet his burden as discussed below.

2. The defendant cannot establish an ineffective assistance of counsel claim regarding the suppression of evidence claim.

Trial counsel’s failure to address a suppression issue in the trial court does not bar an ineffective assistance of counsel claim on appeal. *Mierz*, 72 Wn.App. at 789–90.

However, the same challenge to the defendant exists with an ineffective assistance claim as discussed above.<sup>12</sup> When pursuing an

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<sup>12</sup> A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v.*

ineffective assistance argument on the basis of a failure to seek suppression, the defendant must establish that a motion to suppress likely would have been granted. *McFarland*, 127 Wn.2d at 333–334. That standard often cannot be met when the record lacks a factual basis for determining the merits of the claim. *Id.* at 337–338. This case is in the same circumstance. The facts are unsettled and the parties have not had the opportunity to make their respective records regarding the professed error.

The defendant, nonetheless, contends that RAP 2.5(a)(3) permits his challenge to now be heard. The record provides only that Detective Drapeau asked the defendant if he could obtain several DNA swabs as reference samples. RP 890-93. During cross examination,

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*Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). This court presumes that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689–90, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McFarland*, 127 Wn.2d at 335. Deficient performance prejudices a defendant if there is a “reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defense attorney’s competence is viewed from the entire record. *Strickland v. Washington*, 466 U.S. at 690-92. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Hamilton*, 179 Wn.App. 870, 879–80, 320 P.3d 142 (2014). It is worth noting that the defendant claims the DNA evidence was not overwhelming later in his argument and brief. *See*, Appellant’s brief at p. 29.

Detective Drapeau advised that when he asked the defendant for his DNA sample, the defendant asked if he needed a lawyer. RP 950-01. The defense attorney then asked: “And he did that voluntarily? He didn't have to do that, correct?” RP 950. The detective replied the defendant asked whether he needed a lawyer. RP 951. The detective remarked: “I told him that DNA all looks the same initially, so I would like his DNA as a sample to compare which was his and which was not.” RP 951. There was no further discussion or facts presented surrounding the acquiring of the defendant’s DNA.

As such, the trial court did not have an opportunity to evaluate the facts, and the parties did not have the opportunity to make their respective records and arguments.<sup>13</sup> The record is only a snapshot, and it is lacking in the basis for the search and the full circumstances surrounding it such as whether consent or a different exception applied to the taking of the DNA. Because it is unknown whether a motion to suppress would have been

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<sup>13</sup> Analysis of either position requires factual determinations be made concerning the circumstances of the search and the existence of any exigencies. Trial courts, not appellate courts, make factual determinations. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). Similarly, this court does not substitute its judgment for that of the trier of fact. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Whether the facts are as the parties allege is for the trial judge to determine, not this court. *Id.*

granted, this court cannot determine whether counsel performed ineffectively. Accordingly, this court should decline to consider this issue.<sup>14</sup>

In addition, this court gives great deference to a defense lawyer's performance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984); *McFarland*, 127 Wn.2d at 335. The defendant cannot demonstrate his lawyer's alleged "failure" to file a suppression motion was anything other than a sound professional decision and potentially a desire not to file a meritless motion based upon his review of the evidence, his conversations with the defendant, and the police reports provided to him during discovery.<sup>15</sup> One can presume that his lawyers had all of the police reports to include the full context surrounding the DNA search of the defendant.

Lastly, the defendant has not established there is a reasonable probability that even if his lawyers had filed a suppression motion and argued it soundly, that the defense would have prevailed in the trial court.

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<sup>14</sup> If a defendant argues an issue on appeal that requires evidence or facts not in the existing trial record, the appropriate means of doing so is through a PRP. *State v. Byrd*, 30 Wn.App. 794, 800, 638 P.2d 601 (1981).

<sup>15</sup> The defense attorneys did file a motion to suppress and argue to suppress certain evidence taken from the defendant's home and vehicle pursuant to a search warrant. CP 40; RP 22-60.

