73562-4

FILED
December 8, 2015
Court of Appeals
Division I
State of Washington

NO. 73562-4-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

KEVIN L. GROTHAUS,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Was an improper opinion of guilt testified to by a lay witness so prejudicial that the jury could not be presumed to have followed the court's instruction to disregard that evidence?

2. Does the defendant have standing to challenge the constitutionality of RCW 7.68.035 imposing a DNA fee and RCW 43.43.7541 imposing a crime victims' assessment at sentencing?

3. Does the defendant's substantive due process challenge to RCW 7.68.035 and RCW 43.43.7541 involve an issue of manifest constitutional error that justifies reviewing his challenge for the first time on appeal?

4. Should the court exercise its discretion and review the defendant's statutory challenge to RCW 7.68.035 and RCW 43.43.7541 for the first time on appeal?

5. Is the trial court required to determine whether the defendant is or will be able to pay the DNA fee or crime victims' assessment before imposing either legal financial obligation?

II. STATEMENT OF THE CASE

1. The Theft And Trafficking Stolen Property.

The defendant, Kevin Grothaus, has been a carpenter for at least 27 years. He owned his own carpentry business, Grothaus

Construction. In November 2012 the defendant was going through some financial troubles. He asked his neighbor Joe Myers for a job. Mr. and Mrs. Myers agreed to help the defendant out, and hired him as an hourly employee in their general contracting construction business. 3/9/15 RP 56-57, 59, 62-63; 3/10/15 RP 137-140, 261-262.

When the defendant was hired by Joe Myers Construction he did not have any tools. The defendant has pawned his tools and other personal property. As a result he was outfitted with tools by his employer. 3/9/15 RP 62-65; 3/10/15 RP 262-265.

Joe Myers regularly went to the work sites where his employees worked. Every week Mr. Myers noticed that some tools that he had given the defendant were not at the job site. Instead the defendant was using tools that did not work as well as the tools that the defendant had been given. When Mr. Myers inquired as to the whereabouts of his company's tools the defendant told Mr. Myers that the tools were at the defendant's father's house. 3/9/15 RP 69-71; 3/10/15 RP 288.

Mr. Myers also noticed that the defendant was not always at the job site that he was supposed to working at. On March 5, 2013 Mr. Meyers decided to fire the defendant in part because of the

missing tools and in part due to the defendant's lack of attendance. 3/9/15 RP 72-73; 3/10/15 RP 142. Mr. Myers instructed the defendant to return the company truck and tools to Mr. Myers home. The defendant returned the truck without the tools. 3/9/15 RP 73-74.

The Myers attempted to get the tools back from the defendant. Mrs. Myers wrote the defendant demanding that he return the tools that they had identified as missing. The defendant returned his work phone with a letter to the Myers about one week after he was fired. In the letter he promised to return the tools by the following Tuesday. When the defendant did not return the tools the Myers called the police. 3/9/15 RP 74-75; 3/10/15 RP 142-149.

Detective Clinko located many of the Myers tools in four different pawn shops. 3/10/15 RP 168-182. The detective located 15 tools belonging to the Myers' construction company that the defendant had pawned between December 12, 2012 and March 1, 2013. The tools had been pawned for a total of $1,110.00 in loans. 3/10/15 RP 221-227, 242-244, 251-255. The defendant admitted to the detective that he had pawned the tools, and had intended to retrieve them from the pawn shops, but had not done so. No one

could have retrieved the pawned tools except the defendant. 3/10/15 RP 184, 190-191, 206.

2. The Trial.

The defendant was charged by amended information with one count of first degree trafficking in stolen property (count I) and one count of second degree theft (count II). 1 CP 61. Before trial the defense raised fourteen motions in limine. 1 CP 57-60. One motion sought to preclude the State from eliciting testimony that the defendant was guilty of the crimes charged from a police or lay witness. 1 CP 59. The prosecutor agreed that was an ultimate issue for the jury. He told the court he did not intend to ask witnesses if the defendant was guilty of committing the crimes. 3/9/15 RP 26-27. The court granted the motion. Id. The court also granted the defense motion to require the prosecutor to inform witnesses of the court's pre-trial rulings. 1 CP 60; 3/9/15 RP 27.

The State called Joe Myers as a witness. Mr. Myers testified to the facts outlined above. The prosecutor then asked Mr. Myers:

> Q: Let me ask you this, in a straightforward fashion. The defendant, while he was permitted to use those tools, was he permitted to pawn them? Did you ever given him that say-so?
>
> A: That's theft. No.

