

No. 94208-1

NO. 32683-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RAY LENY BETANCOURTH, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Did the trial court correctly rule that Betancourth's statements were admissible because they were voluntary and non-custodial?
- B. Has Betancourth waived any issue of prosecutorial error by choosing not to object during the prosecutor's closing argument?
- C. Has Betancourth failed to prove that his attorney's lack of objection to the prosecutor's closing argument was ineffective assistance of counsel?
- D. Should this court deny review of the legal financial obligations and ability to pay where the issue was not raised at the trial level?
- E. Should this court refuse to consider a constitutional challenge to RCW 43.43.7541 when raised for the first time on appeal, and in the alternative, deny the challenge because the statute does not violate due process?
- F. Has Betancourth failed to show prejudice by a delayed filing of the CrR 3.6 findings of fact and conclusion of law?
- G. Did the trial court correctly deny Betancourth's motion to suppress Verizon Wireless cell phone records?
- H. Did the prosecutor's closing argument allow Betancourth to present his defense?

II. STATEMENT OF THE CASE

The appellant, Ray Leny Betancourth, was charged with first degree murder and first degree assault. CP 3-4. Prior to trial, there were many motion hearings, including a 3.5 hearing and a 3.6 hearing.

3.5 Hearing

At the 3.5 hearing, detectives of the Toppenish Police Department testified. At issue were two meetings with Betancourth -- one on September 21, 2012 and one on October 9, 2012. On September 21, Betancourth went to the police department and talked to detectives in their office for 20 to 30 minutes. RP 37. The detectives' office was located in a single-wide trailer about 9 feet wide by 20 feet long that had been converted to an office space. RP 40-44, 55. The office space consisted of three desks for each detective and file cabinets. RP 55, 58.

Betancourth was not under arrest, nor placed in handcuffs. RP 35. And no one told him he was wasn't free to leave. RP 35-6. The conversation began with a detective asking "Hey, you got a minute? Could we talk to you?" RP 35. Betancourth denied any involvement in the crime and left the police station. RP 36-7, 1172, 1176.

On October 9, Betancourth went to the police station again. Detectives asked if they could speak to him again and he said "yes." RP 40. They then went to the same office and he sat in a chair right next to a door. RP 49, 70. He had become a person of interest at this point. RP 38. Detective Brownell explained to him that he could leave at any time, that he was not under arrest, and that the interview was voluntary. RP 48, 57. Besides Detective Brownell, there were 2 other detectives present,

Dunsmore and Logan. RP 40, 49-50. After about 20 to 30 minutes, Betancourth mentioned speaking with an attorney, and the conversation was ended. RP 41, 54, 57. Detective Brownell gave Betancourth his phone to call an attorney and afterwards Betancourth left the police station. RP 41, 54, 57.

Betancourth testified at the 3.5 hearing. Regarding the October 9 meeting, he testified that he was kind of nervous. RP 69. He said that Detective Brownell was really nice, that Detective Dunsmore was not doing any talking, and that Detective Logan was mad and “getting aggressive.” RP 71-2, 75. He didn’t recall if anyone told him the talk was voluntary. RP 68, 70. He said no one told him he wasn’t free to leave or was under arrest. RP 74. When asked what made him think he wasn’t free to leave he stated:

“How he was yelling at me – I’m not like – This –this happened a long time ago so I’m not so sure, but I’m more – sure he cussed at me. And I was never being disrespectful to no officer, so one I saw that he started acting like that towards me, when I didn’t do anything, yeah, that – that did scare me.”

RP 74. The court ruled that Betancourth’s statements were voluntary and non-custodial. RP 83-5.

3.6 Hearing

A CrR 3.6 hearing was held regarding Verizon Wireless phone records, specifically text messages. RP 138-9. Betancourth moved to suppress the records obtained. At issue was the fact that detectives first secured a District Court warrant for the out-of-state phone records and then later obtained a Superior Court warrant for the same records. RP 152-3. Detective Brownell testified that he sought the second warrant to satisfy a previous ruling made on a different case by a Superior Court judge. RP 157. The second warrant did not seek any new records not already obtained from the first warrant. RP 167. Prior to obtaining any warrants, however, a preservation letter had been sent to Verizon Wireless. RP 140, 154.

The court ruled that the second warrant was to correct a technical error and that demanding the physical records be sent a second time would have been fruitless. RP 186-7. The motion to suppress was denied. Id. .

Trial

On September 19, 2012, three friends, Terrance Frank, Jordan Lemus, and 14-year-old J.M.R. were walking on the sidewalk when a white truck pulled up. RP 1066-7, 1076. Four guys got out of the truck and started yelling at them. RP 1079. The driver of the truck asked, “who broke my windows?” RP 917. The three friends backed off and ran

because they were outnumbered. RP 1079. The guys from the truck chased them. RP 1085. Terrance ran one way and Jordan and J.M.R. ran another way down an alley. RP 1080. As they were running away, J.M.R. was shot in the head and fell to the ground. RP 852, 871, 1159. Jordan jumped over a fence and hid in a bush. RP 1080, 1090. The guys from the truck then got back in the truck and sped off to Buena. RP 919, 1020, 1034. Officers found J.M.R. lying on the ground in the alley. RP 852. J.M.R later died from the gunshot wound. RP 1159.

