

No. 65213-3-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ANTONIO RAMOS, Appellant.

**BRIEF OF RESPONDENT
AND MOTION TO STRIKE**

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

FILED
2016 OCT 15 1 10 27
COURT OF APPEALS
DIVISION ONE
BELLINGHAM, WA

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR.....1

C. FACTS2

D. ARGUMENT9

1. The prosecutor’s cross-examination and comments in closing were not misconduct resulting in prejudice..... 9

a. Cross-examination..... 11

i. The prosecutor was entitled to elicit some of the testimony because Ramos opened the door to such testimony. 11

ii. The reference to Dave sounding “American” was not an attempt to impugn Ramos’s ethnicity but was relevant to rebutting Ramos’ implication that “Dave” must have been the one who delivered the drugs.... 16

iii. The prosecutor did not commit misconduct by asking Ramos whether he knew if the informant had any motive to make up an untrue story about him..... 17

iv. The prosecutor’s questions regarding whether the persons Ramos met outside the store had drug problems were objectionable but did not affect the jury’s verdict. 22

b. Closing Argument..... 23

i.	<i>The prosecutor’s comments regarding the drug business and task force’s planned investigation and candidness of the witnesses were in response to defense argument that the officers had been neglectful in their investigation and the implication that the officers had conspired to identify Ramos as the one who had been in the van.</i>	25
ii.	<i>The prosecutor’s objectionable comment(s) were not so flagrant as to cause incurable prejudice.</i>	31
2.	Ramos failed to raise any issue about his ability to pay standard fees and costs at sentencing and therefore has waived his ability to assert the trial court’s failure to consider his ability to pay on appeal.	35
3.	The State moves to strike references in the appellate brief to a study regarding the effect of legal financial obligations on defendants.	40
E.	CONCLUSION.....	41

TABLE OF AUTHORITIES

Washington State Court of Appeals

State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995), *rev. den.*, 129 Wn.2d 1007 (1996) 12

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 20

State v. Crook, 146 Wn. App. 24, 189 P.3d 811 (2008)..... 38

State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993)..... 10

State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995) 24

State v. Gallagher, 112 Wn. App. 601, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023 (2003) 12

State v. Graham, 59 Wn. App. 418, 798 P.2d 314 (1990) 11, 12, 18, 24

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992)..... 36

State v. Mayer, 120 Wn. App. 720, 86 P.3d 217 (2004)..... 40

State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995) 21

State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006) 17

State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009)..... 38

State v. Wright, 76 Wn. App. 811, 88 P.2d 1214 (1995), *rev. den.*, 127 Wn.2d 1010 (1995) 18

Washington State Supreme Court

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996)..... 11

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)..... 10

<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	37, 38
<u>State v. Hoffman</u> , 116 Wn.2d 57, 804 P.2d 577 (1991)	24
<u>State v. McDonald</u> , 138 Wn.2d 680, 981 P.2d 443 (1999).....	36
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000)	10
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129 (1995).....	10, 24
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. den.</i> , 523 U.S. 1008 (1998).....	10
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046 (1991).....	11, 24
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	36

Federal Authorities

<u>United States v. Solivan</u> , 937 F.2d 1146 (6th Cir. 1991).....	31, 32
<u>United States v. Wettstain</u> , __ F. 3d __, (6 th Cir. 2010) 2010 WL 3384982	32, 33, 34

Rules and Statutes

RAP 2.5.....	36
RCW 9.94A.760	38
RCW 10.01.160	35, 36, 37
RCW 10.46.190	39
RCW 36.18.016	39
RCW 36.18.020	39

RCW 43.43.690	39, 40
RCW 69.50.430	39

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a prosecutor committed misconduct where the defendant opened the door by volunteering on direct that he did drugs but didn't sell them and that he had been in prison during one of the years he had claimed to have made \$60,000-\$70,000 a year, where the prosecutor's question regarding "Dave" sounding American was relevant because the person the informant spoke to on the phone sounded Hispanic, and where the prosecutor did not ask the defendant if the State's witness was lying but asked whether the defendant was aware of any motive the informant had to make up an untrue story about the defendant after the defense had challenged the credibility of the informant.
2. Whether there's a substantial likelihood the prosecutor's objectionable questions regarding the drug problems of the defendant's acquaintances affected the verdict where the objections were sustained, the jury instructed to disregard inadmissible evidence, the questions related to a non-material issue in the case and the State's evidence was very compelling.
3. Whether the prosecutor's comments in closing were misconduct resulting in incurable prejudice where most of the comments responded to defense counsel's argument and insinuation that the investigation was inadequate and that the officers had conspired to identify the defendant as the person who delivered the drugs, and where the alleged "community conscience" comment was isolated, directed at holding the defendant accountable for his actions and any prejudice flowing from it could have been cured by a timely instruction.

4. Whether the trial court erred in finding that the defendant had an ability to pay or likely future ability to pay legal financial obligations where defendant did not object to imposition of those costs and did not present any information to the court for it to determine that he did not have the ability to pay.

C. FACTS

Appellant Antonio Ramos was charged on July 31st 2009 with Unlawful Delivery of a Controlled Substance – Cocaine, in violation of RCW 69.50.401(2)(A), a class B felony, for his actions on March 25th, 2009. CP 47-48. He was found guilty at a jury trial in March 2010. CP 1, 16. At sentencing on an offender score of 6, Ramos faced a standard range of 60 to 120 months. CP 17. Defense counsel only addressed the length of time Ramos should serve and advocated that the court should impose the bottom of the range. RP 187-89. When asked if he had anything to say, Ramos said, “no.” RP 189. The judge imposed 110 months, all standard terms and conditions, the victim fund assessment, \$1500 in court-appointed attorney’s fees, the standard crime lab fee, and DNA fee, totaling \$5550. CP 17-19; RP 190-91. Ramos did not object to imposition of those fees. RP 190-91.

On March 25, 2009, an informant for the Northwest Drug Task Force, Lance Tatum, called Ramos to purchase some cocaine. They talked on the phone for a while and agreed on a price of \$400 for a quarter ounce.

RP 39-42. After the phone call, Tatum called Detective Slick, a member of the task force, and they got together behind the Cost Cutter complex (in the Sunset Square mall) and placed another phone call to Ramos to set up a place to meet. RP 42, 96-97. Detective Slick listened in on that phone call and heard Tatum tell someone named "Tony" that he had the money and wanted to meet at the Sunset Square mall because he was going to have lunch there. RP 42, 97, 130. Tony, who had a male Hispanic accent, told Tatum he wanted to meet at Noon Road, but Detective Slick motioned to Tatum that wouldn't work and the deal had to happen in the Sunset Square parking lot. RP 42-43, 97-98. Tony agreed to meet at Sunset and he showed up about 20-30 minutes later. RP 43.

After the phone call Tatum was personally searched and his car was searched in preparation for the controlled buy, to ensure that Tatum did not have any drugs, money or weapons on him or in his car. RP 43, 71, 95, 98-99. After the searches found nothing, Tatum was given \$400 in pre-recorded buy money and drove over to the spot where he was to meet Ramos, near the Slo Pitch pub and Round Table Pizza, with Officer Hangar driving in front of him and Slick following behind. RP 8, 43-44, 71-72, 100-01, 103.

Ramos pulled a van into a parking spot one spot away from Tatum and Tatum got out of his car and into the van. RP 8, 46, 75, 104-05; Ex. 4. No one but Ramos was inside the van. RP 46, 75. Tatum gave Ramos the \$400 and Ramos gave Tatum a baggie containing almost a quarter ounce of cocaine and told him it was pretty good. RP 31, 46. They talked for a little bit more, Tatum got out, talked to Ramos a little more and then got in his car and left. RP 46, 76, 107; Ex. 4.