3/9/15 RP 89.

Defense counsel objected. Outside the presence of the jury counsel moved for a mistrial. The prosecutor conceded the testimony was improper. The prosecutor candidly stated that he did not discuss the "theft prohibition." He explained that he had spent time explaining the court's other rulings precluding evidence. He did not anticipate the issue arising because he was not going to ask questions that would even approach receiving the answer Mr. Myers gave. 3/9/15 RP 89-90.

The court denied the motion for mistrial, reasoning that the jury could ignore the improper evidence if so instructed. The court specifically instructed the witness not to use the term "theft" again. It also instructed the prosecutor to explicitly inform each witness not to talk about the events in that term. 3/9/15 RP 92-93.

The court then instructed the jury:

> All right. Just before you left there was an objection. Regarding that objection, the portion of the answer that was "no" will stand. Anything beyond that the objection is sustained and the jury will disregard any information beyond that.

3/9/15 RP 93. Defense counsel did not request any further curative instructions. 3/9/15 RP 93-94; 3/10/15 RP 300-308.

III. ARGUMENT

A. THE COURT'S CURATIVE INSTRUCTION WAS SUFFICIENT TO ELIMINATE ANY PREJUDICE RESULTING FROM A LAY WITNESSES NON-RESPONSIVE OPINION THAT THE DEFENDANT COMMITTED A THEFT.

In general, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Although it is error to admit improper opinion testimony the error may be harmless. State v. Montgomery, 163 Wn.2d 577, 595-596, 183 P.3d 267 (2008). Important to that determination is whether the jury was properly instructed. Id. at 595. Instructions that direct jurors that they are the sole judges of the credibility of a witness and are not bound by expert opinions eliminated any prejudice resulting from improper opinion testimony. Id at 595-596, State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

A motion for mistrial should be ordered only when the trial error is so prejudicial that nothing short of a new trial will ensure the defendant is tried fairly. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). A trial court's decision to deny a motion for mistrial is given deference because the trial court is in the best position to determine the prejudice resulting from a trial error. State

v. Garcia, 177 Wn. App. 769, 776-777, 313 P.3d 422 (2013) review denied, 179 Wn.2d 1026 (2014).

Here the court concluded that the error was not so prejudicial that it could not be cured by an instruction to disregard the improper opinion. The jury was specifically instructed to disregard Mr. Meyers testimony "[t]hat's theft." In addition jurors were instructed

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial....Your decisions as jurors must be made solely upon the evidence presented during these proceedings...The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict... if I have ruled that any evidence is admissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

1 CP 31 (emphasis added).

Jurors are presumed to follow the court's instructions absent evidence to the contrary. Kirkman, 159 Wn.2d at 928. The court properly concluded that the error was not so prejudicial that jurors would base their verdict on the improper testimony despite instructions to the contrary. There is no evidence that jurors

considered Mr. Meyers opinion when deliberating on the charges. The only jury question asked for clarification of a definitional instruction. The question was not answered because the jury indicated that it had discovered the answer on its own. 2 CP __ (sub 55 Inquiry from the Jury and Court's Response).

The defendant contends that the court's instruction was inadequate to preserve his right to a fair trial. Specifically he argues that the court's curative instruction was ineffective absent the court's explicit clarification of the jury's role and a reminder that it was to determine guilt independent of a witness' expressed opinion. BOA at 8.

This court considered whether a trial court's instructions to disregard erroneous opinion testimony were adequate to cure prejudice resulting from that evidence in State v. Rafay, 168 Wn. App. 734, 285 P.3d (2012), review denied, 176 Wn.2d 1023 (2013). There a detective who had investigated a murder testified about recreating the lighting conditions in a room where the defendant claimed he saw blood on a wall near the victim after the murder. The officer testified that he could not see what the defendant claimed he saw and "I don't believe he saw what he said he saw." Id. at 810. The trial court sustained an objection to that testimony

and instructed the jury to disregard it. Id. The witness also made several improper editorial comments about the defendant's behavior after the murder which the court likewise struck and instructed the jury to disregard. Id. at 808-809.

This court relied on three things to conclude that under the circumstances of the case the jury was able to follow the court's prompt curative instruction and make a factual determination solely on the properly admitted evidence. Id. at 811. First the improper evidence did not introduce any new details or issues in addition to substantial evidence that had been properly admitted. Second the prosecutor did not use the improperly admitted evidence in argument. Third, the court had instructed the jury that it was the sole judge of credibility. Id.

