NO. 44919-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN MARKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional right to a public trial by taking peremptory challenges privately.

2. The trial court erred when failed to consider the appellant's ability to pay before imposing discretionary legal financial obligations.

Issues Pertaining to Assignments of Error

1. During jury selection, the parties made peremptory challenges privately by passing a piece of paper back and forth at a sidebar. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire in private, did the trial court violate appellant's constitutional right to a public trial?

2. Did the court err in ordering a discretionary legal financial obligation without considering in any meaningful way the appellant's ability to pay?

B. STATEMENT OF THE CASE[2]

The State charged Dustin Marks with first degree assault with a firearm enhancement, first degree unlawful possession of a firearm,

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This brief refers to the verbatim report as follows: 1RP – 4/11/13; 2RP – 4/15/13; 3RP – 4/16/13; 4RP – 4/17/13; 5RP – 4/18/13; 6RP – 4/22, 4/23, and 5/17/13; and RP (12/7/12). The first six volumes listed are consecutively paginated.

second degree vehicle prowling, and reckless endangerment for events occurring March 16, 2012. CP 1-2. Marks's defense was mistaken identity. 6RP 697.

Jury selection occurred on April 15, 2013. After the parties finished asking potential jurors questions, the court announced the attorneys would "do their final selection [of jurors] in writing." 2RP 148. The transcript notes that the case went "[o]ff the record" for the attorneys to do peremptory challenges. The transcript then notes, "Sidebar held, but not reported." 2RP 150. Afterward, the court called the names of the remaining jurors and their seat assignments. 2RP 150.

The jury found Marks guilty as charged. CP 10-16. The court sentenced him within the standard range on assault and firearm possession, for a term totaling 378 months of incarceration. CP 63. The court also sentenced Marks to concurrent sentences of 365 days on the remaining two charges. CP 106-07. The judgment and sentence contained boilerplate language indicating the court considered Marks's ability to pay legal financial obligations (LFOs). RP 60. The court ordered $2,300 in LFOs, including $800 in mandatory fees and $1,500 for Marks's appointed attorney. RP 60-61.

Marks timely appeals. CP 74.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY HAVING THE ATTORNEYS EXERCISE PEREMPTORY CHALLENGES PRIVATELY.

a. Introduction to applicable law

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury.[3] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d

[3] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides in part that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

291 (2004). A violation of the right to a public trial is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814.

b. Peremptory challenges are considered part of "voir dire," which must be conducted openly.

The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, constitutes a part of "voir dire," to which the public trial right attaches. State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference); cf. State v.

Sublett, 176 Wn.2d 58, 70-71, 77, 292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury's question posed during deliberations did not implicate public trial right); but see State v. Love, ___ Wn. App. ___, 309 P.3d 1209, 1213-14 (2013) (rejecting argument that public trial cases involving jury selection controlled the issue, and holding "experience and logic" test did not require open exercise of peremptory challenges based in part on case predating Bone-Club).

The right to a public trial is concerned with "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). Although peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these constitutional limitations, public scrutiny of the exercise of peremptory challenges is essential. The procedure in this case thus violated the right to a public trial.

c. Sublett's "experience and logic" test requires open voir dire, which includes the exercise of peremptory challenges.

At issue in Sublett was whether the trial court violated the petitioners' public trial rights by meeting in chambers with counsel to fashion an answer to a jury question. Sublett, 176 Wn.2d at 65. The Court of Appeals had held the right to a public trial did not apply because the jury's question involved a purely legal issue. Id. at 67-68.

In a plurality opinion, the Supreme Court affirmed under a different theory. Id. at 72. Applying the "experience and logic" test, the majority of justices held that resolution of the jury's question did not implicate the core values the public trial right serves. Id. (lead opinion); id. at 99-100 (Madsen, J., concurring); id. at 141-42 (Stephens, J., concurring). Under the "experience" prong, the court asks whether the place and process have historically been open to the press and general public. The "logic" prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches. Sublett, 176 Wn.2d at 73.

Applying this test to the jury inquiry discussion, the Court observed that, historically, proceedings involving jury instructions have not been conducted in an open courtroom. Id. at 75. Moreover, CrR

6.15(f) requires that jury questions, the court's response, and any objections must be made a part of the record. Id. at 76. Accordingly, the Court found the proceeding did not satisfy the test and concluded petitioners' public trial rights were not implicated. Id. at 77.