The defendant offers nothing more than conjecture in his argument to this court based upon an incomplete record. He presumes and speculates no exception that the search warrant requirement was met based on the limited record. Such a tactic is much different than demonstrating it, if it had been argued, with the appropriate and complete record in the trial court. As a consequence, he has not overcome the strong presumption that his lawyers' representation was not deficient or that his motion to suppress would have likely been granted by the trial court. Accordingly, his ineffective assistance of counsel claim fails.

**B. THE DEFENDANT'S LAWYER WAS NOT INEFFECTIVE BECAUSE HE DID NOT OBJECT TO THE ADMISSION OF THE TESTIMONY REGARDING THE EBAY ACCOUNT BECAUSE THE EVIDENCE WAS NOT PREJUDICIAL AND IT WAS RELEVANT TO ESTABLISH THE DEFENDANT HAD ACCESS TO THE VICTIM'S RESIDENCE.**

The defendant next argues his lawyer was ineffective because he did not object to the introduction of testimony regarding the couple's eBay account.

Standard of review for ineffective assistance of counsel regarding admission of evidence.

This court reviews de novo a claim of ineffective assistance of counsel. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

When the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant

must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different if the evidence had not been admitted by the trial court. *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996) *abrogated on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649 (2006); *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

The defendant bears the burden to show that the objection would have succeeded at trial when an ineffective assistance claim rests on a lawyer’s failure to object. *McFarland*, 127 Wn.2d at 333–34.

“The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989), *review denied*, 113 Wn.2d 1002 (1989). For example, trial counsel may not want to object to avoid emphasizing the testimony. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). “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. Kolesnik*, 146 Wn.App. 790, 801, 192 P.3d 937 (2008); *Madison*, 53 Wn.App. at 763.

At the time of trial, Toni Schmidt discussed the steps taken by her regarding her daughter’s financial matters after death. RP 325-26. During

that testimony, she stated it was her belief the defendant had a key to the victim's house because of the prior eBay activity of the defendant and the victim selling items on the victim's computer in her residence before her death. RP 345; Supp. RP 17. She further remarked the defendant withdrew the funds from the eBay account within several days of her death. RP 325. From the record, it is unknown the amount of the funds withdrawn or if the funds belonged to the defendant or the victim. The defendant did state he and the victim shared a PayPal account for items sold on eBay, and ninety-nine percent of the activity was his. Supp. RP 49.

The defendant has failed to identify any prejudicial impact of this evidence. Moreover, the remark was relevant because it established the basis for Toni's Schmidt knowledge that the defendant had a key to her daughter's residence. He cannot demonstrate an objection would have been sustained at the time of trial. Finally, the defendant's guilt or innocence did not rest on this evidence. The defense attorney was not ineffective by not objecting to this statement.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CERTAIN TESTIMONY UNDER ER 404(B).**

The defendant argues the trial court abused its discretion when it granted the State's motion to admit ER 404(b) evidence regarding

particular instances of his rule over Ms. Schmidt and his prior misconduct toward her.

Standard of review.

This court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, this court reviews the trial court's ruling to admit evidence under ER 404(b) for an abuse of discretion. *Fisher*, 165 Wn.2d at 745. An abuse of discretion occurs when “no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a court also abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *State v. DeLeon*, 185 Wn.App. 171, 195, 341 P.3d 315 (2014). A trial court also abuses its discretion when it fails to abide by the requirements of ER 404(b) for admission of prior misconduct. *Fisher*, 165 Wn.2d at 745.

During a pretrial motion and after an initial offer of proof and argument on admission of evidence of the defendant’s control over the victim, the trial court preliminarily ruled:

[THE COURT:] If I understand the -- the state's theory, and I'm trying -- I'm sort of trying to pull this all together, the state's theory is that this was a "domestic violence

relationship" -- and when I use that term, I'm just using it very generally and very broadly -- that they had a relationship for about six years and that eventually when Ms. Schmidt broke it off from Mr. Arteaga, made it clear that she wanted to try to reconcile with the father of her child and started, you know, spending time with him, that that was the motive that motivated Mr. Arteaga to commit this homicide. This is very general, very general. There's evidence that has been put forward through an offer of proof by several witnesses that they had observed the relationship between Mr. Arteaga and Ms. Schmidt at various -- at various times during that relationship that appeared to them to be very controlling. And they would be testifying as to actual specific things that they saw to come to that conclusion that it was controlling, it was sort of isolating and that sort of a thing. I don't have any problem with admitting that testimony. The incident that happened in August of 2006, I'm struggling with that, because it was really, as far as I could tell, the only witnessed allegation of assault that I'm aware of other than the -- the thing with the ketchup, which we can talk about in a minute. It was back in 2006. I -- I'm kind of struggling with that, so...

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[THE COURT:] The -- the Fiji assault. Wasn't that in 2006?

[DEPUTY PROSECUTOR]: I thought it was in 2008.

[THE COURT:] Was it 2008?

[DEPUTY PROSECUTOR:] I believe so.

[THE COURT:] Okay, I have 2006. I -- that's my -- my --

[DEPUTY PROSECUTOR:] I think somebody may have said 2006, but I was always under the impression it was 2008.

[THE COURT:] Okay, so 2008. So I -- it's sort of an isolated one-time incident of assault, and I need to have a good understanding of whether or not it occurred. And I think the case law is pretty clear that before the court can admit it, there has to be proof that it actually occurred. There's whether or not it occurred. And I think the case law is pretty clear that before the court can admit it, there has to be proof that it actually occurred. There's a dispute, I guess, that it actually occurred, although I don't know what the parameters of that dispute are: It didn't happen? It didn't happen the way they say it happened? I don't know what -- I don't know what that is. So I think that needs to be fleshed out.

RP 155-57.

[THE COURT]: And the thing with the ketchup, when did that happen?

[DEPUTY PROSECUTOR]: Um, I don't recall off the top of my head the timing of that.

[THE COURT]: Are you seeking to admit that?

[DEPUTY PROSECUTOR]: From Ms. Zimmerman. It's just another incident that the Court can rule on that that's what we know about the incident and how Ms. Schmidt was treated in that context within the grand scheme of all the other information we have, so...

[THE COURT]: Okay. Any thoughts on that particular piece? I mean, I sort of see this as a three-part scenario. I see it as the -- the controlling behavior. I'll just call it "the controlling behavior." I don't have a problem with that coming in. I think it's relevant, and I think it -- it explains the state of mind of the defendant, which I think is very relevant to proving in this particular case -- you've got to recall what the charge is. It's an intent and is it premeditated? So I think that really kind of opens up some areas here. The 2008 assault we're going to take testimony on. And then the thing with the ketchup, I -- I don't know

what that -- I don't know what that is. I mean, you're in it with a bunch of people and you -- could that have been just playful? Could it have been goofy? Could it have been -- I don't know. I don't know what the context for that is. So is there somebody that can testify to that as well?

[DEPUTY PROSECUTOR]: Ms. Zimmerman can testify to that as well, yes.

[THE COURT]: Did you want to speak to that particular incident? And I haven't made any rulings now on those two incidents, so I just want that to be clear.

[DEFENSE ATTORNEY]: Well, Your Honor, I don't -- I guess the -- the issue with the ketchup incident is more a matter of -- of whether it's relevant and whether it's -- or perhaps unfairly prejudicial. With the Fiji incident, there is a -- a factual dispute as to what actually occurred. And -- and we anticipate there are two other witnesses who would -- who would -- had different perceptions of what occurred.

[THE COURT]: So maybe we could have some testimony on that tomorrow afternoon?

[DEFENSE ATTORNEY]: I'm going to -- perhaps. I'd have to talk to our witnesses to make sure.

[THE COURT]: Okay.

[DEFENSE ATTORNEY]: But I guess the nature of that also is that that would also be in our view unfairly prejudicial, and it's -- it ends up -- I don't know if you'd call it essentially propensity evidence? that I don't think that there can -- they can really lay the groundwork that what occurred there was really related to control necessarily. I think that's -- I don't think it's there as far as whether -- and as far as that there was a breakup right at that time, I don't think that that groundwork either can be laid.