Here the jury was given a prompt curative instruction to disregard the improper evidence. 3/9/15 RP 93. The jury was similarly instructed at the end of the case. 1 CP 31. The prosecutor did not argue that jurors should convict the defendant because Mr. Myers believed that the defendant had committed a theft by pawning his company's tools. 3/11/15 RP 322-341, 360-362.

Additionally there was substantial evidence that the defendant had committed a theft even by the defendant's own admissions. The defendant admitted that he had pawned many tools belonging to Joe Myers Construction Company. 3/10/15 RP 265. He pawned those tools in part to extend the loans he had taken out using his own tools as collateral. 3/10/15 RP 268. The defendant admitted that he knew he was not supposed to pawn his employer's tools, and that doing so was outside the scope of his employment. 3/10/15 RP 288. He also admitted that Mr. Myers could not get the items out of pawn, that he did not sign over any pawn slips to Mr. Myers, and that he lied to Mr. Myers regarding the whereabouts of the tools when asked. 3/10/15 RP 288, 292.

The jury was instructed that to commit theft the evidence must show that the defendant exerted unauthorized control over the property of another with the intent to deprive the other person of the property. 1 CP 39. "Unauthorized control" was defined as "having any property or services in one's possession, custody, or control, as an employee, to appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto." 1 CP 49. Intent was defined as "acting with the objective or purpose to accomplish a result that constitutes a

crime." 1 CP 40. Intent to deprive did not require intent to permanently deprive. 1 CP 48.

Although the defendant testified that he did not intend to deprive his employer of the tools, his other testimony established a theft. He intended to pawn the tools, thereby rendering them at least temporarily out of his employer's possession, custody, or control. He did so for his own use; i.e. to make those tools available to him as collateral for loans that he needed. Like Rafay the improper evidence at issue here did not raise anything different than the evidence that had been properly introduced.

In addition, the jury was less likely to give weight to Mr. Myers' unresponsive opinion testimony. There was no evidence Mr. Meyers' had any legal training. Courts have recognized that improper opinion testimony from a law enforcement officer may be particularly prejudicial because the officer's testimony may carry an aura of reliability. State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). That reliability may result from the belief that a law enforcement officer is familiar with the laws he is charged with enforcing. In contrast, a civilian who is not trained in the law is in no better position to know whether one has legally committed a crime than the jurors themselves. Until they are given the law by

the court, jurors do not know whether the facts testified to constitute a crime.

Jurors may have also considered Mr. Myers as less objective than other witnesses, and given little or no weight to his opinion for that reason. Jurors could easily understand that Mr. Myers may have felt betrayed by the defendant after Mr. Myers had come to the defendant's aid when he needed help. The court's instruction to disregard the testimony altogether ensured jurors would not even give the testimony passing consideration.

Finally, the defendant does not point to any evidence to overcome the presumption that the jurors followed the court's instruction to disregard the improper testimony. Rather he resorts to speculation that the jury could easily have been swayed by the victim's conviction that the defendant was guilty. Id. The defendant's speculation falls short of any actual evidence the jury did consider Mr. Myers' opinion. In light of circumstances of this case, the court should be confident that the comment was not so prejudicial that the jury was unable to follow the court's curative instructions.

B. THE RECORD DOES NOT SUPPORT FINDING THE DEFENDANT HAS STANDING TO RAISE A SUBSTANTIVE DUE PROCESS CHALLENGE TO MANDATORY ASSESSMENTS. THE DEFENDANT HAS NOT PRESERVED THE SUBSTANTIVE DUE PROCESS CHALLENGES TO THOSE ASSESSMENTS. NO SUBSTANTIVE DUE PROCESS VIOLATION OCCURRED WHEN THE COURT IMPOSED MANDATORY ASSESSEMENTS.

At sentencing the defense argued for an exceptional sentence of no time in jail or alternatively a first time offender waiver. He did not address legal financial obligations except to ask the court to "waive all non-mandatory fines and fees." 1 CP 24-26; 6/1/15 RP 5-7. Thereafter the court imposed 90 days confinement on a first time offender waiver to be served on electric home monitoring. 1 CP 16. It ordered the defendant to pay $500 victim assessment and $100 biological sample fee and restitution to be determined at a later hearing. 1 CP 18.