Jordan and Terrance testified that they did not know the guys in the truck. RP 1098. Jordan described the guys as menacing, threatening, and sounding angry. RP 1087. The driver of the truck was identified as Ray Betancourth, the appellant. RP 907, 1213. His passengers were Marcos Cardenas, Mario Cervantes, and David Chavez. 1207-8, 1211, 1213. David Chavez testified at trial, as well as Betancourth's girlfriend, Nancy Ariaga.

At trial, it was undisputed that Betancourth believed that Terrance had broken the windows out of Betancourth's car 2 days prior to the murder. RP 1202. Betancourth testified that he planned on confronting Terrance and fighting him. RP 1204, 1215. Betancourth told his friends and girlfriend that he wanted to "beat his ass" and "beat the shit out of him." RP 905-6, 914-15. He denied shooting anyone, and said after

getting back to the truck, he heard David tell Marcos, “you shot him.” RP 1223.

Detective Brownell testified about the two conversations he had with Bentancourth. The first time, Bentancourth denied all involvement, even being at the scene of the crime. RP 1172, 1176. The second time, he admitted wrongdoing after listening to a recorded interview that his girlfriend gave. 1179. After hearing part of her interview, he admitted, “Guess you know what happened then.” RP 1179. Bentancourth testified that he did not call the police because he felt guilty and admitted that he did not tell the detectives the truth during the first conversation he had with them. RP 1232, 1238-9.

After trial, the jury found Bentancourth guilty of both counts. CP 182, 184. The jury also found that he or another participant was armed with a firearm at the time of the commission of both crimes. CP 183-4.

Sentencing

On August 5, 2014, the judge sentenced him to a total term of 336 months. CP 192. He was also sentenced to the following financial obligations:

- \$5,700.77 Restitution
- \$500 Crime Penalty Assessment
- \$200 Criminal Filing Fee
- \$600 Court appointed attorney recoupment
- \$100 DNA collection fee

\$250 Jury fee

CP 193. He did not object to these costs. 8/5/14 RP 28.¹ He now appeals his convictions and sentence.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT BETANCOURTH'S STATEMENTS WERE ADMISSIBLE BECAUSE THEY WERE VOLUNTARY AND NON-CUSTODIAL.

Miranda warnings are intended to safeguard a defendant's constitutional right not to make incriminating statements to police while in the coercive environment of police custody. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Before a suspect undergoes a “(1) custodial (2) interrogation (3) by an agent of the State,” Miranda warnings must be given or the statements made during the interrogation are presumed involuntary. Heritage, 152 Wn.2d at 214.

A suspect is in “custody” for Miranda purposes if he was formally arrested or his freedom of movement was restricted to a degree associated with a formal arrest. State v. Post, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992). This test involves two discrete inquiries: “[F]irst, what were the circumstances surrounding the interrogation; and second,

¹ The sentencing hearing was transcribed separate from the trial and will be referred to as 8/5/14 RP.

given those circumstances, would a reasonable person have felt he or she was at liberty not to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

Whether the defendant was in custody is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002). The factual inquiry determines “the circumstances surrounding the interrogation.” The legal inquiry determines, given the factual circumstances, whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” Solomon, 114 Wn. App. at 787-88 (citation omitted) (quoting Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). Courts review a trial court’s conclusion that the defendant was in custody de novo. Solomon, 114 Wn. App. at 789 (de novo review applies to question whether a reasonable person in the defendant’s situation would have believed he was not free to end the questioning and leave).

In this case, the facts support the trial court’s conclusion that a reasonable person in Betancourth’s position would not believe himself to be in police custody to a degree associated with formal arrest. On two occasions, Betancourth voluntarily chose to go to the police station to talk to the detectives and each time, he freely left the station after a brief 20 to 30 minute conversation. RP 36-7, 41. Betancourth’s testimony was that

one detective was “getting aggressive” while the other detectives were “being cool.” RP 72. He described Detective Brownell as “polite” and “extremely cool.” RP 75. The other detective, Detective Dunsmore, was a school resource officer at Betancourth’s school and had known Betancourth since sixth grade. RP 71.

When cross-examined, the prosecutor asked Betancourth, “So, when – Sergeant Logan stood up you felt like you weren’t free to leave ‘cause of the way he stood up?” RP 73. Betancourth replied, “He never stood up. Well, he – he was standing up throughout the – the – the—the interview, but it’s not like he stood up and started accusing me of stuff, no.” RP 73. The prosecutor pressed him further and said “What made you think you weren’t free to leave?” RP 73. The only reason Betancourth gave for feeling like he could not leave was that an officer possibly cussed at him. RP 74. He wasn’t sure if the officer yelled at him but said he was, “more sure he cussed at me.” RP 74. He never said what cuss words were used or in what context. More importantly, he never claimed any threats were made to him. He described a situation where one officer didn’t talk very much, one was “really nice” and the other one was possibly cursing. The trial court did not find his claim that he felt intimidated by Sergeant Logan to be a credible claim. CP 105.

Based on the testimony, the trial court did not err when it admitted Betancourth's statements. He was not in police custody when the detectives interviewed him and, therefore, Miranda warnings were not required. Substantial evidence also supports the trial court's conclusion that Betancourth's statements were voluntary. The decision of the trial court should be affirmed.

Furthermore, for sake of argument, any error regarding the trial court's admission of his statements is harmless beyond a reasonable doubt and therefore not reversible error. Here, Betancourth testified consistent with his statements to the detectives and admitted that he did not initially tell the truth and that during the second meeting he told them something like, "guess you know what happened then." RP 1244. This court should find that any error was harmless beyond a reasonable doubt.