[THE COURT]: Okay.

[DEFENSE ATTORNEY]: So it's -- it's just an incident that was about four years ago that -- an uncharged incident. So really the case law doesn't really support admitting such an incident unless there's some kind of -- unless there are facts that really connect it to the present incident. Like somehow it was a dispute about money or it was a dispute about something at that time. I mean, if it was really part of this story, we probably wouldn't have a strong ground to say that it should be excluded if it really was part of what happened. But if it's just part of the relationship and more general how she was treated, then I don't think the case law supports allowing that. It's very unfairly prejudicial, your Honor.

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[THE COURT]: So we'll take testimony on both of those. I want to -- let's make a determination that it actually happened, *and then I need to do the weighing of the prejudice versus the probative value.*

RP 158-161. (Emphasis added).

Thereafter, the trial court heard pretrial testimony from several witnesses regarding specific incidents proposed ER 404(b). Witnesses called by the State for the hearing included Ms. Zimmerman (RP 225-233), and Desiree Tibbs (RP 234-242). After testimony and argument, the court stated:

THE COURT: Okay. I said yesterday that I would allow testimony with regard to the -- I'm just going to call it "the controlling issues." And we heard, I think, a couple witnesses today that would speak to those issues. I think that that is very relevant toward proving the defendant's intent, if you will, premeditation, et cetera, et cetera, motivation. The assault in Fiji has not been proved. The witness basically on questioning did not testify that she

observed anything other than crying, a red face, being upset. There was no disclosure as to the details. There was no -- you know, I was expecting to hear some testimony about red marks around the neck; there were none even though you asked. So I'm not convinced that that happened, that there was even an assault. And so I think that that sort of evidence would be -- would have the jury speculating on issues that are improper. So I'm not going to allow that testimony. I think the ketchup incident, however, there does seem -- and I didn't hear a date as to when that happened. I'm assuming it was sometime in 2007, 2008, but you'll need to flesh that out. As I recall, the testimony was that Mr. Arteaga was not happy that they were going out with the group. This was a New Year's -- it was New Year's Eve. I didn't catch the year, however, but it was New Year's Eve.

RP 265-66.

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THE COURT: They were going out to eat; it was a regular thing; Mr. Arteaga didn't want to go, and he was kind of pouty and angry; and then in front of everyone he poured ketchup on her head. I think that basically shows that pattern that I think is relevant. So I would allow testimony with regard to that. I'm not going to allow testimony with regard to the Fiji, or we'll just call it "the Fiji incident." I will allow testimony with regard to the nature of that relationship.

RP 266.

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, this evidence may be admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

ER 404(b)'s list of other purposes is not exclusive. *State v. Baker*, 162 Wn.App. 468, 473, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011); *State v. Grant*, 83 Wn.App. 98, 105, 920 P.2d 609 (1996).

ER 404(b) is read in conjunction with ER 403<sup>16</sup> which requires the trial court to exercise its discretion when balancing whether probative evidence is substantially outweighed by unfair prejudice. *Fisher*, 165 Wn.2d at 745. For ER 404(b) purposes, intent and motive can be introduced even if it is not an essential element of the crime charged provided the prior bad act is reasonably related to the crime charged and does not merely show propensity. *State v. Fuller*, 169 Wn.App. 797, 829, 282 P.3d 126 (2012).

In *State v. Powell*, 126 Wn.2d 244, 247, 893 P.2d 615 (1995), after the victim's body was found in Puget Sound, an autopsy revealed strangulation as the cause of death and the police subsequently arrested the victim's husband. *Powell*, 126 Wn.2d at 248. At trial, the court admitted evidence that the defendant assaulted the victim four times in the year before her death; the night before the murder they verbally fought and the

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<sup>16</sup> ER 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

victim left the residence, and shortly before the murder, the defendant was angry when he learned that she had withdrawn money from the couple's joint account. *Powell*, 126 Wn.2d at 249–54.