1. The Defendant Lacks Standing To Challenge The Constitutionality Of RCW 43.43.7541 And RCW 7.68.035.

RCW 43.43.7541 requires the sentencing court to impose a fee of $100 as a legal financial obligation for collection and maintenance of the offender's DNA. RCW 7.68.035 requires the sentencing court to impose a $500 crime victims' assessment for each felony and gross misdemeanor conviction. Neither statute conditions imposition of the fee or assessment on a determination

conditions imposition of the fee or assessment on a determination that the offender either currently has the ability to pay or will likely be able to pay it. The defendant challenges the portion of each statute that requires imposition of the fee or assessment without first making that determination.

A party does not have standing to challenge a statute on constitutional grounds unless he is harmed by the particular feature of the statute which is claimed to be unconstitutional. In re Powell, 117 Wn.2d 175, 197, 814 P.2d 635 (1991), Kadorian by Peach v Bellingham Police Department, a division of the City of Bellingham, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992). The defendant does not have standing to challenge the portion of each statute which imposes a mandatory requirement without first inquiring into his ability to pay the obligations because the record demonstrates that he is not personally harmed by that portion of the statute.

The defendant was facing hard times in November 2012. He has a marketable skill however, and was described as "one of the best" framers in the construction industry. 3/9/15 RP 61. He had been able to find employment twice with the Myers, first as a subcontractor and again as an hourly employee. 3/9/15 RP 61-63; 3/10/15 RP 261-263. The defendant's testimony indicates that prior

to November 2012 he had sufficient income to support a mortgage on a home and to purchase other non-essential personal property such as scuba gear and golf clubs. 3/10/15 RP 262-263. There is no indication that the defendant was unable to work and produce an income. Rather it appears that the defendant's lack of income is due to matters completely within his control. Mr. Myers cited the defendant's failure to consistently have the tools he had been given to work with at the job site, as well as attendance problems as the reason he decided to let the defendant go in March 2013. 3/10/15 RP 72. Personal choices that result in lack of employment at one point in time do not mean the defendant cannot have the ability to pay in the future.

The defendant did file an affidavit of indigency with the court when he filed his notice of appeal. 2 CP __ (sub 71 Motion and Declaration for Order Authorizing the Defendant to Seek Review at Public Expense and Appointing Attorney on Appeal.) It does not appear the court investigated the defendant's statements on his affidavit before signing the order of indigency. 2 CP __ (Sub 72, Order Authorizing the Defendant to Seek Review at Public Expense and Appointing an Attorney on Appeal). The court signed the order on the same date it was presented with the motion for order of

indigency. The affidavit contains contradictory language; although the defendant claims to have no income, he also claims to have a $500 monthly payment on a debt to another person. Moreover, the affidavit also indicates that he has either stocks, bonds, or notes of an approximate value of $2,000, an amount that exceeds the financial obligations imposed by the court that he challenges.

The defendant has completed serving his sentence on electric home monitoring. 2 CP __ (Sub 83). There does not appear to be an impediment to the defendant working to earn the income necessary to be able to pay the $600 in fee and assessment imposed by the court. Because the record supports the conclusion that the defendant will have the ability to make payments, he is not personally injured by the mandatory provisions of either RCW 43.43.7541 or RCW 7.68.035. He therefore lacks standing to challenge the constitutionality of either statute.

2. The Defendant Has Not Preserved The Constitutional Challenge To Either RCW 43.43.7541 Or RCW 7.68.035 For Review.

The defendant did not challenge imposition of the DNA fee or crime victims assessment at trial. Generally the appellate court will not consider a matter raised for the first time on appeal. Kirkman, 159 Wnd at 926. An exception exists when the issue

involves manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue then the defendant bears the burden to show the error was manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is "manifest" if the defendant shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. Kirkman, 159 Wn.2d at 927.

The defendant does not address his burden of proof under RAP 2.5. The error is not manifest because the defendant was not prejudiced when the fee was imposed on him pursuant to the statute.

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

The Supreme Court found the Sentencing Reform Act contained adequate safeguards to prevent imprisonment of indigent defendants. Those safeguards included former RCW 9.94A.200 that allowed a defendant the opportunity to show cause why he should not be incarcerated for a violation of his sentence. Id. at 918. Those same protections still exist. RCW 9.94A.6333. Because the defendant will not face any punitive sanction for failure to pay if he is indigent, he has not shown that he was actually prejudiced when the court imposed the challenged fees under RCW 43.43.7541 and RCW 7.68.035 without a determination of his ability to pay beforehand.[1] For that reason the court should not consider the defendant's challenge to that statute for the first time on appeal.

