No. 42849-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT T. DRISCOLL,

Appellant.

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

The Honorable Gary r. Tabor, Judge
Cause No. 11-1-00703-4

BRIEF OF RESPONDENT

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2. Whether defense counsel was ineffective for failing to offer to stipulate that Driscoll had a prior conviction for an unnamed serious offense rather than allowing in a copy of the judgment and sentence without objection.

3. Whether Driscoll's counsel was ineffective for failing to object to testimony regarding his criminal history.

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6. Whether the right of the public and of Driscoll to an open and public trial was violated because the jury instruction conference was apparently held in chambers.

7. Whether the court failed to consider Driscoll's ability to pay the legal financial obligations before imposing them.

B. STATEMENT OF THE CASE.

The State accepts Driscoll's statement of the procedural and substantive facts. Any additions will be part of the argument section below.

C. ARGUMENT.

1. There was ample evidence produced at trial to support Driscoll's convictions for possession of both methamphetamine and a firearm. The evidence was disputed, but disputed evidence is not the same as insufficient evidence.

Driscoll argues that there was not sufficient evidence produced at trial to prove that he had either actual or constructive possession of the drugs and firearm found in the engine compartment of the car which he drove to the Department of Corrections (DOC) office where he was arrested and the car searched. He does not dispute that whoever possessed the methamphetamine did so with the intent to deliver.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the

defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The State does not dispute that Driscoll was not in actual possession of the gun and the meth at the time of his arrest. They were not on his person; they were in a bag under the hood of the car which he drove to the DOC office. There was ample evidence that he constructively possessed the items.

> [C]onstructive possession means that the goods were not in actual, physical possession, but the defendant had dominion and control over them. . . . "Dominion and control means that the object may be reduced to actual possession immediately." . . . We examine the totality of the circumstances, including the proximity of the property and ownership of the premises where the

> contraband was found, to determine whether there is substantial evidence of dominion and control. . .

State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009) (internal cites omitted). An automobile constitutes a "premises" for purposes of this analysis. State v. Summers, 107 Wn. App. 373, 384, 28 P.3d 780, 28 P.3d 526 (2001).

Although the defense witnesses, including Driscoll, gave contradictory testimony, the following facts were before the jury. Driscoll was convicted on July 31, 2001, of unlawful distribution of meth to a person under the age of 18. The judgment and sentence carried the advisement that he could not possess firearms. RP 46-47.[1] In February of 2011, Driscoll was on community custody and under the supervision of CCO Dan Cochran for a conviction for unlawful possession of a firearm in 2008. He was serving the community custody portion of a Drug Offender Alternative Sentence (DOSA). RP 18, 200.

After learning that Driscoll had been heard discussing drug activity with a jail inmate during a recorded phone call, Cochran went to Driscoll's residence on February 3, 2011, to obtain a urine specimen for a urinalysis. Driscoll claimed he had just used the

[1] Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the two-volume transcript of the trial, dated November 16 and 17, 2011.

bathroom and could not provide a sample, so Cochran told him to report to the DOC office later that day, which was a Thursday. He failed to do so. Nor did he appear on Friday. On Monday, February 7, 2011, Driscoll called DOC and said he was otherwise occupied that day, but would come in on Tuesday. He was told that was unacceptable and he must report that day. He did so. RP 21-22. Although he was not told he was going to be arrested, Driscoll assumed that he would be. RP 20-22, 203.

Cochran was aware that Driscoll owned and drove a white Honda Accord with gull wing doors. Driscoll showed it to Cochran when he bought it and Cochran had a copy of the registration. Cochran took a photograph of the Honda. When he drove by Driscoll's residence to check on him, if the car was there, Driscoll would be there. When Cochran went to Driscoll's residence on February 3, the car was there. RP 27-28.

Matt Frank is a CCO whose office at the Martin Way DOC building has a window facing the parking area at the front of the building and a two-way window/mirror through which he could see the lobby. On February 7, he observed the white Honda, which he recognized from previous encounters with Driscoll, pull up and park in front of the DOC building. Driscoll got out of the driver's side and

a female got out of the passenger side. RP 57-58. Frank watched the two go into the lobby where Driscoll filled out some paperwork, and the two went back out to the Honda. Driscoll got back into the driver's seat of the car and the female got into the passenger side. They appeared to smoke a cigarette, and they returned inside the building. Shortly afterward Driscoll was arrested and Frank observed the search of the car from his office window. RP 59-60.