B. BETANCOURTH WAIVED ANY ISSUE OF PROSECUTORIAL ERROR BY CHOOSING NOT TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT.

A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Here, the challenges involve the State's closing argument and rebuttal argument. The defense claims that the State's use of the phrase "beat the shit out of" inflamed the passions of the jury. Appellant's Brief

at 23. There were no objections by the defense during either argument. As such, Betancourth waived the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

In addition, improper remarks by the prosecutor are not grounds for reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006) (quoting Russell, 125 Wn.2d at 86). These onerous standards of review prevent defendants from provoking or passively accepting the State’s improper conduct at trial in order to undermine the validity of their convictions on appeal. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008).

A prosecutor’s closing argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519 111 P.3d 899 (2005). This framework of analysis is critical. One cannot just examine a few sentences from the closing argument and

say that it is prejudicial without analyzing the comments in the context of the closing and in the context of the evidence presented at trial.

One issue in this case was the defendant's intent—what did he intend to do when he saw the guy who broke his car window? Witnesses testified that Betancourth told his friends and girlfriend that he wanted to “beat his ass” and “beat the shit out of him.” RP 905-6, 914-15, 1122-3. Even Betancourth admitted that he said this. RP 1203-4. First of all, there was nothing improper about the use of those terms because that is what the evidence was at trial. The prosecutor didn't embellish or make things sound worse than they actually were. He simply used the defendant's own words.

In fact, the prosecutor often actually *downplayed* what was said by the defendant. And he did so on numerous occasions by substituting the word “shit” with things such as, “S”, “heck,” or “you-know-what”. RP 1452, 1454, 1487, 1490, 1492-5. He even asked the jury to excuse his language stating “but this is what the evidence is.” RP 1435-6. As such, there was nothing improper about the prosecutor's argument.

Second, Betancourth never objected to the prosecutor quoting him. The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically

prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

For sake of argument, even assuming the prosecutor’s comment had been improper, Betancourth’s misconduct claim fails because he cannot show any prejudice. Betancourth makes no persuasive argument as to why an objection and instruction would not have cured any prejudice in this case. And in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury, the prosecutor’s remarks were not “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”

In sum, Betancourth has failed to show that the prosecutor’s statements was improper. Furthermore, the jury was already instructed that the lawyers’ statements are not evidence and that they must reach their decision based on the facts proved to them and on the law given to them and “not on sympathy, prejudice, or personal preference.” CP 153. Jurors are presumed to follows these instructions, State v. Barry, 183 Wn.2d 297, 306, 352 P.3d 161 (2015), and nothing the records suggests that the jury did not follow the instructions in this case.

C. BETANCOURTH HAS FAILED TO PROVE THAT HIS ATTORNEY’S FAILURE TO OBJECT DURING CLOSING ARGUMENTS WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Betancourth claims that his attorney was ineffective because he didn’t object to the prosecutor’s use of the phrase “beat the shit out of.” But there is a “strong presumption that counsel’s performance was reasonable.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defense must show deficient performance of the part of his trial attorney and that but for the deficient performance, the outcome of the trial would have been different. Id. When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. Id. at 863. To rebut the presumption of reasonable performance, a defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052 (1984). That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel’s initial calculus; hindsight has no place in an ineffective

assistance analysis. See Strickland, 466 U.S. at 689; cf. State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) (“The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.”).

To satisfy the prejudice prong of the Strickland test, the defendant must establish that “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” Kyllo, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” Id. at 694-95.

The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Here, there was no deficient performance. The arguments made by the prosecutor regarding what Betancourth said were supported by the evidence. Any objection, request, or motion would have been denied. That is most likely why defense counsel did not object. It may also have

been a tactical decision intended to avoid drawing further notice to the defendant's statements. Furthermore, Betancourth has not established prejudice. Thus, he has failed to establish both prongs of ineffective assistance of counsel.

D. THIS COURT SHOULD DENY REVIEW OF LEGAL FINANCIAL OBLIGATIONS AND ABILITY TO PAY WHERE THE ISSUE WAS NOT RAISED AT THE TRIAL LEVEL.

This court need not and should not address this issue. As this court previously ruled and as Division II of this court recently ruled in State v. Lyle, Slip Opinion COA #46101-3-II (July 10, 2015):

Lyle did not challenge the trial court's imposition of LFOs at his sentencing, so he may not do so on appeal. Blazina, 174 Wn. App. at 911. Our decision in Blazina, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. Blazina, 182 Wn.2d at 830. We decline to exercise such discretion here.

This court has consistently ruled that this issue need not be addressed for the first time on appeal. This division of the court has done so since this court's ruling in State v. Duncan, 180 Wn.App. 245, 250, 253, 327 P.3d 699 (2014) (petition for review accepted). In Duncan, this

court ruled that Duncan’s failure to object was not because 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.”

The opinion in Duncan was not changed by the ruling in State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Blazina addressed RCW 10.01.160(3), which states a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” When determining the amount and method for paying the 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.” RCW 10.01.160(3). In Blazina, the Washington Supreme Court held that this statute requires a court “do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” 182 Wn.2d at 838. Rather, the record must show the court “made an individualized inquiry into the defendant’s current and future ability to pay.” Id.