The *Powell* court held that the admission of the previous assaults and fights was appropriate to show the defendant's motive, which was very important in the case because it involved circumstantial proof of guilt. *Powell*, 126 Wn.2d at 260. “[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” *Powell*, 126 Wn.2d at 259; *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007) (although motive is not an element of murder, it is often necessary when only circumstantial evidence is available.)

The *Powell* court held that *testimony establishing the hostile relationship between the couple created a strong motive for the murder.* *Powell*, 126 Wn.2d at 260. It then concluded that the trial court did indeed weigh the prejudice of all the evidence against its probative value in its decision to admit the evidence because the trial court carefully sorted through the proposed testimony and excluded a substantial amount of

evidence in an effort to maintain a balance. *Powell*, 126 Wn.2d at 264–65.<sup>17</sup>

Here, the trial court exercised its discretion excluding some of the State’s proposed ER 404(b) evidence and admitting other proposed evidence. The record shows the trial court had tenable reasons for admitting some of the defendant’s prior acts showing animosity directed toward Ms. Schmidt. The defendant did not challenge the fact that these events occurred after testimony was taken. The trial court identified the purpose for which the evidence was offered and it determined it was

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<sup>17</sup> See also, *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) (evidence of a defendant’s motive is relevant in a homicide prosecution - evidence of quarrels and ill-feeling may be admissible to show motive); see also, *State v. Price*, 126 Wn.App. 617, 638–39, 109 P .3d 27 (2005), *review denied*, 155 Wn.2d 1018 (2005) (the court upheld the admission of evidence of quarrels or disputes between the victim and the defendant during the time leading up to the murder with a limiting instruction and held the evidence relevant for motive of assault or murder); *Grant*, 83 Wn.App. at 107 (“[s]uch evidence is properly admissible in the sound discretion of the trial court under ER 404(b) when it is relevant—when it makes a fact of consequence to the determination of the action more or less likely—and when its probative value outweighs its prejudicial effect. Here, the State sought to admit evidence of Grant’s prior assaults on [the victim] to explain her statements and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge. As is reflected in the present case, victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others.”)

relevant to prove intent, premeditation, and motive to kill Ms. Schmidt. The trial court did not abuse its discretion.

The defendant complains the trial court failed to weigh the probative value versus the prejudicial effect. On the record and during a portion of the hearing, the trial court did state it needed to hear testimony of the witnesses to weigh the prejudicial impact versus the probative value of the proposed evidence. The failure to specifically pronounce the required verbiage on the record at the time of ruling is not reversible where the trial court has established a sufficient record for the reasons to admit the evidence. *See, e.g., State v. Carleton*, 82 Wn.App. 680, 686, 919 P.2d 128 (1996).

Even so, any error in the admission of prior misconduct evidence is harmless unless this court finds that “within reasonable probabilities ... the outcome of the trial would have been different if the error had not occurred.” *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984);<sup>18</sup> *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). “Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

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<sup>18</sup> Evidentiary errors under ER 404(b) are not of constitutional magnitude. *Jackson*, 102 Wn.2d at 695.

Here, the trial court established a sufficient record identifying the purposes for which it believed the evidence was relevant and admissible to allow review of its decision. During a part of the hearing, the trial court did have in mind the necessity to weigh the prejudice versus the probative value of the evidence. The trial court did exercise its discretion in excluding some potential ER 404(b) evidence, and, admitting other ER 404(b) evidence.

The defendant also complains the several acts admitted were too remote in time to be probative. Contrary to this claim, the evidence was probative to establish the dynamic of the approximate six-year relationship; the consistent animosity and mindset of the defendant toward the victim over that period of time, and his restrictions of the victim and the loss of that dominion over time resulting in his motive and intent to kill her at the time of the murder. The trial court did not abuse its discretion.

**D. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL AND THE LFOS IMPOSED IN HIS CASE ARE MANDATORY AND EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).**

The defendant next argues the trial court failed to make an individualized determination on his ability to pay before imposing LFOs

with regard to restitution and other costs. The defendant has waived consideration of this issue.