Cochran contacted Driscoll's female companion, who used a remote device to unlock the Honda from inside the building.[2] RP 25. A team of CCOs, including Cochran, searched the car. RP 28. Using a hood release lever located inside the car, one of the CCOs released the hood latch and the engine compartment of the car was searched. There they located a black bag on the driver's side under the hood. RP 31-33. Inside the bag was a semiautomatic slide-action pistol and a smaller black bag containing an electronic digital scale which could measure very small weights, several baggies containing what appeared to be methamphetamine, several empty baggies, and two glass smoking pipes, one of them broken. RP 34-35, 37, 39, 81-83. All of these items are things commonly identified with the drug trade. RP 39, 65, 77. Driscoll

[2] At trial, Neill testified that she told the CCOs that the car was unlocked. RP 145.

stipulated that the suspected meth had been tested at the crime lab and found to be, in fact, meth. RP 116-17.

Driscoll's thumb print was found on the scale. RP 114. On February 7, 2011, the Honda was registered to him, RP 68, even though both Driscoll and his girlfriend swore he gave it to her as a gift on February 1. RP 141-42, 203.

Driscoll's female companion, identified as his girlfriend Danielle Frost, RP 25, or Danielle Neill, RP 165, testified that she owned the car and she put the drugs and gun under the hood. RP 141, 143. She gave a complicated story about the drugs; although she first said she got the drugs, with a street value of $2,320, RP 94, from a friend she wouldn't name, RP 156, she then said they were accidentally left in the car by a drug dealer whom she at first declined to name, of whom she was afraid, and who had, many years before, shot Driscoll. RP 157, 176, 207.

Corey Ballard testified that he had sold a pistol to Neill sometime between August and December of 2010. She told Ballard she was buying it for her boyfriend, Driscoll. RP 131-32. Neill denied telling him that. RP 154.

In his wallet, when he was arrested, Driscoll had $323 in cash. RP 44. Driscoll claimed to have earned the money building

a deck for "a guy up in Puyallup," RP 188, but he could not provide a name, address, or phone number for this person. RP 44, 188. When Driscoll was informed that the drugs and gun had been found under the hood of the car he turned "really pale" and "visibly started to sweat." RP 85. After Driscoll was taken to the Nisqually Tribal Jail, Frank listened to a phone conversation between Driscoll and a female. Driscoll told the female that his alibi was going to be that somebody else dropped him off at DOC and he was not in the Honda. RP 60-61.

Driscoll argues first that the drugs and gun could not have been under his dominion and control because they were under the hood and could not have been "reduced to actual possession immediately." Appellant's Opening Brief at 11. But "immediate possession" cannot mean instantaneous. If that were true, a person away from his own home would not have dominion and control over it or the property in it because he could not instantly lay his hands on it. The term has to mean "a reasonable time under the circumstances," or "possess without any intervening action to claim title." And it took the CCOs only minutes to open the hood and remove the black bag from under the hood of the car.

At trial Driscoll argued that he could not have had dominion and control over the car because Neill had the keys. RP 205, 248. However, he testified that when they went out to smoke, she gave him the keys and he unlocked the car, got the cigarettes, and gave her the key back. If Driscoll could obtain the keys from Neill whenever he wanted, then he also had dominion and control of the car even if those keys were in Neill's pocket. There was extensive testimony at trial that Neill actually owned the car, even though there was no verifiable documentation of that. RP 118-26, 142, 183, 203, 205. But ownership is not the issue. One can have dominion and control over something to which one does not hold title, and the evidence showed that in this case not only did Driscoll actually have title, but he drove the car to DOC and unlocked it to get the cigarettes. He knew he was going to be taken into custody, RP 184-85. It makes sense that after arrival at DOC he gave the key to Neill so she could drive home.

Driscoll testified at trial that early on February 7, while Neill was taking a shower, he went to the Honda to get cigarettes and saw the scale on the center console. He picked it up because it looked like a cell phone, but when he identified it as a scale he put it back, and that is how his thumb print got on it. RP 189. But

according to Neill's rather confusing testimony, the scale would not have been in the console and she had no idea how Driscoll's print got on it. RP 158, 162-63.