The Supreme Court ruling in Blazina also reaffirmed that RAP 2.5(a) provides appellate courts with discretion whether to review a defendant’s LFO challenge raised for the first time on appeal. Blazina, 344 P.3d at 683. There, the Blazina court exercised its discretion in favor

of allowing the LFO challenge. Id. Here, Betancourth failed to object to the trial court's imposition of LFOs. 8/4/14 RP 28. And the court had heard trial testimony that Betancourth was employed at the time of the crime. RP 1198-99. This court, therefore, has discretion to rely on the analysis in Duncan, and deny review of the claimed error.

There is an enormous burden and expense to bring innumerable defendants back from prison to conduct new sentencing hearings to address these alleged error. This must be balanced against the possibility that the amount of costs that will be imposed will actually change. Additionally, there is the consideration of the actual amount that will be collected, contrasted with these new costs. Costs to the State include costs for the return of each defendant to court, the appointment of counsel, setting a new hearing, the hearing itself, and the return of each defendant back to prison. Often the amount of money that would be subject to change or review is nominal because many of the costs found in the "boilerplate" sections of the judgment and sentence are mandatory and not discretionary.

This court is well aware that a trial court is not required to inquire about the individual's ability to pay when imposing mandatory costs. Evidence of ability to pay is unnecessary to support the mandatory financial obligations imposed by the court. In State v. Lundy, 176 Wn.

App. 96, 102, 308 P.3d 755 (2013), the court noted that, for these costs, “the legislature has directed expressly that a defendant’s ability to pay should not be taken into account.”

As Lundy states:

This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing these obligations. 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. *See, e.g., State v. Kuster*, No. 30548-1-III, 2013 WL 3498241 (2013). And our courts have held that these mandatory obligations are constitutional so long as “there are sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.” *State v. Curry*, 118 Wash.2d 911, 918, 829 P.2d 166 (1992) (emphasis added).

...

Additionally, a \$500 victim assessment is required by RCW 7.68.035(1)(a), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant’s ability to pay. *See State v. Curry*, 62 Wash.App. 676, 680-81, 814 P.2d 1252 (1991), *aff’d*, 118 Wash.2d 911, 829 P.2d 166; *State v. Thompson*, 153 Wn.App. 325, 336, 223 P.3d

1165 (2009). Because the legislature has mandated imposition of these legal financial obligations, the trial court's "finding" of a defendant's current or likely future ability to pay them is surplusage.

Lundy at 102-3 (footnote omitted, emphasis in original.)

At sentencing, Betancourth's attorney said that he was working at the time and had a GED. 8/5/14 RP 19. The judge informed Bentancourth that he would have financial obligations, including restitution. 8/5/14 RP 28. Specifically, he was ordered to pay the following:

- \$5,700.77 Restitution
- \$500 Crime Penalty Assessment
- \$200 Criminal Filing Fee
- \$600 Court appointed attorney recoupment
- \$100 DNA collection fee
- \$250 Jury fee

CP 193. There were no objections to any of the financial obligations.

8/5/14 RP 28. Most of these costs are mandatory, as opposed to discretionary. The only two discretionary costs are the jury fee and court-appointed attorney recoupment, which total \$850.

The State would urge this court to continue to exercise its right to deny these challenges of costs when they have not been raised in the trial court pursuant to RAP 2.5. The decision rendered in Duncan was appropriate. These costs are a matter that is not simply overlooked by a defendant. These costs were ordered in open court and Betancourth chose not to challenge any of them. As stated in Blazina, RAP 2.5(a) provides

appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. 344 P.3d at 683. The Supreme Court chose to select that one case and exercise its discretion under RAP 2.5 to hear the issue.

Prior to the Supreme Court's ruling in Blazina, all three divisions of this court had held that a defendant's failure to raise this issue or to object to the imposition of these costs in the trial court was a failure to preserve the issue. See State v. Blazina, 174 Wn.App. 906, 911, 301 P.3d 492 (2013), remanded, 182 Wn.2d 827, 344 P.3d 680 (2015); State v. Calvin, 176 Wn.App. 1, 316 P.3d 496, 507-08 (2013), remanded, No. 89518-0 (2015); State v. Duncan, 180 Wn.App. 245, 253, 327 P.3d 699 (2014), petition for review granted, No. 90188-1 (2015). Because the Supreme Court's decision in Blazina did not change that reasoning, this court should decline to review costs in this case.

E. THE COURT SHOULD REFUSE TO CONSIDER A CONSTITUTIONAL CHALLENGE TO RCW 43.43.7541 WHEN RAISED FOR THE FIRST TIME ON APPEAL OR DENY THE CHALLENGE BECAUSE THE STATUTE DOES NOT VIOLATE DUE PROCESS.

The next issue raised by Betancourth is also being raised for the first time on appeal. He challenges the mandatory \$100 DNA fee under RCW 43.43.7541 as violating due process.

Generally, appellate courts will not consider a matter raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 826, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue then the defendant bears the burden to show the error was manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if the defendant shows that he was actually prejudiced by it. State v. Kirkman, 159 Wn.2d 918, 926-7, 155 P.3d 125 (2007). Here, the error is not manifest because Betancourth was not actually prejudiced when the fee was imposed.

Furthermore, courts have held that statutes imposing mandatory financial obligations are not unconstitutional on their face. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (crime victims penalty assessment); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (crime victims penalty assessment, DNA collection fee); State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) (restitution, crime victims penalty assessment, DNA collection fee). Constitutional principles are only implicated if the State seeks to enforce the debt at a time when the defendant, through no fault of his own, is unable to comply. Curry, 118 Wn.2d at 917.