At one point Officer Bertrand drove by in an unmarked truck in order to identify the driver. RP 55-56, 75, 106; Ex. 4. Officer Bertrand, who knew Ramos from past contacts, was able to identify the driver as Ramos. RP 56-57. Officer Bertrand then parked and walked by the van and again identified the driver as Ramos and informed the other officers it was Ramos. RP 57-58, 107.

After Tatum left, Ramos drove the van over to the Cost Cutter store area of the parking lot and parked right next to the car Officer Johnson was in. RP 9-10. While he was driving over to the store, Officer Hanger was able to identify the driver of the van as Ramos. RP 77. Ramos got out of the van and went towards the Cost Cutter store. RP 59, 77. On his way he met up with a male and a female outside the grocery store, persons with whom Officer Hanger had an investigation, and after

talking with them for a bit he went inside the store. RP 78, 154, Ex. 4.

After about 15 minutes Ramos came out of the store with a bag in his hand, walked directly to the van, got in the passenger side door and after a while drove away. RP 12, 79-80, 110, 131; Ex. 4. The other two persons did not get into the van. RP 12, 80.

No one else was seen getting into or out of the van aside from Tatum and Ramos. RP 8-12, 59, 64, 116. Tatum identified Ramos as the one in the van that gave him the drugs. RP 46, 50. Officer Hangar was able to videotape portions of the activity in the parking lot. RP 80-81. Officer Johnson compared the surveillance video with a photo of Ramos and concluded they were the same person. RP 13.

Tatum drove back to the area where he was initially searched, followed by Detective Slick, and immediately gave Detective Slick the baggie. RP 47-48, 108. He was searched again by Detective Slick and nothing was found on him. RP 48, 109. A search of his car revealed nothing as well. RP 110. Tatum was given \$100 for the transaction. RP 110.

The task force officers did not arrest Ramos because they intended to try to do more buys from him. RP 111. Tatum tried to reach Ramos

later in order to arrange another buy, but after one contact wasn't able to get a hold of him. RP 48-49, 112.

Ramos testified on March 25, 2009 he was working out on Noon Road doing stucco work, work he had done for 30 years and for which he made \$60,000-\$70,000 per year. RP 139. He took his lunch break around 11:30 a.m. and a friend of his, "Dave," drove over in a blue van and picked him up to take him to Cost Cutter because his driver's license was suspended. RP 140. "Dave" had long hair and a beard like Ramos, was of similar weight, but much younger and taller. RP 140, 144-45; Ex. 4. Ramos testified that "Dave" often gave him rides to the Cost Cutter store. RP 141. "Dave" dropped him off at the Cost Cutter and told Ramos he'd meet him over by the Slo Pitch. RP 141, 151. Ramos testified he was inside the store for 10-15 minutes and when he came out the van was parked near the Cost Cutter, so he headed for the van. RP 141. Ramos saw the keys in the ignition so he assumed that "Dave" was over at the Slo Pitch having a drink. RP 141. Ramos testified he waited 10-15 minutes for "Dave" to return and when he didn't he drove around to the Slo Pitch and picked him up there, despite his license being suspended. RP 142, 150. Ramos denied being the driver of the van when the van drove out of

the Cost Cutter parking lot. RP 150. Ramos testified on direct that he used drugs but didn't sell them. RP 142.

On cross-examination Ramos admitted that he didn't make \$60,000-\$70,000 in 2008 because in 2008 he was in prison, but that he had made \$74,000 in 2007. RP 142-43. He testified that he worked from March to December in 2007, and then testified he didn't remember whether he worked in April or May of that year. RP 143.

He also testified on cross-examination that he didn't know the last name of "Dave," that he had just met him at a cannery in 2009. RP 144. When asked if he met "Dave" when he got out of jail, Ramos testified that he met "him inside so he just give me his number or something." RP 144. When asked if he had spent time with Dave in jail, Ramos testified that he had done a couple days, but that he wasn't good with names. RP 144. Ramos admitted he didn't know what "Dave" did for a living, didn't know where he grew up, but knew that "Dave" didn't have any family living in Whatcom County. RP 148-49. Ramos testified that he had only ridden in the van with Dave three to four times over a two week period. RP 149. When asked if Dave was American, Ramos said yes. When asked if he sounded like an American, he said yes. RP 152. He was then asked if he had a Spanish accent, and Ramos said no. RP 152.

Ramos denied meeting some people he knew outside the Cost Cutter store. RP 154. When asked if met Rachel Lebec on his way in to the store, Ramos admitted that he said hi to a couple people but didn't know who they were. RP 154. When asked if he didn't know who they were, he said he didn't know them by name. RP 154. He was then asked if Rachel Lebec was one of those persons, and he testified "Yeah. I don't know her as Rachel." When asked if he knew her from the drug world, he said he didn't know. RP 154. When asked if he recognized the name of the other person, Aaron Salsbury, he said no. RP 155. When asked, Ramos testified that he did not know him from the drug world. RP 155.

Ramos also initially denied knowing Tatum. RP 155. He testified he had never met him, that Tatum called him but he didn't know Tatum. Id. Ramos testified that he didn't know when Tatum had called him, but that Tatum hadn't called him that day. RP 156. He then testified that Tatum had called him after that day. Id. When asked, Ramos testified that he and Tatum had not had any disagreements in the past and had never met him before the day before. RP 156-57. When asked if he could think of any reason Tatum might be making up something untrue about him, Ramos answered no. RP 157.

D. ARGUMENT

1. The prosecutor's cross-examination and comments in closing were not misconduct resulting in prejudice.

Ramos asserts that the prosecutor committed blatant misconduct in cross-examination and closing argument that was prejudicial to his case. Some of the questions the prosecutor asked, or statements made in argument, were objected to and overruled, but Ramos does not assert on appeal that the trial court erred in overruling those objections. Some of the allegedly objectionable questions and argument were not objected to by defense counsel, but Ramos does not argue that counsel was ineffective in failing to object. While a couple of questions on cross-examination were objectionable, they did not relate to a material issue before the jury. Most of the argument Ramos contends on appeal was misconduct was in response to argument of defense counsel alleging that the investigation was inadequate and that the officers had conspired with one another to identify Ramos as the one who sold the drugs to the informant. To the extent that the prosecutor's prefatory remarks in closing invoked the "community conscience," they were isolated, directed at holding Ramos accountable for his actions, not flagrant and did not cause incurable prejudice.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998).

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell, 125 Wn.2d 24, 82, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995),

cert. denied, 516 U.S. 1121 (1996). Defense counsel’s decision not to object or move for mistrial is strong evidence that the prosecutor’s argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

a. Cross-examination

- i. The prosecutor was entitled to elicit some of the testimony because Ramos opened the door to such testimony.*

In order to constitute prosecutorial misconduct, the objectionable testimony must have been purposefully elicited or used by the prosecutor.

“A defendant may be vigorously cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify.” State v.

Graham, 59 Wn. App. 418, 427, 798 P.2d 314 (1990). A prosecutor may cross-examine a defendant in order to qualify or rebut the defendant’s

testimony on direct or to explore issues defendant raised in his testimony.