Given that circumstantial evidence is given as much weight as direct evidence, and a challenge to the sufficiency of the evidence admits the truth of the State's evidence, there was more than sufficient evidence to permit a rational jury to find Driscoll guilty of unlawful possession of a firearm in the first degree and unlawful possession of a controlled substance, methamphetamine, with intent to deliver. While the defense witnesses contradicted the State's witnesses on key points, they also contradicted each other. Credibility determinations are left solely to the jury, and here the jury clearly did not believe the defense witnesses. Contested evidence is not insufficient evidence.

> 2. The record shows that defense counsel's decision not to offer a stipulation rather than allow in evidence of Driscoll's prior felony conviction would have been a legitimate trial tactic. In any event, Driscoll does not demonstrate that he was prejudiced by the admission of the judgment and sentence.

Both the Washington and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel was adequate and effective. McFarland, 127 Wn.2d at 335. To prevail in an ineffective assistance of counsel claim, a defendant must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance is so inadequate that there is a reasonable probability that the trial result would have differed, undermining confidence in the outcome. Strickland, 466 U.S. at 694. If a defendant fails to establish either prong, the claim automatically fails without consideration of the remaining prong. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), *overruled on other grounds by* Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). A reviewing court will not find ineffective assistance of counsel if the action complained of goes to trial tactics or the defense theory of the case. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1995).

One of the elements of the crime of unlawful possession of a firearm is that the defendant has a previous conviction for a serious

offense. RCW 9.41.040(1)(a). In this case it was alleged, and the jury was instructed, that the prior serious offense was Unalwful Delivery/Distribution of a Controlled Substance-Methamphetamine, to a person under the age of eighteen. CP 2, 24.

If a defendant offers to stipulate that he has a prior conviction for a serious, unspecified offense, it is error for the trial court to refuse the offer and instead admit evidence about the conviction if it would result in unfair prejudice. State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998). Prejudice occurs when the probative value of the conviction is small but there is a great risk that the jury will be tainted by information about the prior conviction and decide the case on an improper basis. State v. Rivera, 95 Wn. App. 132, 139, 974 P.2d 882, 992 P.2d 1033 (2000).

Driscoll argues that his trial counsel should have offered to stipulate that he had a prior conviction for a serious offense without identifying that crime because one of his current charges was for a similar offense. Even though Driscoll refers to Jury Instruction No. 8, Appellant's Opening Brief at 15-16, he does not assign error to it; that instruction contains the elements instruction for unlawful possession of a firearm, which includes as element (2) "]t]hat the defendant had previously been convicted of Unlawful

Delivery/Distribution of a Controlled Substance to a person under the Age of Eighteen, a serious offense." If that is an element of the crime, for purposes of this case, then Driscoll would have had to offer a stipulation that included that information. Any difference between that and the admission of the judgment and sentence is non-existent.

It is apparent from the record that defense counsel had tactical reasons for allowing the prior judgment and sentence into evidence without objection. While a conviction for delivering meth to a minor isn't a good thing, given that he was charged with unlawful possession of a firearm counsel would justifiably have been concerned that the jury would speculate that the prior conviction was for a violent offense. Driscoll never denied he had a drug problem, and testified that he had a meth problem since 1996. RP 197-98. In addition, he was on a DOSA sentence at the time of these offenses, a fact that the jury was certain to find out. RP 19. Further, Driscoll's defense was that Neill hid the gun and drugs under the hood and that he had never seen either or had any knowledge of them. By freely admitting his earlier drug conviction he could appear to be open and honest with the jury, relying on it

believing Neill. The fact that it didn't work does not mean it was not a tactical decision.

Even if counsel should have offered a stipulation, Driscoll cannot show that he was prejudiced, that the result would likely have been different if a stipulation had been offered. The evidence against Driscoll was overwhelming. The jury knew he was on supervision for a DOSA sentence at the time this offense was committed. On direct examination, he admitted that he'd been arrested several times for violations of community custody. RP 192. He testified to a long history with drug abuse. RP 196-198. He explained that he took the fall for somebody else in the 2001 conviction, that he really wasn't guilty of it. RP 199. When asked on cross examination about other felony convictions, he offered a list. RP 199-200. In the overall context of the trial, the fact that the jury knew the nature of the underlying conviction made no difference to the outcome of the trial.

Because he cannot show prejudice, he cannot show ineffective assistance of counsel, even if it would have been better tactics to offer a stipulation to an unnamed felony conviction. In Johnson, the defense had offered to stipulate that Johnson had a felony conviction that prevented him from possessing firearms

without naming the offense, and the court held that it was error for the trial court to refuse the stipulation. Johnson, 90 Wn. App. at 63. However, it also held that the error alone did not mandate reversal. Johnson's conviction was reversed based on cumulative error. Id. at 74. If refusing to accept a stipulation was not reversible error, than it should not be reversible error when trial counsel failed to offer one.