In contrast, voir dire is the proceeding at issue in this case. It is well established that the right to a public trial extends to voir dire. Id. at 71; Strode, 167 Wn.2d at 226.

Peremptory and for-cause challenges are an integral part of voir dire. Wilson, 174 Wn. App. at 342-43 (unlike potential juror excusals under CrR 6.3, exercise of peremptory challenges under CrR 6.4 is part of "voir dire" to which public trial right attaches); see also Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers violated public trial right).

Although cases clearly hold that voir dire must be open, the experience and logic test is also satisfied because historically, voir dire has been conducted in open court. Moreover, openness clearly enhances the basic fairness of the proceeding.

d. The procedure in this case was closed to the public.

Even if the procedure occurred in an otherwise open courtroom, any assertion that the procedure was, in fact, public, should be rejected. The procedure was essentially a sidebar, which occurs outside of the

public's scrutiny, and thus violates the appellant's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"), review granted, 176 Wn.2d 1031 (2013); see also Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial). The procedure the court used was as closed to the public as if it had taken place in chambers.

e. A record made after-the-fact does not cure the error.

Despite an after-the-fact record, the trial court violated the right to a public trial by taking peremptory challenges in the manner described the above.

First, the availability of a record of an improperly closed voir dire generally fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012); see also Harris, 10 Cal.App.4th at 684 (holding, based on application of federal law, that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not public trial violation or render those proceedings "public); cf. People v.

Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at sidebar if challenge and party making it was then *immediately* announced in open court).

Second, while parties need give no rationale for such challenges, their open exercise is essential considering the important limits on such challenges, which may be triggered solely by a juror's appearance. While in most cases peremptory challenges are not subject to a ruling by the trial court, it is the very lack of court control that makes it crucial they be open to public scrutiny in all cases. See State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326, 46, 88-95, 118-19 (2013) (notwithstanding majority of justices' affirmance of denial of Batson challenge, lead opinion, concurrence and dissent underscoring harm resulting from improper race-based exercise of peremptory challenges and highlighting difficulty of obtaining appellate relief even where discriminatory exercise may have occurred). Saintcalle highlights the need for public scrutiny, which encourages parties to police themselves and enhance the fairness of the trial process. Thus, an after-the-fact written record of such challenges is inadequate, given the need for scrutiny in the first instance.

In summary, peremptory challenges are part of voir dire to which the public trial right applies. Wilson, 174 Wn. App. at 342-43. The multitude of cases prohibiting closed voir dire controls the result here.

Because the error is structural, prejudice is presumed, and reversal of Marks's convictions is required. Wise, 176 Wn.2d at 16-19.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER MARKS'S ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The judgment and sentence contains the following boilerplate language:

> 2.5 **ABILITY TO PAY LEGAL FINCINCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. . . .

CP 60. There is no box for the trial court to check on the pre-printed form, and the trial court made no contemporaneous statements at sentencing regarding Marks's ability to pay. CP 60; 6RP 746-59. The court ordered Marks to pay $2300 in legal financial obligations, including $1,500 in non-mandatory fees.[4] CP 61.

[4] As for the remaining $800, RCW 7.68.035(1)(a) requires a $500 victim assessment, RCW 43.43.7541 requires a $100 DNA collection fee, and RCW 36.18.020(2)(h) requires a $200 criminal filing fee, each regardless of the defendant's ability to pay.

RCW 9.94A.760 permits the court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The record contains no indication the trial court considered Marks's ability or future ability before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous, and the validity of the order may be challenged for the first time on appeal.

a. The validity of the LFO order may be challenged for the first time on appeal as an erroneous sentencing condition.[5]

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). Specifically, a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

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[5] This Court found to the contrary in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013) (being heard under case no. 89028-5). The Supreme Court has granted review. According to ACORDS, hearing is set for February 11, 2014.

In Moen, this Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which formerly set a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, this Court explained:

> We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142 (1) had passed as a waiver of that timeliness requirement; *it was invalid when entered.*

Id. at 541 (emphasis added). This Court concluded the restitution order did not comply with the authorizing statute and the order could therefore be challenged for the first time on appeal. Id. at 543-48; see also State v. Grantham, 174 Wn. App. 399, 299 P.3d 21, 24 (reversing restitution order on similar grounds based on challenge raised for first time on appeal), review denied, 178 Wn.2d 1006 (2013).