Graham, 59 Wn. App. at 427. Inadmissible evidence may be admitted if a party “opens the door”:

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party... The introduction of inadmissible evidence is often said to “open the door” both to cross-examination and to the introduction of normally

inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *rev. den.*, 129 Wn.2d 1007 (1996) (*quoting* Karl B. Tegland, 5 Wash. Prac. 41 3rd Ed. 1989). “Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness.” State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023 (2003). The scope of cross-examination lies within the sound discretion of the trial court. Graham, 59 Wn. App. at 427.

Ramos asserts that the prosecutor improperly informed the jury that Ramos was in the “drug business” and involved in the drug world. Prior to the prosecutor asking any questions on cross-examination about Lebec and Salisbury, Ramos himself brought up the issue of his involvement with drugs. On direct examination, much to defense counsel’s consternation¹ and in response to defense counsel’s question as to whether

¹ On redirect, defense counsel prefaced a question for Ramos with: “Now, before the prosecutor started questioning you I had finished questioning and you did something that every defense attorney dreads and you answered a question I didn’t ask. We’ll talk about that for a minute. You said I do drugs, I don’t sell them. Tell me about that.” RP 159.

he had sold any drugs, Ramos testified, “No. I use drugs, yeah. I buy them but I don’t sell them.”² RP 142.

Ramos also asserts that the prosecutor injected the issue of Ramos’s prison sentence into the case. Again, Ramos was the one who volunteered that he had been incarcerated. On cross examination, the prosecutor questioned Ramos’s testimony on direct that he made \$60,000 to \$70,000 per year doing stucco work, work he’d been doing for 30 years. RP 142-143. In response to the prosecutor’s question, “You didn’t make that amount in 2008, did you?”, Ramos replied, “In 2008 I went to prison. I made that in, I made \$74,000 in 2007.” In inquiring about whom this “Dave” person was, Ramos initially testified that he met Dave at a cannery in 2009. RP 144. The prosecutor then asked Ramos if he met Dave after he got out of jail, to which Ramos replied, “No. I met him inside so he just give (sic) me his number or something.” RP 144. The prosecutor then clarified with Ramos that he was testifying that he actually met “Dave” in jail, which Ramos confirmed. Id. On redirect, defense counsel asked Ramos, “You also talked about being in jail, is that right?” and then, referencing Ramos’s prior testimony about using drugs, asked him, “Is that why you were in jail?” Ramos responded: “I come in jail for, yeah, twenty

² Ramos reiterated this on redirect. RP 160.

days for driving suspended. That's the reason I was suspended April through May for using drugs, yeah." RP 160. The prosecutor then clarified on re-cross-examination that Ramos had actually been incarcerated for drug charges, not driving while license suspended charges. RP 160-61.

The prosecutor did not elicit the testimony that Ramos was in prison in 2008, as Ramos contends, rather he asked whether he had made that amount in 2008, to which Ramos could simply have testified, "no." Ramos, however, volunteered that he had been in prison that year. It was Ramos, not the prosecutor, who introduced the issues of Ramos's prior drug use and incarceration.

Ramos asserts that even if he opened the door to some of the testimony about his involvement with drugs and his incarceration, the prosecutor went too far in cross-examining him about those issues. Ramos's testimony was that he didn't sell drugs and implied that he didn't need to sell drugs, given that he had worked for 30 years, making \$60,000 to \$70,000 per year. The prosecutor was entitled to probe the veracity of this testimony, by questioning whether he had actually made those amounts in 2007 and 2008, in order to challenge Ramos's credibility.

Similarly, the prosecutor was entitled to question the veracity of Ramos's volunteered testimony that he had been incarcerated in 2007 because his license had been suspended, when in fact he had been incarcerated on drug convictions. Ramos's testimony was not that he had been incarcerated because of drug convictions, as he contends, his testimony was that *his license was suspended* because of his drug convictions. The prosecutor was entitled to explore these false implications from Ramos's testimony in order to challenge his credibility.

Ramos also asserts that the prosecutor improperly emphasized that Ramos had met this "Dave" person while in jail. However, the prosecutor's question on cross was directed at *when* he met Dave, after he was incarcerated, not *where* he met him. Ramos then volunteered that he had met Dave "inside," contrary to his initial testimony that he had met him at a cannery in 2009. As the jury may not have known what Ramos meant by "inside," and as his answer contradicted his prior testimony, the prosecutor was entitled to clarify that Ramos meant that he had met "Dave" in jail.

- ii. *The reference to Dave sounding “American” was not an attempt to impugn Ramos’s ethnicity but was relevant to rebutting Ramos’ implication that “Dave” must have been the one who delivered the drugs.*

Ramos asserts that the prosecutor attempted impermissibly to draw attention to Ramos’s ethnicity. While Ramos’s ethnicity in and of itself was not relevant, whether his voice sounded Hispanic, and conversely whether Dave’s voice didn’t sound Hispanic, was relevant because the person the informant spoke with on the phone to set up the buy had an Hispanic accent. RP 97. Whether Dave sounded Hispanic was relevant because Ramos’s story implied that it was Dave who must have sold the drugs, while Ramos was inside the Cost Cutter buying lunch. If Dave didn’t sound Hispanic, then Dave was not the one who set up the buy, making Ramos’s story less believable. It’s clear from the prosecutor’s question about Dave “sounding” American, that the question was directed at the tenor of his voice. Moreover, that is how the prosecutor used the testimony in closing, pointing out that Ramos had an Hispanic accent and Dave did not, making it thus more likely that it was Ramos on the phone who had set up the buy and thus was the one who had sold the drugs.³ RP

³“Again, Mr. Ramos is candid enough to say that his friend Dave does not have a (sic) Hispanic accent. And Detective Slick, while listening to the phone call between Mr.

183-84. The prosecutor's reference was relevant, based on the evidence and not at all like the prosecutor's reference in Perez-Mejia⁴ to the gang members' "machismo" and call for the jury to send a message to gang members. The prosecutor did not call attention to Ramos's ethnicity and did not call for a conviction based on ethnic prejudice or nationalistic concerns.

iii. The prosecutor did not commit misconduct by asking Ramos whether he knew if the informant had any motive to make up an untrue story about him.

Ramos next alleges that the prosecutor on cross asked Ramos if the informant was lying. This mischaracterizes the question the prosecutor asked on cross-examination. The prosecutor asked Ramos whether he could think of any reason the informant would make up something untrue about him, which was a proper question regarding the informant's credibility. It did not improperly call for Ramos to testify that the informant was lying, only to state whether he knew of any motive the informant would have to fabricate his testimony. This line of questioning

Ramos and Mr. Tatum clearly heard a Spanish accent from that conversation. And we know from the testimony that Mr. Ramos has a (sic) Hispanic accent." RP 183-84.

⁴ State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006).

was permissible and relevant because defense had already challenged the credibility of the informant.

Where defense raises an issue as to the credibility of a state's witness, it is permissible for the state to inquire of the defendant what the witness's motive is to lie about the incident. Graham, 59 Wn. App. at 427. Although it is misconduct to ask a witness if another witness is lying because it is irrelevant *opinion testimony*, questions about whether another witness is mistaken are at most merely objectionable,⁵ and at times are relevant and probative. State v. Wright, 76 Wn. App. 811, 821-22, 88 P.2d 1214 (1995), *rev. den.*, 127 Wn.2d 1010 (1995).