3. Neither Statutes Requiring Mandatory Imposition Of The DNA Fee Or The Crime Victims Assessment Violate The Defendant's Substantive Due Process Rights.

If the court concludes that the defendant does have standing to challenge the constitutionality of RCW 43.43.7541 and RCW 7.68.035 it may within its discretion address the defendant's issue

[1] Nor did the defendant lose his right to vote when the mandatory fees were imposed. RCW 29A.08.520. That right may be lost only if the defendant has willfully failed to comply with the terms of his order to pay the legal financial obligations. RCW 29A.08.520(2)(a). A person does not willfully fail to pay if through no fault of his own he is unable to pay a fine or fee. Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

even though it has not been raised at the trial court. State v. Blazina, 182 Wn.2d 827, 834-835, 344 P.3d 680 (2015). If the court considers the defendant's substantive due process challenges to each statute it should reject them.

Statutes are presumed constitutional. The party challenging the statute bears the heavy burden to prove the statute is unconstitutional beyond a reasonable doubt. State v. Blank, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). If at all possible statutes should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991).

Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014) affirmed, 184 Wn.2d 321 (2015). The level of review depends on the nature of the right at issue. Amunrud v. Board of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006), cert denied, 549 U.S. 1282 (2007). The defendant does not claim that his property interest in a monetary assessment is a fundamental right. As a result, the claim is subject to the rational basis review. In re Metcalf, 92 Wn. App. 165, 176-177, 963 P.2d 911 (1998), cert denied, 572 U.S. 1041 (1999). Under that standard a statute must

be rationally related to a legitimate state interest. Amunrud, 158 Wn.2d at 222.

The legislature found that DNA databases are important tools in criminal investigations, in excluding people who are the subject of investigations or prosecutions, detecting recidivist acts, and identifying the location of missing and unidentified persons. RCW 43.43.753. It created a DNA identification system to serve those purposes. RCW 43.43.754. Monies collected under RCW 43.43.7541 are put into an account administered by the state treasurer. They may be used only to create, operate, and maintain the DNA database. RCW 43.43.753; State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 240 (2009), review denied, 168 Wn.2d 1030 (2010).

The Legislature originally enacted the crime victims statute "to provide a method of compensating and assisting innocent victims of criminal acts who suffer bodily injury or death as a consequence thereof." Laws of Washington 1977, 1st Ex. Sess., Ch. 302, §1. The statute was subsequently amended to include a provision intended to provide funds for "comprehensive programs to encourage and facilitate testimony by the victims of crimes and

witnesses to crimes." Laws of Washington 1982, 1st Ex. Sess., Ch. 8, §1; RCW 7.68.035(4).

The defendant acknowledges that the stated purposes for each statute are legitimate interests. BOA at 12. He complains that imposing the fee and assessment on those persons that are unable to pay them do not rationally further those interests.

Like the two statutes at issue here, RCW 10.73.160 does not require an ability to pay inquiry prior to assessing those costs. In the context of that statute the court observed that it is not necessary to inquire into a defendants ability to pay or inquire into a defendant's finances before a recoupment order may be entered against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same holds true for the DNA fee and Crime Victims Assessment statutes.

Each defendant presents different circumstances. A person who is entitled to appointed counsel because he meets the statutory definition of indigence does not mean the person is completely without funds to make some payments, however minimal. RCW 10.101.010(3), (4). Nor does it mean that the defendant is without assets which he could use to finance those

payments. Where a defendant had assets which he could use as collateral for a loan to pay a fine the court found he was not constitutionally indigent, even though he met the statutory definition of indigence which entitled him to appointment of counsel. State v. Johnson, 179 Wn.2d 534, 555-556, 315 P.3d 1090 (2014).

Here the defendant possesses marketable skills, has a demonstrated ability to earn an income with which to pay the mandatory fee and assessment, and is currently out of custody and available to work. An offender sentenced to a lengthy prison term may have less ability to immediately pay those obligations, but may have the opportunity to work in prison industries. RCW 72.09.100. A percentage of payment for work performed in those programs is paid toward inmates' legal financial obligations. RCW 72.09.111(1)(a)(i)(v). In each offender's case he may benefit from a gift of funds such as an inheritance, from which the offender could pay those financial obligations. In any event an offender will not suffer an adverse consequence from his failure to pay unless he has wilfully failed to do so. Blank, 131 Wn.2d at 239, Curry, 118 Wn.2d at 918.