The Supreme Court has held that the Sentencing Reform Act contains adequate safeguards to prevent imprisonment of indigent defendants. Id. at 918. Those safeguards included former RCW 9.94A.200 that allowed a defendant the opportunity to show cause why he should not be incarcerated for a violation of his sentence. Id. at 918. Those same protections still exist. RCW 9.94A.6333. Because Betancourth will not face any punitive sanction for failure to pay if he is indigent, he has not shown that he was actually prejudiced by imposition of the DNA collection fee under RCW 43.43.7541. For that reason, the court should not consider Betancourth's challenge to that statute for the first time on appeal.

If the court accepts review then it should reject Betancourth's constitutional challenges to RCW 43.43.7541. Statutes are presumed constitutional and the party challenging a statute's constitutionality has the burden of proving otherwise beyond a reasonable doubt. In re Pers. Restraint of McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014). If at all possible statutes should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991).

Betancourth claims that RCW 43.43.7541 is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the \$100 DNA fee. Except in circumstances not relevant here, a party

may generally only challenge a statute if he is harmed by the feature of the statute that is claimed to be unconstitutional. State v. Cates, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). Betancourth supports his claim of indigency by pointing to the fact that he was found indigent for purposes of this appeal. However, he may ultimately have funds to pay the fee through the prison industries program or through a gift of funds. RCW 72.09.100, RCW 72.09.111(1)(a)(iv), RCW 72.11.020, RCW 72.11.030. At this point, he has not been harmed.

Even assuming, for sake of argument, he has been harmed, the statute does not violate due process. Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014) affirmed, 184 Wn.2d 321 (2015). The level of review depends on the nature of the right at issue. Amunrud v. Board of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006), cert denied, 549 U.S. 1282 (2007). Betancourth agrees that his claim is subject to the rational basis review. See In re Metcalf, 92 Wn. App. 165, 176-177, 963 P.2d 911 (1998), cert denied, 572 U.S. 1041 (1999). Under his standard, a statute must be rationally related to a legitimate state interest. Amunrud, 158 Wn.2d at 222.

Here, the legislature found that DNA databases are important tools in criminal investigations, in excluding people who are the subject of investigations or prosecutions, detecting recidivist acts, and identifying the location of missing and unidentified persons. RCW 43.43.753. It created a DNA identification system to serve those purposes. RCW 43.43.754. Monies collected under RCW 43.43.7541 are put into an account administered by the state treasurer. They may be used only to create, operate, and maintain the DNA database. RCW 43.43.7532; State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). Betancourth agrees that these are legitimate state interests. Appellant's Brief at 33.

However, Betancourth argues the interest in collecting money to support the objectives of the DNA database statute do not apply to persons who are indigent at the time of sentencing. He argues that since the State cannot collect from those defendants who cannot pay, it is irrational to impose that obligation on indigent defendants. Appellant's Brief at 34. He relies on the court's reasoning in Blazina.

As discussed previously, Blazina dealt with error resulting from the trial court's failure to comply with RCW 10.01.160(3). That statute requires trial courts to make an individualized determination of the defendant's ability to pay court costs before imposing those costs as part of the sentence. Blazina, 182 Wn.2d at 837-38. Betancourth relies on a

discussion by the court regarding the problems associated with the current system of imposing legal financial obligations. He claims that this supports his position that imposing the fee in RCW 43.43.7541 on indigent defendants bears no rational relationship to its legitimate purpose. That discussion in Blazina related to the court's reasons for accepting discretionary review of the otherwise unpreserved error. Id. at 835-836. It does not support the conclusion that the statute as written does not further a legitimate state interest.

While Betancourth may have no current ability to make even minimal payments on the financial obligation, his status may change. As noted, there is the opportunity for employment in the prison. RCW 72.09.100. The legislature recognized that inmates are paid for their work in that program. It provided for a percentage of the inmates' income to be paid toward the inmates legal financial obligations. RCW 72.09.111(1)(a)(iv). Further, Betancourth may be given funds, through an inheritance or otherwise. If such funds come into an inmate's actual possession, a portion is paid toward those court ordered obligations. RCW 72.11.020, 72.11.030.

In the context of RCW 10.73.160 relating to appellate costs, the court observed that it is not necessary to inquire into a defendant's ability to pay or inquire into a defendant's finances before a recoupment order

may be entered against an indigent defendant “as it is nearly impossible to predict ability to pay over a period of 10 years or longer.” State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The same is true for the DNA collection fee. Because it is unknown whether a defendant will gain employment in the prison or obtain funds otherwise, a defendant’s indigent status at sentencing does not impair the rational basis for the fee as applied to indigent defendants.

Betancourth’s argument attempts to add a requirement to the rational basis test -- that the DNA fee not be unduly oppressive on individuals. He points to the fact that interest accrues on legal financial obligations. This argument should be rejected for two reasons.

First, while interest may accrue on the DNA fee, the interest is not necessarily collected. The interest may be reduced or waived in certain instances; it must be waived if it accrued during the time the defendant was in total confinement if the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2).

Second, the court rejected the claim that the rational basis test had an “unduly oppressive” component in Amunrud, 158 Wn.2d at 226. Instead the test was only that the law bears a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database. Providing a funding mechanism for that

database is reasonably related to that interest. As such, this court should decline consideration of Betancourth's challenge because he did not preserve the claim of error below, and in the alternative, because the statute does not violate his substantive due process rights.