As in State v. Graham, *supra*, defense counsel here repeatedly challenged the credibility of the informant's testimony as well as the officers' testimony. Defense counsel opened his cross-examination of the informant with: "Mr. Tatum, try to answer this honestly; that wasn't Mr. Ramos in the van that day, was it?" RP 49. Defense counsel then went into the particulars of the "unusual deal" that the informant had with the police. RP 50. At the end of his cross-examination, he inquired of the

⁵ If the question is merely objectionable, and does not rise to the level of misconduct, the issue is waived for appeal if the defense did not object below. Wright, 76 Wn. App. at 822-23. Counsel did not object here. RP 157. Counsel did object to the question that preceded the one Ramos challenges. The prior question was "So he would have no

informant's prior conviction for forgery. RP 52-53. He followed up with, "You're aware that's a crime of dishonesty," to which the informant answered yes before the State objected. After inquiring about the informant's conviction for theft, defense counsel then asked "So you're a thief?" The prosecutor's objection was sustained. RP 53. Under such circumstances, where defense directly challenged the informant's honesty and credibility, it was not improper for the prosecutor to inquire as to whether Ramos was aware of any reason the informant had to falsely implicate Ramos in the drug transaction.

Ramos also asserts the prosecutor asked Ramos to state that the officers were lying when he asked the question, "Can you explain why you're the only person that was seen near that van?" RP 157. Contrary to Ramos's assertion that this question called for him to "explain why the police were lying about another person also being in the van with Ramos," the question called for Ramos to speculate why no one else was seen near the van given his story that Dave had been in the van and that there were a number of officers in the parking lot. While the question was

reason whatsoever to make up anything untrue about you, would he?" The objection that the question called for speculation was sustained. *Id.*

objectionable to the extent it called for speculation on Ramos's part,⁶ it did not call for Ramos to testify that the officers were lying. The question highlighted the fact that Ramos's story, that there was another person in the van with him when he arrived and when he left, was not credible given that no one else who was there in the parking lot saw anyone else, aside from the informant, near or inside the van.

Cases cited by Ramos are distinguishable. In most of them the prosecutors specifically and explicitly asked the defendant whether one of the State's witnesses was lying. In Boehning the objectionable question the prosecutor asked was whether the victim had come forward "and made this up for no reason at all." State v. Boehning, 127 Wn. App. 511, 523-24, 111 P.3d 899 (2005). This was objectionable because it called for the defendant to comment on, and give impermissible opinion testimony regarding, the victim's credibility. *Id.* at 524. However, in that case the prosecutor also asked a question asking the defendant to confirm that there would be no reason for the victim to be upset with him, which was *not* the basis for the court's ruling that the prosecutor's cross-examination was misconduct. The court held that the *final* question went beyond clarifying

⁶ The question was objected to and the objection sustained based on calling for speculation. RP 157.

whether the victim had a motive to lie and had clearly asked whether the victim had made it all up. *Id.* at 524 (emphasis added). The prosecutor's questioning here did not go beyond inquiring whether Ramos was aware of any motive the informant had to lie about Ramos's involvement in the drug deal.

Ramos contends that the cross examination that occurred here is virtually the same as that in State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995), a case which was handled by this same prosecutor. However, in that case the prosecutor did ask the defendant specifically whether one of the State's witnesses was "absolutely lying," asked whether testimony was "invented" and whether the witnesses were conspiring to get the defendant. Those were the questions that the court found were misconduct. *Id.* at 76. The prosecutor did not ask questions like those here and did not cross the threshold between the legitimate question of whether a defendant is aware of any motive another witness would have to make something up and the improper question of asking whether another witness is lying. Even the questions in Neidigh were "not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury." Neidigh, 78 Wn. App. at 77.

iv. The prosecutor's questions regarding whether the persons Ramos met outside the store had drug problems were objectionable but did not affect the jury's verdict.

Ramos also asserts that a number of the questions that the prosecutor asked on cross-examination regarding his involvement and knowledge of others in the drug world were impermissible and misconduct. As set forth above Ramos was the one who introduced his connection to the "drug world" by testifying that he used drugs, but didn't sell them. Questions regarding knowing the two people he met outside the store, whom the task force officer knew from investigations the officer had with them, and how Ramos knew them, were relevant to probe Ramos's credibility.⁷ Ramos initially denied even meeting up with them. The trial court overruled defense objection to the question regarding whether he knew Lebec from the drug world, which ruling has not been challenged on appeal. Defense counsel did not object to the question as to whether Ramos knew Salsbury from the drug world. The prosecutor's follow-up questions about knowing whether Lebec had a drug problem or was in drug court and that Salsbury had convictions, however, were not relevant,

⁷ RP 78. One of the officers believed the persons were "involved," and defense asked about their location. RP 82, 89.

and the court properly sustained the objections to those questions. While defense counsel did not ask for a curative instruction, the jury was directed, through the instructions, not to consider any evidence that the court had ruled inadmissible. CP 29-30. In fact, the court sustained the objection before Ramos could answer the question about Salsbury's convictions. RP 155. Although these questions were objectionable they did not relate to a material issue in the case and did not affect the outcome of the verdict.

b. Closing Argument

Ramos asserts that the prosecutor made numerous remarks in closing that created an incurable prejudice to his case, including an appeal to the "community conscience" to keep the community safe from drug dealers, references to Ramos's involvement in the drug world, and vouching for the credibility of the State's witnesses. To the extent that the prosecutor's initial remarks in closing could have conveyed to the jury that the reason they were there was to protect the community from drug activity occurring in the parking lot, they were improper. However, they were isolated, directed at holding Ramos accountable for his actions, and did not create an incurable prejudice in the context of the evidence presented in this case. The other challenged comments responded to

argument from defense counsel, did not rise to the level of vouching, and were not misconduct.

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86. A prosecutor may argue reasonable inferences from the record to the jury. State v. Hoffman, 116 Wn.2d 57, 94-95, 804 P.2d 577 (1991). While a prosecutor may not personally vouch for a witness, it is not misconduct for a prosecutor to comment on a witness's credibility if it is based on the evidence and is not a personal opinion. State v. Fiallo-Lopez, 78 Wn. App. 717, 730-31, 899 P.2d 1294 (1995). A prosecutor's remarks, even if improper, are not grounds for reversal if they were provoked by the defense as long as the remarks did not go beyond that which was necessary to respond to the defense argument, did not bring matters before the jury that were not in the record, and were not so prejudicial that a curative instruction could not be effective. Graham, 59 Wn. App. at 428. Defense counsel's decision not to object or move for a mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. Swan, 114 Wn.2d at 661.

- i. *The prosecutor's comments regarding the drug business and task force's planned investigation and candidness of the witnesses were in response to defense argument that the officers had been neglectful in their investigation and the implication that the officers had conspired to identify Ramos as the one who had been in the van.*

Ramos asserts that the prosecutor's comments regarding why the officers did not follow up regarding the cell phone number and why the officers were unable to complete their planned investigation were misconduct. Ramos also asserts that the prosecutor's statement on rebuttal that the officers were being "100% candid" vouched for their credibility. Defense counsel's objection regarding the "candid" comment was overruled by the trial court and that ruling has not been challenged on appeal. The prosecutor's comments responded to defense argument attacking the investigation and the lack of follow-up and to defense insinuation that the officers had gotten together after the fact to identify Ramos as the seller of the drugs. Given the defense argument, the prosecutor was entitled to explain why they didn't pursue tracking down the cell phone number, why they didn't complete their planned investigation and to argue that the officers were being candid in their

testimony, testifying to what they could testify to, and acknowledging what they didn't do in the investigation and why.