Under § 4.3 of the judgment and sentence, the trial court ordered the defendant pay a \$500 victim assessment fee, \$200 in court costs, a \$100 DNA fee, and \$4,065.70 in restitution for a total of \$4,865.70. CP 82.

The defendant did not challenge the trial court's imposition of these mandatory LFOs at his sentencing. In general, this court may refuse to review any issue not raised in the trial court: “[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review,” and an “appellate court may refuse to review any claim of error which was not raised in the trial court.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

This court should exercise its discretion under RAP 2.5(a) and follow its decision *State v. Duncan*, 180 Wn.App. 245, 327 P.3d 699 (2014), *petition for review filed*, No. 90188–1 (Apr. 30, 2014), decided before *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). In *Duncan*, this court held that the defendant's failure to object was not because of the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering “the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to

the sentencing court that they are, and will remain, unproductive.” *Duncan*, 180 Wn.App at 250; *State v. Calvin*, 176 Wn.App. 1, 316 P.3d 496, (2013), *petition for review filed*, No. 89518–0 (Nov. 12, 2013) (pre-*Blazina*) (failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal).

Consequently, the defendant in the present case failed to preserve the matter for appeal and this court should not consider it. *State v. Blazina*, 174 Wn.App. 906, 911, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827 (2015).<sup>19</sup>

1. Mandatory LFOs.

The defendant does not distinguish between discretionary and mandatory LFOs in his brief. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account by the trial court. *State v. Lundy*, 176 Wn.App. 96, 102, 308 P.3d 755 (2013). The LFOs imposed in the present case are mandatory. The statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory

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<sup>19</sup> In its consideration of the issue in *Blazina*, *supra*, the Supreme Court rejected the State's ripeness argument. Accordingly, the fact that the LFO issue may not be ripe does not preclude this court's review of the issue. However, the Supreme Court noted, an appellate court may use its discretion in reaching unpreserved claims of error. *Blazina*, 182 Wn.2d at 830.

LFOs. “For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account.” *State v. Lundy*, 176 Wn.App. at 102; *see also, State v. Kuster*, 175 Wn.App. 420, 306 P.3d 1022 (2013) (pre-*Blazina*); RCW 7.68.035(1)(a); RCW 6.18.020(2)(h); RCW 43.43.7541.

These costs are required to be paid by statute irrespective of the defendant's ability to pay. In addition, RCW 9.94A.753(4) and (5) dictate “[r]estitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property” and “[t]he court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.”

There is no error in the defendant’s sentence because the trial court imposed the mandatory LFOs.

**E. THE DOMESTIC VIOLENCE DESIGNATION APPEARS TO BE A SCRIBNER’S ERROR, AND THIS COURT SHOULD STRIKE IT FROM THE JUDGMENT AND SENTENCE.**

The defendant next complains the domestic violence designation contained within § 2.1 of the judgment and sentence must be pled and proved to the jury.

In *State v. Hagler*, 150 Wn.App. 196, 201, 208 P.3d 32 (2009), *review denied*, 167 Wn.2d 1007 (2009), Division One of this court

explained that the local prosecutor designated crimes arising from “domestic violence” in charging documents so that the justice system could “recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse.” *Id.* at 196. The court also explained that this “designation need not be proven to a jury under *Blakely*.” *Id.* at 96. A trial court can make this finding on its own because it “does not itself alter the elements of the underlying offense....” *Id.* at 96.

Here, the trial court made such a finding. However, the domestic violence designation was not pled in the amended information. Therefore, the designation appears to be mistaken and the State agrees this court should strike the domestic violence designation contained within § 2.1 of the judgment and sentence.

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## V. CONCLUSION

For the reasons stated above, the defendant's conviction and sentences should be affirmed.

Dated this 6<sup>th</sup> day of August, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ARTEAGA,

Appellant,

NO. 32564-4-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on August 6, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill Reuter, Of Counsel  
Nichols Law Firm PLLC  
jillreuterlaw@gmail.com

8/6/2015

(Date)

Spokane, WA

(Place)

*Crystal McNeas*

(Signature)