F. BETANCOURTH HAS FAILED TO SHOW ANY PREJUDICE BY A DELAYED FILING OF THE 3.6 FINDINGS OF FACT AND CONCLUSION OF LAW.

Betancourth contends the trial court erred by failing to enter written findings of fact and conclusions of law following the suppression hearing. The purpose of those findings is to assure meaningful appellate review. State v. Cannon, 130 Wn.2d 313, 922 P.2d 1293 (1996).

Here, findings of fact and conclusions of law were entered on September 30, 2015. CP 214-5.² While the practice of submitting late findings and conclusions is disfavored, it does not provide a basis for reversal unless a defendant demonstrates that he was prejudiced by the late filing. Id. at 329; see also, State v. Royal, 122 Wn.2d 413, 423, 858 P.2d 259 (1993). Betancourth has made no showing or argument that he was prejudiced. Significantly, the originally proposed findings and conclusions were promptly submitted once their omission was discovered,

² A Supplemental Designation of Clerk's Papers was filed on October 5, 2015. The next numbers in the sequence would be 214-8. Per ACORDS, Supplemental Clerk's Papers are due 11/20/2015.

and Betancourth's appeal was not delayed. Accordingly, reversal is unwarranted.

**G. THE TRIAL COURT CORRECTLY DENIED
BETANCOURTH'S MOTION TO SUPPRESS CELL
PHONE RECORDS.**

1. Verizon's 20-day deadline to respond

RCW 10.96.020 includes some language that must be included on warrants for records outside of Washington. That statute, in pertinent part, states as follows:

Criminal process issued under this section must contain the following language in bold type on the first page of the document: "This [warrant, subpoena, order] is issued pursuant to RCW [insert citation to this statute]. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply."

RCW 10.96.020(2). In this case, notice of this 20-day deadline was omitted from the warrants. The trial court concluded that the language from RCW 10.96.020 is an "instructional caution that goes to the recipient of the warrant and does not rise to the level...that would prevent the [introduction of] the evidence that was the subject of the warrant." CP 218.

This is consistent with caselaw on how to interpret search warrants. “The crucial test of a search warrant is its basis in probable cause, not its hypertechnical adherence to a particular form.” See State v. Kuberka, 35 Wn. App. 909, 911-12, 671 P.2d 260 (1983). Courts test and interpret a search warrant “in a commonsense, practical manner, rather than in a hypertechnical sense.” State v. Perrone, 119 Wn. 2d 538, 549, 834 P.2d 611 (1992). As explained in State v. Dodson:

The trial court’s additional conclusion that the warrant was invalid because it failed to specify the time for its execution and return does not withstand scrutiny. The rules for execution and return of a warrant are generally ministerial in nature and will not invalidate a warrant absent a showing of prejudice to the defendant. State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114 (1996). None of the defendants has shown or argued that the warrant’s failure to specify the time of its execution and return prejudiced him or her in any way. Consequently, suppression of the evidence on this basis was not warranted. Id. at 312.

The analysis in Dodson can readily be applied to the case here. The requirement to provide a timeframe to the recipient is a benefit to the party seeking the warrant – in this case, the State. The purpose is so Verizon Wireless responds within 20 days, and does not delay compliance. This rule is similarly, ministerial in nature. Furthermore, there has been no showing or argument that omission of this language from the warrant

caused any prejudice to Betancourth. As such, the trial court correctly denied his motion to suppress on this ground.

2. Independent Source Doctrine

Under RCW 10.96.060, only a Superior Court judge may issue a warrant to recipients outside of the State of Washington. That statute provides as follows:

10.96.060. Issuance of criminal process.

A judge of the superior court may issue any criminal process to any recipient at any address, within or without the state, for any matter over which the court has criminal jurisdiction pursuant to RCW 9A.04.030.

This section does not limit a court's authority to issue warrants or legal process under other provisions of state law.

Betancourth argues that because officers did not get a second set of records, the independent source doctrine does not apply. Appellant's Supplemental Brief at 13. He suggests that after getting a Superior Court warrant, officers would have had to return the records obtained from the invalid District Court warrant to the phone company and ask for a new set of records identical to the ones they returned.

But Courts have held that the independent source doctrine applies even where the seized goods are kept in the police's possession. See, e.g., State v. Herrold, 962 F.2d 1131 (3d Cir. 1992). If the item seized is this

case was marijuana, there would be no need to return the marijuana and then seize it again after securing the Superior Court warrant. Demanding such a result would be senseless.

The independent source doctrine is a “well-established exception to the exclusionary rule.” State v. Miles, 159 Wn. App. 282, 291, 244 P.3d 1030 (2011). The United States Supreme Court’s decision in Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), is the “controlling authority’ defining the contours of the independent source exception.” Id. at 292. In Murray, the court held that the Fourth Amendment does not require the suppression of evidence discovered during police officers’ illegal entry if that evidence is also discovered during a later search pursuant to a valid search warrant that is independent of the illegal entry. Murray, 487 U.S. at 542. The Supreme Court stated that:

The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents’ decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id.

Accordingly, in Washington, courts have interpreted the requirements in Murray to have two prongs, both of which must be satisfied. “Under the independent source exception, an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State’s decision to seek the warrant is not motivated by the previous unlawful search and seizure.” Miles, 159 Wn. App. at 285.