It is this feature of each statute that the court relied on when it concluded that no inquiry into an ability to pay was constitutionally

necessary before imposing mandatory financial obligations at sentencing. Blank, 131 Wn.2d at 241-242, Curry, 118 Wn.2d at 918. In Curry the court specifically addressed the constitutionality of the mandatory victim penalty assessment. Id. at 917-918.

Nevertheless the defendant argues that Blank and Curry do not control whether an inquiry into an ability to pay is constitutionally required before the DNA fee and crime victims assessment may be imposed. He argues that neither case addressed whether it there was a rational relationship between the State's legitimate interest in providing funds for DNA collection and Crime Victims compensation and ordering indigent defendants to pay towards those funds. However the court did say that RCW 7.68.035 was not "unconstitutional on its face." Curry, 118 Wn.2d at 917. As demonstrated there is a rational relationship between the interest to be served and statutory requirement. Although the defendant may have met the statutory definition of indigence that does not mean he is completely without the ability to make payments toward the obligation.

The defendant also supports his position by citing the court's reference to the state's "broken LFO system" in Blazina. In light of that comment the defendant argues Curry and Blank should be

revisited. BOA at 15, citing Blazina, 182 Wn.2d at 835. That reference related to the courts reasons for accepting review of an unpreserved challenge to imposition of court costs under RCW 10.01.160. Id. It says nothing about the continued viability of the court's holdings in either Curry or Blank.

The defendant also argues that a careful reading of Curry and Blank in light of the current collection scheme supports his position that an ability to pay inquiry is required before the DNA fee and crime victims assessment may be imposed. He points to various statutes imposing interest on judgments and mechanisms for collection to argue that enforcement actually occurs at the time the judgment enters. None of the statutes relied on however imprison defendants for a non-willful failure to pay. For that reason the argument should fail.

The defendant points RCW 10.82.090(1) which states that financial obligations imposed in a judgment "shall bear interest form the date of the judgment until payment, at the rate applicable to civil judgments." The statute does not require immediate collection. It does take into account the defendant's ability to pay. It permits a court to waive non-restitution interest if the interest accrual causes a hardship on the offender or his immediate family. RCW

10.82.090(2). For this reason the court should reject the defendant's argument that the State's interest in uniform sentencing is not served by imposing mandatory obligations on defendant's who do not have the ability to pay them due to interest accrual on those obligations. BOA at 13.

The defendant also points to various statutes that allow for payroll deduction, wage garnishment, and wage assignment. These statutes do not in themselves mean there is no rational relationship between the State's interests in the DNA fee and crime victims assessment and in making imposition of that fee and assessment mandatory on indigent defendants. If one has a wage, one necessarily has some income with which he may pay something toward those obligations each month until they are retired.

Additionally there are statutory mechanisms to ensure the monthly payments are based on the offender's ability to pay. When collection is attempted an inquiry into the offender's ability to pay is done administratively, either by the Department of Corrections or the clerk's office. RCW 9.94A.760(5)-(7). A wage assignment is achieved through a petition and court order. RCW 9.94A.7701. The amount withheld for legal financial obligations

from one or more judgments is capped at the 25% of the offender's wage. RCW 9.94A.7703(2),(3). Likewise the employers' service fee is capped at a minimal amount. RCW 9.94A.7705(4). An offender who is subject to a wage assignment may petition the court to quash, modify, or terminate the order upon showing that the order causes extreme hardship or substantial injustice. RCW 9.94A.7708.

The defendant also cites RCW 36.18.190 permitting the court to order as a court cost a sum for the remuneration for services or charges paid to collection agencies or for collection services. Court costs are governed by RCW 10.01.160. The court is required to take into account the offender's ability to pay before imposing that cost. RCW 10.01.160(3), Blazina, 182 Wn.2d at 838.

Thus, if these interest and collection statutes had any bearing on the constitutionality of the mandatory provisions of RCW 43.43.7541 and RCW 7.68.035, then they support the conclusion that those statutes pass constitutional muster. No offender is punished for a non-willful failure to pay. These statutes provide significant safeguards to ensure that the defendant's ability to pay is taken into account before a payment schedule is imposed.