The trial court failed to comply with the statutory requirements in imposing the discretionary LFOs. Marks may therefore challenge the trial court's LFO order for the first time on appeal.

b. The sentencing court did not comply with RCW 10.01.160(3).

RCW 10.01.160(3) provides:

> [t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court *shall*

> take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word "shall" means the requirement is mandatory.[6] State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002); see State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (in light of RCW 9.94A.525(5)(a)(i), which contains "shall" language, "[t]he sentencing court . . . must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct. The court has no discretion on this."), abrogated on other grounds by State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013)). The trial court thus lacked authority to impose LFOs as a condition of Marks's sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must establish the sentencing judge did, in fact, consider the defendant's

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[6] By way of comparison, RCW 9.94A.753, which addresses restitution, provides:

> The court *should* take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(Emphasis added.)

individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012); cf. State v. Lundy, ___ Wn. App. ___, 308 P.3d 755, 761 (2013) (distinguishing Bertrand and affirming imposition of LFOs in part based on Lundy's history of lucrative employment); State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991) (statement in presentence report that Baldwin was employable showed sentencing court properly considered burden of costs under RCW 10.01.160(3)). If the record does not show this occurred, the trial court's LFO order is does not comply with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court made any individualized determination regarding Marks's ability to pay. The State did not provide evidence establishing Marks's ability to pay or ask the court to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.[7] RP 750. The trial court made no inquiry into Marks's financial resources, debts, or employability. RP 756-58. There was no

[7] It is the State's burden to prove the defendant's ability or likely ability to pay. Lundy, 308 P.3d at 760.

evidence before the trial court regarding Marks's past employment or his future employment prospects. There was no discussion at the sentencing hearing regarding Marks's financial circumstances. RP 746-59. The only information before the trial court was not auspicious: Marks was 35 years old with a history of incarceration and drug addiction and faced an approximately 30-year sentence. RP 748, 753-54, 756.

The boilerplate finding in the judgment and sentence is the only nod to the requirement set forth in RCW 10.01.160(3). CP 29. Such boilerplate does not establish compliance with RCW 10.01.160(3).

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (explaining that boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The judgment and sentence form used in Marks's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. CP 60. Rather, every time one of these forms is used, there

is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3). This type of boilerplate cannot establish the trial court complied with RCW 10.01.160(3).

In summary, the record fails to establish the trial court actually considered Marks's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Marks to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

c. The order is ripe for review.

The State may argue that the issue is not ripe for review because the State has not yet attempted to collect the costs. This argument should be rejected. Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, those cases address challenges based on an assertion of financial hardship or on procedural due process principles that arise in regard to collection. In contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when

considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160(3) before issuing the order. As such, Marks meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. Marks is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change.

Moreover, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate

consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at a 12 per cent interest rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

> reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately,

reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay before the trial court may impose LFOs. Lundy, 308 P.3d at 760. The defendant is not required to disprove this. See, e.g., State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999) (defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission).

For a person unskilled in the legal field, self-representation in a remission process can be a daunting prospect, especially if this person is

already struggling to make ends meet. See Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Id. at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows so overwhelming the person just gives up.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). For the reasons stated, Marks's challenge to the legal validity of the LFO is ripe for review.

D. CONCLUSION

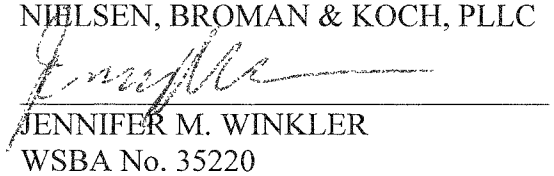
The trial court violated Marks's right to a public trial by taking peremptory challenges by quietly passing a sheet of paper back and forth. This Court should reverse his convictions.

In any event, the court also erred in when it ordered discretionary LFOs without actually considering whether Marks would be able to pay them.

DATED this 25th day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 44919-6-II
	)	
DUSTIN MARKS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DUSTIN MARKS
DOC NO. 786241
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF NOVEMBER, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 25, 2013 - 4:53 PM

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