In State v. Green, the Court of Appeals distinguished two federal cases and noted that “valid warrants in Herrold and United State v. May, 214 F.3d 900 (7th Cir. 2000), specifically authorized the search and seizure of the evidence at issue (the gun and cash), providing a clear independent source to seek and seize the evidence.” State v. Green, 177 Wn. App. 332, 346, 312 P.3d 669 (2013).

In Herrold, police officers made an initial unlawful entry into a trailer and saw drugs and a loaded gun in plain view. 962 F.2d at 1134. They waited for a search warrant to seize the drugs but seized the gun during the initial entry. Id. at 1134-35. The search warrant affidavit included observations of the gun and drugs inside the trailer. Id. at 1135. They executed a search warrant later that night and seized the drugs. Id. The Third Circuit held that the drugs and gun were admissible under the independent source doctrine because, even excluding information obtained

during the initial entry, the warrant was still supported by probable cause. Id. at 1140-44. The court concluded that although the gun was seized during the illegal entry, it should be treated as seized under the search warrant, which specifically authorized the seizure of firearms. Id. at 1143.

The court stated:

It would be dangerous to require officers to leave a fully-loaded, semi-automatic weapon unsecured until they obtained a warrant, and **senseless to require the formality of physically re-seizing the gun already seized during the initial entry.** Thus, the only logical implication under Murray is that the gun is as admissible under the independent source doctrine as the other, non-dangerous evidence, seen during the initial entry but not seized until the warrant-authorized search.

Id.

Similarly, it would be senseless to require the formality of returning the records to the phone company and having them hand over the same exact records back to the officers. An executive relations analyst for Verizon Wireless testified at the 3.6 hearing. RP 138. She indicated that no documents were sent after the second search warrant because “it would have been the same information we had already provided.” RP 147. Like the gun in Herrold, this court should conclude that although the records were subpoenaed pursuant to an invalid District Court warrant,

they should be treated as seized under the valid Superior Court search warrant that was subsequently issued.

Finally, even if the admission of the cell phone texts was erroneous, that error was harmless beyond a reasonable doubt. The texts show that Betancourth wanted to seek revenge on the guys who broke his car window. But evidence of his intent was also introduced by David Chavez. He also admitted on the stand that he wanted to fight the guys and felt like “beating his ass.” RP 1204-5. There were additional text messages, including “I don’t think I should be so public right now” and “wait for me.” RP 1130,134. However, the texts were not so damaging to say that there wasn’t other overwhelming evidence.

3. Validity of RCW 10.96.060

Betancourth claims that warrants issued under RCW 10.96.060 for out-of-state records are per se invalid. He claims that the two other statutes are inconsistent with RCW 10.96.060. But he fails to explain in any detail the inconsistencies and how those inconsistencies invalidate RCW 10.96.060. He cites RCW 2.08.190, which has to do with powers within the judge’s district, and a venue provision, RCW 2.08.210. Neither statute is inconsistent with RCW 10.96.060.

Furthermore, the warrant in this case dealt with text messages, which are subject to the Stored Communications Act (SCA), 18 USCS §

2701. This federal statute provides, in pertinent part, that a government entity may “require the disclosure by a provider of electronic communication service of the contents of a...electronic communication...pursuant to a warrant...issued using State warrant procedures...by a court of competent jurisdiction.” 18 USCS § 2703. A “court of competent jurisdiction includes...a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants.” 18 USCS § 2711(3)(B). The Act further provides that “in the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.”

Here, it is indisputable that Yakima County Superior Court meets the definition of a court of competent jurisdiction. As such, Yakima County Superior Court could require the disclosure of text messages held by an out-of-state company pursuant to the SCA. Furthermore, the warrant is not prohibited by the laws of the State of Washington.

Appellant provides one Ohio Court of Appeals case for his argument that one state can't subject citizens of another state to its laws on search and seizure. However, the Ohio case is distinguishable based on its facts—it involved an Ohio municipal court warrant for a search of a house in California. State v. Jacob, 185 Ohio App.3d 408, 924 N.E.2d 410 (2009). This is clearly distinguishable from a warrant for text message

records held by a phone company that does business throughout the country, including Washington State.³

Here, a national phone company, Verizon Wireless, chose to honor the Yakima County Superior Court warrant and did so without hesitation and pursuant to the SCA. Verizon Wireless likely handles these types of out-of state warrants on a daily basis. And their records custodians testify throughout the country in out-of-state court proceedings like the 3.6 hearing in this case. RP 138. A Washington statute authorized the Superior Court judge to issue the warrant. Bentencourth's reasons to invalidate the statute and warrant are not compelling.

H. THE PROSECUTOR'S CLOSING ARGUMENT ALLOWED BETANCOURTH TO PRESENT HIS DEFENSE.

Betancourth argues that the prosecutor's closing argument deprived him of his right to present a defense. Appellant's Supplemental Brief at 13-14. He claims that the prosecutor argued that accomplice liability in the underlying felony negates the defense. WPIC 19.01, in pertinent part, outlines the elements of the defense:

³ As the United States Supreme Court observed in 1992, by virtue of intentionally availing itself of the Washington economic market, a business subjects itself to the personal jurisdiction of the state. See Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 307, 112 S.Ct. 1904, 1910-11 (1992) (“[I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s *in personam* jurisdiction even if it has no physical presence in the State.”).

It is a defense to a charge of murder in the [first][second] degree based upon [committing][or][attempting to commit](fill in felony) that the defendant:

(1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (2) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. The defendant has the burden of proving this defense by a preponderance of the evidence.

...