Finally, the defendant argues the mandatory obligations are unconstitutional because they do not serve the State's interest in uniform sentencing because they can subject those who are unable to pay to a longer period of involvement with the criminal justice system. BOA at 13. The State's interest in uniform sentencing is a different interest than the State's interest in funding DNA collection and preservation and crime victims' compensation and services. The defendant cites no authority that a statute must rationally relate to all of the State's legitimate interests rather than just one specific interest. In Amunrud the court reaffirmed that the rational basis test requires only an inquiry into whether the law bears a reasonable relationship to a legitimate state interest. Amunrud, 158 Wn.2d at 226, ¶33. As demonstrated the challenged statutes satisfy that test.

C. THE STATUTORY CHALLENGE TO THE LEGAL FINANCIAL OBLIGATIONS HAS NOT BEEN PRESERVED FOR REVIEW. RCW 10.01.160 DOES NOT APPLY TO EITHER THE DNA FEE OR THE VICTIM PENALTY ASSESSEMENT.

The defendant also challenges the legal financial obligations ordered by the court on the basis that they were imposed in violation of RCW 10.01.160(3). He has not preserved this issue for

review. Further, the plain language of the DNA and crime victims statutes is not modified by RCW 10.01.160(3).

1. The Statutory Challenge To The Legal Financial Obligations Has Not Been Preserved For Review.

The defendant did not challenge the imposition of legal financial obligations at sentencing on the basis that he is or will be able to pay them. Appellate courts generally will not review a claim of error that has not been preserved in the trial court. Kirkman, 159 Wn.2d at 926). The rule is designed to encourage the efficient use of judicial resources by permitting a trial court to correct potential errors and thereby avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

The appellate court does have discretion to consider an issue, even if it has not been raised below. Blazina, 182 Wn.2d at 834-835. In Blazina the Court of Appeals exercised its discretion to not review an unpreserved challenge to court costs that had been ordered under RCW 10.01.160(1) without performing the requisite ability to pay analysis under RCW 10.01.160(3). Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013), remanded, 182 Wn.2d 827 (2015). The court noted that it had reviewed a similar issue despite no objection at the trial level

because the defendant in that case had a disability that affected her likely ability to pay the costs. Id. citing State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), review denied 175 Wn.2d 1014 (2012). Because nothing suggested the present defendant's case was similar, the court did not accept review. Blazina, 174 Wn.2d at 911. The Supreme Court found the Court of Appeals properly declined review. Blazina, 182 Wn.2d at 834. It exercised its independent discretion to accept review because there had been calls to reform the legal financial obligation system. Id.

Like the Court of Appeals in Blazina, this court should refuse to review the defendant's statutory challenge to the legal financial obligations ordered by the trial court. There is no indication in the record that the defendant could not have the ability to pay those obligations; he has marketable skills and had been employed in the past. His unemployed status at trial does not mean that he will always remain unemployed.

The defendant asks the court to exercise its discretion and review the issue, citing the policy reasons for exercising that discretion given by the Supreme Court in Blazina. That case was decided several months before the defendant was sentenced. The defense was on notice what the court said RCW 10.01.160(3)

required at the time of sentencing. They had every opportunity to raise the issue, and thus prevent potential error and unnecessary appeal, but instead chose to remain silent. In a similar situation the court refused to exercise its discretion to review an issue that had not been raised in the trial court. State v. Fenwick, 164 Wn. App. 392, 399, 264 P.3d 284 (2011), review denied, 173 Wn.2d 1021 (2012). (Refusing to exercise discretion to review a search and seizure issued based Gant[2] and its progeny where the trial occurred after those cases had been decided and no suppression motion had been argued.) Likewise this court should decline to review the defendant's statutory challenge to the legal financial obligations.

He also argues that it is not practical to require defendants to employ the remission process provided in RCW 10.01.160(4) if they are truly indigent and unable to pay. The issue in this case relates to the defendant here and not defendants in general. As the court observed in Blazina, the legislature intended legal financial obligations to be imposed on a case by case basis. Blazina, 182 Wn.2d at 834. Because the error was unique to each defendant's case, and review would not promote sentencing uniformity, the

[2] Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

court said the Court of Appeals properly declined review. Id. The remedial portion of that statute is likewise unique to each defendant. For that reason it similarly does not justify the court's exercise of discretion to accept review.

The defendant also points to the boilerplate language in paragraph 2.5 of the judgment and sentence arguing that this is a systematic error used in a majority of the courts around the state, and calls for a systematic response. BOA at 28; 1 CP 15. There is no evidence in this record that most courts around the state use the same preprinted language in their judgment and sentence forms. Additionally the Supreme Court already gave a systematic response to the asserted problem in Blazina. The defense chose to waive the claim of error when it did not bring that ruling to the trial court's attention. This court should refuse to review the statutory challenge to the defendant's legal financial obligations.