During cross-examination, defense counsel challenged the investigation for the failure to follow up to see if the cell phone number the informant called was registered to anyone,⁸ and challenged the officers' credibility. RP 14-15, 60-62, 82-84, 87-91, 113-124, 127, 134-37. On redirect, the prosecutor inquired about the prepaid phones and the detective explained that he hadn't been successful in the past in tracking down information about the owner of the cell phone if it was a prepaid phone, that it was difficult to track down cell phone numbers, and that was the reason he didn't follow up on the cell phone number. RP 131. On recross, it was *defense counsel* who asked the detective if it was his experience that people, "in the drug trade," often use throw away phones. The officer confirmed that was his experience. RP 134. When asked if he knew the phone at issue was a prepaid phone, the detective admitted he didn't. RP 134-35. In closing the prosecutor responded to this attack on the investigation by explaining that people in the drug business use throw away phones and that therefore it's hard to determine who the owners of

⁸ The detective testified that he didn't bother following up with the phone number because with prepaid phones it was a waste of his time. RP 123.

those phones are based on the number. The prosecutor did not argue that Ramos's phone was a prepaid phone. The prosecutor wasn't arguing that Ramos was involved in the drug business because the phone was a throw away phone, but was simply responding to the implication from defense cross examination that the investigation was inadequate because the detective hadn't followed up regarding the cell phone number.

The prosecutor's comment in closing regarding the task force wanting to do additional buys explained why the officers had planned to conduct the investigation in the manner that they did and why they hadn't performed the investigation that defense counsel had insinuated on cross-examination was necessary for an adequate and thorough investigation. RP 170-71. For example, they didn't put a wire on the informant because they intended to try to do additional buys, but had been unable to because the informant couldn't get a hold of Ramos.

In his argument defense counsel also attacked the officers' failure to write reports, alleging that the officers who had not written a report had gotten together with one another after the fact, and after seeing Ramos at defense table, to identify him. His attack on the investigation included that: the crime lab person didn't know how the evidence got to the lab, that the officers failed to write reports but testified that they remembered

the incident from almost a year before, that at least one of the officers admitted that he'd been wrong before and about things he'd been certain about, that the detective did not include in his report that the person on the phone had an Hispanic accent, that they had failed to follow up on trying to find the prerecorded buy money at the store where Ramos had just purchased something, they had failed to try to get a wire for the transaction, and they had failed to follow up with the van to see who the owner was and talk to him about Ramos's use of the van.

In rebuttal the prosecutor explained why the officers had not written reports, explained that the "shoddy investigation" included three eye witnesses (the officers), and explained that at least one of the officers was "candid enough to admit," that he had made mistakes before in his life, but that he had identified Ramos that day. RP 182. The prosecutor also acknowledged that Ramos was "candid enough" to testify that "Dave" did not have an Hispanic accent. RP 183. Almost immediately thereafter the prosecutor stated:

So the story that Mr. Ramos concocted the police officers would have to absolutely be blind and dumbfounded to testify the way they have and really try to bring a case against Mr. Ramos and falsely convict him when the truth of the matter is they were just telling you what they saw and they are not being anything less than 100% candid.

RP 184. Defense counsel then objected, which objection was overruled by the judge. *Id.* The prosecutor then explained that if the officers were going to make up a story, there wouldn't have been the minor discrepancies amongst their stories, that they were just trying to remember things that happened almost a year before. RP 184. Taken in context, the purpose of the prosecutor's argument was to explain to the jury that the officers weren't trying to conspire in their testimony against Mr. Ramos, that they were being forthright in their testimony, acknowledging what they did, and didn't do, or see that day. The prosecutor's remarks might have been improper if they had *not* been in response to the defense argument attacking the credibility of the officers, but they were provoked by the defense and were limited to responding to those allegations.

Ramos also contends that the prosecutor's concluding remark that "we know" that Ramos was the one who delivered the drugs and was guilty as charged was misconduct as well, resulting in incurable prejudice. Ramos ignores the fact that the prosecutor prefaced his concluding comments with the phrase "The State submits..." While the prosecutor only referenced this in the first sentence where he used the phrase "we know," from the context it's clear he intended it to apply to each time he stated "we know" within that paragraph. In the first sentence after "The

State submits” he states, “we know what happened out there that day....”

Then he goes on, “We know that there was a drug delivery. And we know that he delivered those drugs and is guilty as charged.” The prosecutor was not expressing his personal belief, but rather that the State was proposing to the jury that, after hearing all the evidence, that “we,” the persons present in the courtroom collectively, know that Ramos was the one who delivered the drugs, and therefore Ramos was guilty as charged. The prosecutor had used this “we know” rhetorical technique throughout his closing to argue that the evidence conclusively proved certain facts about the case, for example that Mr. Tatum was working as an informant, that the drug involved was cocaine, that the informant was searched by the detective behind the Goodwill store. RP 163-64, 166, 168, 170, 172, 173.

The “we” in this rhetorical device does not refer to the police, but the collective “we” of the persons who had heard all the evidence. The prosecutor’s concluding remark that “we know” Ramos was the one who delivered the drugs did not refer to the prosecutor’s personal belief, but taken in context is reasonably interpreted as arguing that those who have heard the evidence know that the defendant was the one who delivered the drugs and is therefore guilty.

- ii. *The prosecutor's objectionable comment(s) were not so flagrant as to cause incurable prejudice.*

Ramos asserts that the prosecutor's argument, combined with his cross examination, was so flagrant that it resulted in incurable prejudice. Defense counsel never objected to the prosecutor's prefatory remarks that Ramos asserts invoked a "community conscience" argument. His failure to object is indicative that the comments did not cause incurable prejudice to his client.⁹ The majority of the prosecutor's closing reviewed the evidence presented, in particular the videotape, and countered the insinuations and argument of defense counsel. RP 163-73. A timely request for a curative instruction would have minimized whatever prejudice flowed from the "community conscience" comment.

"Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible." United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991).

The fairness or unfairness of comments appealing to the national or local community interests of jurors in a given instance will depend in great part on the nature of the community interest appealed to, and its relationship to, and the nature of, the wider social-political context to which it

⁹ This was not a defense counsel who was reluctant to object during closing, he objected three times during the prosecutor's closing and rebuttal. RP 171, 184.

refers. The correlation between the community interest comments and the wider social-political context to a large extent controls the determination of whether an appeal is deemed impermissible because it is calculated to inflame passion and prejudice.

Solivan, 937 F.2d at 1152.

Ramos relies upon Solivan in contending that the prosecutor's prefatory comments in closing are reversible misconduct. In Solivan, however, defense counsel objected at the time the government attorney requested the jury to tell the defendant "*and all of the other drug dealers like her ... that we don't want that stuff in Northern Kentucky...*"

Solivan, 937 F.2d at 1148 (emphasis added). The court held that the misconduct in encouraging the jurors to convict the defendant in order to send a message to other drug dealers was not harmless, despite the cautionary instruction given, because the instruction was not given in a timely manner and was not strong enough. *Id.* at 1157.

A recent case distinguished Solivan on the grounds that while the "community conscience" comments were improper they were not flagrant.

United States v. Wettstain, __ F. 3d __, (6th Cir. 2010), 2010 WL 3384982

at 9. In Wettstain, the prosecutor began his argument with:

You folks are the conscience of the community. You are the representatives of this community, and you know that there's a plague on the community, which is methamphetamine. Now, you know that at the center of this epidemic are these

two monsters, Mr. Stewart and Mr. Wettstain, because they've been peddling methamphetamine all over your community for at least-for most of the last 10 years.