WPIC 19.01. An accused must establish all four subsections by a preponderance of the evidence. State v. Gamboa, 38 Wn. App. 409, 413, 685 P.2d 643 (1984). This defense is based upon RCW 9A.32.050. The jury was given this instruction in Betancourth's case and it is a correct statement of the law.

In his Supplemental Statement of the Case, Betancourth points to two different parts of the prosecutor's closing argument and two different parts of the prosecutor's rebuttal argument. Appellant's Supplemental Brief at 2-5. In closing, while discussing subsection 1 of WPIC 19.01, the

prosecutor argued that Betancourth aided the commission of the homicidal act as follows:

“Number one, he has to show that he did not commit the homicidal act. That’s true. But he – also has to show that he didn’t solicit, request, importune – in other words provide the opportunity – or aid the commission of the homicidal act. Well, he provided – importune means provide the opportunity. He provided the opportunity for the homicidal act, didn’t he? He brought Marcos to the scene where the shooting took place. Rode around with him in a truck looking for Terrence and his friends. Went back and got reinforcements, took him back to the scene of the crime.”

RP 1450-1. The defense objected as a misstatement of the law. 1451.

The objection was overruled. RP 1451. The prosecutor then stated “So he gave him the opportunity, and he – and he aided it. Its –That’s it right there. He can’t show that by a preponderance of the evidence that he didn’t do that. So you should deny it on that basis alone.” RP 1451. The prosecutor then discussed the other three subsections.

In rebuttal, the prosecutor came back to the statutory defenses and argued the following:

Mr. Therrien talks about the statutory defense. And he said he points out he didn’t commit a homicidal act. That’s true. This is the first element that I talked about. And

once again, -- argue to you that he didn't prove any of them. He has to prove them -- he didn't prove -- He has to prove all four of them but he didn't prove any of them. But one of them is he did -- importune, or provide the opportunity, to Mr. Cardenas, to commit a second degree assault, and he assisted him by driving him there. And the evidence would tend to show that he encouraged it. I mean, he told his girlfriend, "I'm going to beat the S out of Terrence and his friend."

RP 1493-4. There was no objection during this argument. Id.

Subsection 1 of Statutory Defense

This subsection provides as follows:

(1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof.

RCW 9A.32.050(b)(i). This statute is very broadly worded. The defendant must prove that he did not "aid" the commission of the homicidal act **in any way**. The word "aid" was defined in Instruction Number 8 as "*all assistance* whether given by words, acts, encouragement, support or presence." CP 160 (emphasis added). The prosecutor's argument above was consistent with the broad language of RCW 9A.32.050. Based on the evidence presented, it was reasonable for the prosecutor to argue that Betancourth did aid in the commission of the homicidal act in any way.

Subsection 4 of Statutory Defense

This subsection provides as follows:

(4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.050(b)(4). The prosecutor's argument regarding subsection 4, which was not objected to, was: "well, serious physical injury is what this was all about, wasn't it? When he's going to beat the heck out of them, to paraphrase." This did not misstate the law and was not an improper argument.

"A prosecutor can certainly argue that the evidence does not support the defense theory." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125, 130 (2014). David Chavez testified that if someone's going to "kick someone's ass," they're going to cause them serious injuries. RP 951. Furthermore, Chavez testified that Betancourth had a .38 in the truck and looked at it before they got out but put it under his seat. RP 912.

Based on the testimony at trial, it was a reasonable inference that Betancourth knew his friends were going to engage in conduct likely to result in serious physical injury. This was not prosecutorial error. The prosecutor does not commit misconduct by arguing reasonable inferences

from the facts in evidence. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

Standards of Review

For the sake of argument, if there was any error in the prosecutor's arguments, the Court must determine whether the defendant was prejudiced under one of two standards of review. State v. Allen, 182 Wn.2d 364, 375 (2015). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Id. However, if the defendant failed to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id.

During the prosecutor's closing, counsel objected. Therefore, the former standard applies. As to the closing, it cannot be said that the argument had a substantial likelihood of affecting the verdict. The jury instructions were read nearly verbatim to the jury by the prosecutor and were a correct statement of the law. The prosecutor never misstated the law. He made arguments based on the law. Betancourth bore the burden of proving the defense and had to prove all four elements by a preponderance of the evidence. See WPIC 19.01. Had the prosecutor not

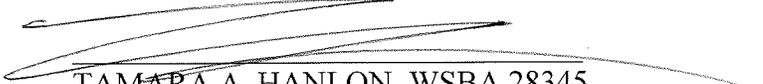
argued subsection 1 of the defense, the result still would have been the same. There was overwhelming evidence of the defendant's guilt, and little to support that he proved all four elements of the defense.

As to the prosecutor's rebuttal argument, had the defense objected, the trial judge could have instructed the jury to disregard the prosecutor's argument and could have re-read the jury instruction to the jury. This would have cured any prejudice. It cannot be said that the prosecutor's argument was "so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." In sum, Betancourth was allowed to present his defense and there was no prejudice requiring reversal of his conviction.

IV. CONCLUSION

In sum, for the foregoing reasons, the State asks that the court affirm Betancourth's convictions.

Respectfully submitted this 16th day of November, 2015,



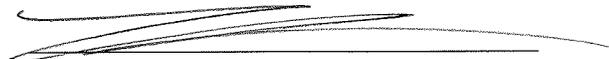
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on November 16, 2015, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Suzanne L. Elliott at suzanne-elliott@msn.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of November, 2015 at Yakima, Washington.


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