2. RCW 10.01.160 Does Not Apply To The DNA Fee Or The Crime Victim Assessment.

If the court does review the defendant's statutory challenge to the legal financial obligations it should reject the defendant's arguments that RCW 10.01.160 applies to the DNA fee and the crime victims' assessment. The court recently rejected the

argument that the court should conduct an ability to pay determination under RCW 10.01.160(3) before imposing the mandatory obligations under RCW 43.43.7541 and RCW 7.68.035. Kuster, 175 Wn. App. at 424. Likewise this court should reject that argument.

RCW 10.01.160 relates to court costs. Court costs are "limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." RCW 10.01.160(2). Costs include expenses for serving warrants, jury fees, administering a deferred prosecution, pretrial supervision, and incarceration. Id. Neither the DNA fee nor the crime victims' assessments are court costs.

The crime victims' assessment provides funds for victims of crimes generally. The assessment applies even when there is no crime victim, such as when the defendant is convicted of a drug charge or felony DUI. RCW 7.68.035(1). It provides funds for a "comprehensive program[ ] to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). It also provides benefits for victims injured as a result of a criminal act. RCW 7.68.070, RCW 7.68.074, RCW 7.68.080. It is designed

to aid all crime victims, not just the victim of the defendant's particular offense. Since it applies to crimes generally, it is not an "expense specially incurred by the state in prosecuting the defendant..."

Similarly the DNA fee supports the collection and retention of DNA samples that are used for "identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons." RCW 43.43.754(4). Thus the DNA bank that the DNA fee funds performs broader functions than simply the criminal prosecution of a given offender for a given offense. The fee does not relate to a DNA sample that may be taken in the context of a criminal prosecution for identification purposes. CrR 4.7(b)(2)(vi). Rather the fee supports the retention of comparison samples for identification purposes in case of another prosecution. For those reasons it too is not an "expense specially incurred by the state in prosecuting the defendant..." Because the DNA fee and crime victims assessment are not "costs" as defined in RCW 10.01.160 the remaining provisions of that statute do not apply to the DNA fee or crime victims assessment.

The defendant employs rules of statutory construction to argue that RCW 10.01.160(3) must be read in conjunction with

RCW 43.43.7541 and RCW 7.68.035. By doing so he argues an ability to pay inquiry is required before imposing obligations under either statute. However the rules of statutory construction do not support his arguments.

Courts construe statutes to give effect to the object and intent of the Legislature. State v. Warfield, 103 Wn. App. 152, 156, 5 P.3d 1280 (2000). Where the meaning of a statute is clear on its face the court gives effect to the plain language without resort to the rules of statutory construction. Id. Here each statute is clear on its face. Each uses mandatory language to require the court to impose the financial obligation without first conducting an ability to pay determination. "Every sentence imposed for a crime specified in RCW 43.43.7541 must include a fee of one hundred dollars." RCW 43.43.7541. "When a person is found guilty in any superior court of having committed a crime... there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035(1)(a). The word shall in a statute created a mandatory requirement unless it is apparent that there is a contrary legislative intent. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994).

Neither statute contains a requirement that the court first conduct an ability to pay inquiry before imposing those obligations.

The defendant argues for the court to read into those statutes that omitted language. Whether the legislature has omitted language from a statute either intentionally or inadvertently the court will not read into the statute the language it believes was omitted. State v. Gray, 174 Wn.2d 920, 928, 280 P.3d 1110 (2012).

A review of the legislative history of RCW 43.43.7541 shows that statute has never required an inquiry into an offender's ability to pay. As the defendant acknowledges under a prior version of the statute the DNA fee was mandatory unless the court found that imposing the fee would result in undue hardship. See Laws of Washington 2002 chapter 289, §4. The legislature amended the statute to remove that hardship consideration. Laws of Washington 2008, chapter 97, §3. To read RCW 7.68.035 and RCW 43.43.7541 to require an ability to pay consideration would contravene the legislature's intent.

IV. CONCLUSION

For the forgoing reasons the State asks the court to affirm the defendant's conviction and sentence.

Respectfully submitted on December 8, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

KEVIN L. GROTHAUS,

Appellant.

No. 73562-4-I

DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, nelsond@nwatorney.net; dobsonlaw@comcast.net and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of December, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office