Id. at 8. Defense counsel objected and the trial court gave a cautionary instruction informing the jury that it was their job to decide whether the defendants were guilty or not guilty, not to solve the drug problem in the community. Id. Although improper, the court held the prosecutor's remarks were not flagrant because they were isolated, the prosecutor did not intend to prejudice the defendants, and the "community conscience" statement did not mislead the jury because it did not marshal them to punish all the drug dealers in their community by convicting [the defendants]." Id. at 9. The court also noted that the evidence presented against the defendants was strong. Id.

Similarly, while the prosecutor's prefatory remarks were improper to the extent that they invoked the community conscience, they were not flagrant and certainly don't warrant reversal. The prosecutor began his closing:

In the course of this trial you probably learned things about drug activity in the community that you had no idea was going on. You have actually seen videotape of drug activity in this community. Most of you had no idea what is going on and probably wish you didn't know it was going on. But the events that are depicted in the video you saw this morning of March 25th, 2009 is why the detectives were out there at that parking lot on that date to investigate

drug crimes. This is also why we are here today, so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot. That's why they were there, that's why you're here, and that's why I'm here, to stop Mr. Ramos from continuing that line of activities. That's what the case is about and that's what the truth of this case is about and that's why this is a serious case.

RP 163. The comments here do not even rise to the level of those in Wettstain. As in Wettstain, they were isolated and did not invite the jury to punish *all* drug dealers by convicting Ramos. They did not ask the jury to send a message to drug dealers. They drew attention to the evidence of the drug activity the jury saw occurring in the parking lot, and asked the jury to stop *Mr. Ramos* from continuing that drug activity. The prosecutor did not intend to inflame the jury with the comments, but to impress upon them that this case, a single delivery, was important. Here, had defense counsel objected and requested a curative instruction, as the defense did in Wettstain, any impermissible prejudice that flowed from the prosecutor's comments would have been alleviated. However, defense counsel chose not to, and therefore reversal is not warranted.

Moreover, as in Wettstain the State's evidence was very strong and there is not a substantial likelihood that the verdict was affected. Here there were four officers who corroborated the informant's testimony about the drug transaction and who was involved in it, the drug sale was

accomplished through a “controlled buy,” and some of the events were corroborated by the videotape.¹⁰ Ramos’s story on the other hand, was simply not credible, and in the words of the trial judge, “the facts he presented were just bogus,” and his “story didn’t carry any weight.” RP 190-91. While it was error to attempt to cross examine Ramos about his acquaintances’ drug problems and convictions, and to make comments that could have been interpreted as invoking the “community conscience,” it did not result in incurable prejudice to Ramos where objections were sustained to the questions, the remarks were not objected to and the evidence of Ramos’s guilt was strong.

2. Ramos failed to raise any issue about his ability to pay standard fees and costs at sentencing and therefore has waived his ability to assert the trial court’s failure to consider his ability to pay on appeal.

Ramos alleges that the trial court erred in finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court’s alleged failure to consider his inability to pay. To the extent that he relies on a statutory basis, RCW 10.01.160, for his argument, he waived the issue by failing to raise it at sentencing.

¹⁰ In stating that the “case against Ramos could perhaps have been proven without resort to the improper tactics employed by the prosecutor,” Ramos himself admits that the State’s evidence was sufficient to convict him.

There is nothing in the record to show that Ramos does *not* have the ability to pay his legal financial obligations either now or *in the future*, particularly given the length of the time Ramos has to satisfy the judgment. Ramos also disputes the amounts imposed, but some of them are mandated by statute and the court did not abuse its discretion in setting the others.

Ramos bears the burden of showing that the trial court's alleged error in finding that he has "the ability or likely future ability to pay" based on the court's failure to consider his inability to pay under RCW 10.01.160 is error that he may raise for the first time on appeal. As he failed to raise the issue below, he must demonstrate that the alleged error was a manifest one of constitutional magnitude. RAP 2.5. "Manifest" means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *see also*, State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it had "practical and identifiable consequences" in the case). If the error was manifest, the court must also determine if the error was harmless. Lynn, 67 Wn. App. at 345. The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Ramos relies in part on RCW 10.01.160(3) in asserting that there was insufficient evidence in the record for the court to make a finding that Ramos has the ability to pay legal financial obligations. There is no constitutional requirement that a court make a specific finding regarding a defendant's ability to pay. *See, State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (under the constitution court need not make any specific finding but need only consider defendant's ability to pay as long as there is a mechanism for a defendant who ultimately is unable to pay to have the judgment modified). To the extent that Ramos relies upon a statutory basis to allege trial court error at sentencing, Ramos had an obligation to bring the statute, and the underlying factual basis, to the court's attention. Ramos waived any statutory error and any error regarding failure to consider underlying facts in deciding how much to impose in fees and court costs by failing to bring those matters to the court's attention at the time of sentencing.

Ramos asserts that there is not substantial evidence in the record to support the court's finding that he has the ability to pay, now or in the future, the legal financial obligations it imposed. However, there is nothing in the record to support a finding that he does *not* have the ability to pay the costs and fees, particularly where the court has jurisdiction over

his judgment and sentence until the judgment is satisfied. RP 187-89; RCW 9.94A.760(4). Ramos references the orders of indigency as evidence that the court was aware of his inability to pay. While Ramos did have a public defender, Ramos did not file the motion for the order of indigency he references until a week after sentencing, and as noted in

Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale than the costs involved in obtaining counsel and mounting an appeal. Moreover, in both cases, recoupment of attorney fees was waived. *It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.*

Curry, 118 Wn.2d at 915 n.2 (emphasis added in italics). A defendant's indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008); *see also*, State v. Smits, 152 Wn. App. 514, ¶16, 216 P.3d 1097 (2009) (the time to address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative). Furthermore, while the judge

did not find Ramos's story credible at all, the evidence in the record, that Ramos testified to, was that he made \$60,000 to \$70,000 per year.

Ramos further asserts that the record does not support the amounts the court imposed. The judge stated that he was imposing all standard terms and conditions, the victim fund assessment, \$1500 in attorney fees and other standard fees. Most of the fees imposed are either set by statute or by the Whatcom County Superior Court Clerk's published schedule. (See App. A, Whatcom County Clerk's Fee Schedule.¹¹) RCW 10.46.190 provides the authority to impose the jury fee, and under RCW 36.18.016 the amount is \$250. RCW 36.18.016(b). The filing fee, to be paid upon conviction, is \$200 pursuant to RCW 36.18.020(h). \$1500 certainly is not an outrageous amount in attorney's fees to impose for a case that went to trial for two days and in which the defendant was represented over the course of an eight month period.

Ramos also disputes the VUCSA fine imposed and the crime lab fee because the court has the discretion to suspend all or part of the fee if the defendant is indigent. RCW 69.50.430; RCW 43.43.690. The VUCSA fine is mandatory unless the court makes a specific finding of

¹¹ The State requests that the Court take judicial notice of the schedule, particularly given that Ramos failed to assert any issue regarding the amount of fees below.

indigency, and then the court has the discretion to waive it or not. State v. Mayer, 120 Wn. App. 720, 726-27, 86 P.3d 217 (2004). If there is no discussion regarding indigency, then there is insufficient evidence for a court to make a finding of indigency and the court must impose the fine. *Id.* at 728. Under RCW 43.43.690 the defendant must file a verified petition regarding their ability to pay before the crime lab fee may be suspended or deferred. RCW 43.43.690(1). Ramos did not and has not filed such a petition. Ramos has not shown that the trial court abused its discretion in imposing the fees and court costs it did.

3. The State moves to strike references in the appellate brief to a study regarding the effect of legal financial obligations on defendants.

Ramos references a study regarding the legal financial obligations and the effect on defendants and the rate of recidivism. Appellate Brief at 33-34. The State moves to strike this reference from the appellate brief as this information was never presented to the trial court, and does not provide a basis for the trial court not to impose the statutory fees. Argument as to the wisdom of requiring defendants to pay for the costs their unlawful conduct imposes upon the judicial system and society as a whole is one better left for the legislature.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Ramos's conviction for unlawful delivery of a controlled substance and the legal financial obligations imposed in the judgment and sentence.

Respectfully submitted this 15th day of October, 2010.

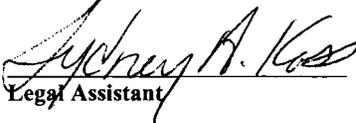


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

NANCY P. COLLINS
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101



Legal Assistant

10/15/2010
Date

APPENDIX A

WHATCOM COUNTY CLERK'S FEE SCHEDULE

Effective July 26, 2009

(Payments **must** be made in cash, cashier's check, Law Firm check or money order. Check for filing fee should be separate amount from check for other services. All fees must be paid in advance. RCW 36.18.018

CIVIL

Title	Service Provided	Fee	RCW
Abstract of Judgment	Filing	20.00	36.18.012(2)
Abstract of Judgment	Preparation	5.00	36.18.016(4)
Anti-Harassment Petition	Filing (NO FEE IN WHATCOM)	53.00	36.18.018.020(2)(d)10.14.040
Arbitration Request for Trial De Novo	Filing	250.00	36.18.016(25)
Arbitration-request for Mandatory Arbitration	Filing	220.00	36.18.018(24)
Bail Bond Justification	Filing	230.00	36.18.020(2)(a)
Change of Name	Filing	230.00	36.18.020(2)(a)
Civil Case Filing	Filing	230.00	36.18.020(2)(a)
Common Law Lien-Petition	Filing	35.00	36.18.020(8)
Counter-claim, Cross-claim, 3 rd Party claim	Filing in civil case	230.00	36.18.020(a)
Deeds of Trust, Surplus Funds	Filing	230.00	61.24.080(3) 36.18.020(2)(a)
Election – Affidavit of Elector Contesting Election of Person	Filing	230.00	36.18.020(2)(a) 28A305.070 29.65.020
Emancipation of Minor	Filing	50.00	36.18.014
Foreign Judgment	Filing	230.00	36.18.020(2)(a)
Frivolous Lien/Claim Statute	Filing of Application for Order	35.00	36.18.016(17)
Judicial Review	Filing	230.00	36.18.020(2)(c)
Jury Demand	6 member jury 12 member jury	125.00 250.00	36.18.016(3)
Land Use Petition	Filing	230.00	36.70C.040 36.18.020(2)(a)
Legal Newspaper	Filing Petition & Order	230.00	36.18.020(2)(a) 65.16.040
Property Taxes, Certification of Delinquency, Application for Judgment	Filing; \$2 each contestant at time of filing appeal	2.00	86.64.120 86.64.040
Protection of Vulnerable Adults	Filing	230.00	36.18.020(2)(a) 74.34.110
Registration of Land Titles (Torrens Act)	Filing	5.00	65.12.780 36.18.016(13)
Restoration of Rights to Possess Firearms	Filing	230.00	9.41.047 36.18.020(2)(a)
Restrictive covenant for filing petition to strike discriminatory provisions in real estate	Filing	20.00	36.18.012(6) 49.60.227

Title	Service Provided	Fee	RCW
Supplemental Proceedings	Filing	20.00	36.18.016(7)
Tax Warrants - Dept of Revenue; All other depts. Special Fuels Tax	Filing	20.00	36.18.012(10) 36.18.050 82.38.235
Transcript of Judgment	Filing	20.00	36.18.012(2)
Unlawful Detainer	1. Filing 2. Defendant files Answer or Order to Show Cause, Plaintiff pays fee 3. Full filing fee	75.00 <u>112.00</u> 187.00	36.18.020(2)(a) 36.18.012(4)
Water Rights Statement	Filing	25.00	36.18.016(16) 90.03.180
Water System Requirements (Enforcement of---	Filing	230.00	36.18.020(2)(a) 79.119A040(6)
Work Permits -minor under 14 yrs of age (Petition)	Filing	20.00	28A.225.080
Writs of: Attachment, Garnishment or Restitution, Execution of Real Property	Each filing	20.00	36.18.016(6) 36.18.050

DOMESTIC

Title	Service Provided	Fee	RCW
Custody	Filing (includes \$20 facilitator fee)	250.00	36.18.020(2)(a) 36.18.016(15) 26.12.240
Custody – Out of State Decree	Filing to enforce or modify (includes \$20 facilitator fee)	250.00	36.18.020(2)(a) 36.18.016(15) 26.12.240 26.27.150(1)
Domestic Relations (Divorce, Legal Separation, Validity of Marriage)	Filing (includes \$20 Facilitator fee & \$30 Victim Assessment fee)	280.00	36.18.020(2)(a) 26.12.240 36.18.016(15) 36.18.016(2)(b)
Facilitator's surcharge	Added to filing fee or if fee waived, \$20 to be paid	20.00	36.18.016(15) 26.12.240
Modification of Decree - in existing Whatcom Cause #	Filing in existing case Facilitator fee Total	36.00 <u>20.00</u> 56.00	36.18.016(2) 36.18.016(15)
Modification of Decree Never filed in this county	New Filing Facilitator fee	280.00	36.18.020(2)(a) 36.18.016(15)
Relocation Notice	Filing in Existing Case Facilitator fee Total	36.00 <u>20.00</u> 56.00	36.18.050 36.18.016(15)
Wage Assignment, Spousal Maintenance or Child Support	Filing of Original action	250.00	36.18.020(2)(a) 36.18.016(15) 26.18.070

PROBATE/PATERNITY/ADOPTION

Title	Service Provided	Fee	RCW
Adoption	Filing Facilitator fee	250.00	36.18.020(2)(a) 36.18.016(15) 26.12.240
Adoption Certified Copy Fee (for vital records)	Certified copy	varies	Vital records
Adoption registration fee (for vital records)	Seal the file	35.00	Vital records
Certificate of Qualification	Issuance (Form K)	2.00	26.18.016(9)
Disclaimer of Interest	Fee repealed - see exceptions	-0-	11.86.031(4) 36.18.016(13)
Escheat - Probate Proceedings	Filing Claim Filing Dept. of Revenue Affidavit	230.00 2.00	36.18.020(2)(f) 11.08.300
Estate - Probate	Filing	230.00	36.18.020(2)(f)
Guardianship	Filing	230.00	36.18.020(2)(f)
Letters of Administration, Guardianship or Testamentary	Issuance & certified copy	5.00	36.18.016(9)
Non-judicial probate dispute filed within existing case	Filing - Petition, written agreement/memorandum	20.00	11.96A.220 36.18.020(7)
Non-Probate Notice to Creditors	Filing	230.00	11.42.010(3)(a) 36.18.020(2)(f)
Notice to Creditors-Probate filed in another county where decedent resided	Filing	20.00	36.18.050 11.40.020(2)
Paternity	Filing Facilitator fee	250.00	36.18.020(2)(a) 36.18.016(15) 26.18.070
Paternity Modification	Filing Facilitator fee Total	36.00 20.00 56.00	36.18.016(2)(a) 36.18.016(15) 26.18.070
Petition Contesting Will	Filing	230.00	36.18.020(2)(g)
Petition Objecting to Non- Judicial Resolution	Filing	230.00	36.18.020(2)(g)
Petition to Admit Rejected Will	Filing	230.00	36.18.020(2)(g)
Small Estate	Filing	20.00	11.62.010 36.18.050
Termination of Child Relationship	Filing Facilitator fee	250.00	26.12.240 36.18.020(2)(a) 36.18.016(15)
Will Only (after death - no probate contemplated)	Filing	20.00	36.18.012(7)
Will (Repository) people still living.	Filing	20.00	11.12.265 36.18.016(26)

CRIMINAL (imposed by Court upon conviction or guilty plea)

Title	Service Provided	Fee	RCW
Collection fee – Criminal	Charge per case per year for clerk to supervise collection of payments	Up to \$100 per year	County resolution 146-99
Crime Victim Penalty upon conviction/admission of guilt	Felony	500.00	7.68.035
	Gross Misdemeanor	250.00	
Filing Fee/Costs imposed & reimbursement to county following admission of guilt/conviction	Filing	230.00	36.18.020(h)
Jury fee upon conviction	6-person jury	125.00	7.68.035
	12-person jury	250.00	36.18.016(3)(b)
Restoration of Right to Possess Firearms	Filing Petition	230.00	36.18.020(2)(a) 9.41.047

JUVENILE FEES

Title	Service Provided	Fee	RCW
Crime Victim Penalty upon conviction/admission of guilt	Felony	100.00	7.68.035
	Misdemeanor	75.00	

APPEALS

Title	Service Provided	Fee	RCW
Appeals from Administrative Hearing Decision	Filing (also see non-fee list)	230.00	34.05.514 36.18.020(2)(c)
Civil Appeal from Court of Limited Jurisdiction	Filing (to be paid to lower court)	220.00	36.18.020(2)(b)
Civil Appeal from Court of Limited Jurisdiction-Criminal case	Filing (imposed when affirmed or dismissed – to be paid at lower court)	220.00	36.18.020(2)(h)
Clerk's Certificate on Appeal		2.00	36.18.016(5)
Clerk's Papers	Preparation of designated papers	.50 per pg	36.18.016(20) (a), 15.4(e)
Notice of Appeal from Superior Court matter to Appellate Court	Filing (payable to Whatcom County Clerk)	280.00	36.18.018(2) 2.32.070
Petition to Review Court of Appeal Decision Terminating Review	Filing	200.00	2.32.070
Transmittal of record & exhibits to Appellate Court	Mailing costs	Actual cost	RAP 9.8 & 15.4(e)
Upon conviction; failure to prosecute appeal; or affirming conviction in Court of limited jurisdiction	Filing	220.00	36.18.020(2)(h)

MISCELLANEOUS

Title	Service Provided	Fee	RCW
Authenticated or Exemplified copies of documents on file	Certificate \$2 per seal Plus copy fees of \$5 1 st pg. + \$1 each pg. thereafter:	4.00 Plus copies \$5/1	36.18.016(5) 36.18.016(4)
Civil Bench Warrants, Notices, Summons, Subpoenas, Certificates of Deposition for Out of State Depositions	Issuance	20.00	36.18.050
Bond – approving, including justification on the bond other than in civil actions & probate proceedings		2.00	36.18.016(8)
Certificate	Executing with or without seal	2.00	36.18.016(5)
Change of Venue	Filing fee (payable to Clerk of County to which case is being transferred) or Domestic cases (DIN, DIC, INV & SEP)----- All other Domestic cases--- Preparing Change Venue	230.00 280.00 250.00 20.00	4.12.090 36.18.020(2)(a) 36.18.016(18) CR 82(d)
Copies: Certified copies of documents from legal file or imaged documents	First page of each document Every following page of each document	5.00 1.00 per page	36.18.016(4)
Copies: Documents without seal (un-filed, filed or scanned)	Per pager	.50	36.18.016(4)
Copies: Electronic copies, E-mail documents w/o seal	E-mailing (per page)	.25	36.18.016(4)
Copies of cassette tapes Copies of CD's	Audio Tapes Audio/Video CD's	10.00 25.00	36.18.016(12) 36.18.016(4)
Dike, Drainage & Sewerage Improvement District	Petition for Review filing	230.00	36.18.020(2)(a) 85.15.110
Ex Parte	Presentation of Order, Conforming provided copies per order	30.00	36.18.016(11)
Extension of judgment	Filing	200.00	36.18.016(14) 6.17.020
Fees in Special Cases – where no fee is provided for; fees similar & equal to those allowed for services of the same kind	Filing	Variable	36.16.050
Filing any paper not related to or part of any Civil, Criminal or Probate matter, required or permitted to be filed for which no other charge is provided by law.	Filing	20.00	36.18.012(3)

Title	Service Provided	Fee	RCW
Forms/Packets available	Per packet	Variable	
Investment Service Fee – if written request received for service	Service fee for interest investments	5% of Income Earned	36.48.090
NSF Check charge	NSF	25.00	128-196 County resolution
Oaths & Affirmations	Fee repealed	-0-	RCW 5.28 36.18.016(13)
Reports & copies produced at the local level as permitted by 2.68.020 & Supreme Court Policy	Copies & reports	Variable	36.18.016(21)
Searches	Looking for cases/research (\$20 per hour, \$10 per half hour)	\$20 & \$10	36.18.016(11)
Statistical Reports	Compiling	20.00 per hr	36.18.016(1)
Witness/Jury Fee	Per day Per mile	10.00 .405	
Cost of non-statutory services rendered by clerk by authority of local ordinance or policy must be charged		Actual cost	36.18.016(23)

FEES IN SPECIAL CASES (RCW 36.18.050)

1. When the Clerk is required to perform services for which no fee or compensation are specifically listed, the Clerk shall be allowed fees similar to and allowed for similar services by statute.
2. Investment service charge and earnings under RCW 36.48.090 must be charged
3. Costs for non-statutory services rendered by clerk by authority of local ordinance or policy must be charged.

FEE EXEMPTIONS

Title	Service Provided
Adoptions Preplacement Report	RCW 26.33.190 – Report filed at not cost, even if no case filed yet. Assign a case # and fee is required when Pet. For Adoption is filed
Disclaimer of Interest	Repealed 2005 – no charge
Domestic Violence Petitions	RCW 26.50.040 – no filing fees, forms provided free of charge, no charges for certified copies or service fees.
Employment Security	50.32.110, 50.32.190 Judicial Review on Unemployment Compensation -No fees of any kind chargeable to individuals -No fees for department for any clerks
Guardianships	RCW 11.88.030 – if attorney general petitions for appointment of guardian, no fee charged. Or if the alleged incapacitated person has less than \$3,000 in total assets, no filing fee is charged.
Immigration	No charge for any fees to the U.S. Dept. of Immigration for requests relating to their duties.
In Forma Pauperis	RCW 7.36.250 – If order signed, Clerk does not charge any fees for filing.
Paternity & Support Actions	RCW 74.20.300 – no fees charged to DSHS or Prosecutor in these cases.
Relinquishment for adoption	RCW 36.18.020(3) – no fee for filing petitions under this RCW
Veterans Administration	RCW 73.36.155 & 73.04.120) No fees charged to the requesting party when requesting copies of legal documents for matters concerning VA eligibility, etc.

Limited Partnerships now filed with Secretary of State. Certificates of Osteopath, Osteopathy Surgery, Chiropractors, Chiropody, Optometry, etc., now filed with Department of Licenses.