3. Permitting evidence of Driscoll's prior criminal history to come in at trial without objection was well within the scope of trial tactics.

The discussion in the previous section regarding ineffective assistance of counsel is applicable to Driscoll's assertion that his trial attorney was ineffective for permitting testimony, without objection, about Driscoll's prior convictions. Here it was clear that the defense was relying on the theory that Neill was solely responsible for the drugs and the gun being in the car and that Driscoll was totally ignorant of the contraband. Some of Driscoll's history would come in because he was on supervision for a DOSA sentence. Driscoll took the stand, and expecting a lay witness to monitor his testimony regarding his criminal history would be risky. By allowing all of his criminal history in, Driscoll could appear to be forthright and honest to the jury. Defense counsel did an excellent

job in closing argument explaining why they should believe Neill. *See e.g.*, RP 249-250. Driscoll now argues that the case turned on whether the jury believed him or the State witnesses, Appellant's Opening Brief at 19, but it also depended heavily on the jury believing Neill. She had no convictions. Unfortunately for Driscoll she was not credible, but that does not mean his attorney did not make a strategic decision to allow in Driscoll's criminal history without objection.

Finally, as before, the evidence against Driscoll was overwhelming. Even if trial counsel had objected and successfully kept Driscoll's prior convictions from the jury, the outcome of the trial would have been the same.

> 4. Having chosen to allow in evidence of Driscoll's prior convictions, counsel was correct in agreeing to Instruction 6, which told the jury that the prior convictions could be considered only for the purpose of deciding credibility or for establishing an element of the offense.

Again, Driscoll argues that his credibility was so central to the case that Instruction No. 6 prejudiced him. That instruction read:

> You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, or for determining if a prerequisite element

> of a charged crime has been proved, and for no other purpose.

CP 23-24.

Driscoll would certainly have wanted such a limiting instruction. Without it, the jury would have been free to consider his propensity for committing drug offenses, which he clearly would not have wanted. Nor, again, does the State agree that Driscoll's credibility was as important to his defense as Neill's. If the jury believed her, he could have exercised his right not to testify and he would have been acquitted. Granted that Driscoll did not help his case by testifying, but he would not have wanted the evidence of his priors to be used for any purpose the jury wanted to use it. In addition, the evidence of the 2001 conviction was an element of the crime of unlawful possession of a firearm, and it was appropriate to inform the jury of that.

And, once again, the evidence against Driscoll was so overwhelming that even if his attorney should have objected to this instruction, he cannot show prejudice. The outcome of the trial would have been no different.

> 5. By allowing in a hearsay statement about a telephone call during which Driscoll discussed drug activity, trial counsel limited the evidence to a passing

> reference. Requiring the State to produce the witness who listened to the call would have emphasized it.

Driscoll argues that his attorney was ineffective, and he was prejudiced, because trial counsel did not object to the following testimony by Dan Cochran:

> We had—I had received a phone call from an employee here at the—the Thurston County Jail, and they had informed me that they were listening to their phone calls. Most of the calls are recorded that are going out of the jail. And they had overheard a conversation with Mr. Driscoll who was on the outside talking to an offender who was locked up at the time, and they let me know that they had heard a conversation where they were referring to Mr. Driscoll several times was participating in drug activity.

RP 20-21.

Evidence of the phone call was admissible because it explained why Cochran contacted Driscoll on February 3. The State does not dispute that it was hearsay. But it was a brief explanation by Cochran, who then went on to talk about the events of the next few days. If trial counsel had objected, the State would have called the person who overheard the phone conversation, which would certainly have made a greater impression on the jury than the hearsay statement. The recording of the phone call itself might have been played to the jury. Allowing the hearsay without objection minimized the impact of the evidence on the jury, and was

not only a legitimate trial tactic but an astute move on the part of defense counsel.

> 6. The record is insufficient to demonstrate that anything but legal, ministerial matters were discussed during the jury instruction conference, which presumably was held in chambers.

At the conclusion of the evidentiary portion of the trial, the court excused the jury and made these remarks to counsel and the defendant:

> I would like to talk with counsel for a few minutes in chambers about the jury instructions. I think that the issue of the judgment and sentence has been resolved because I believe there's been discussion about areas I was concerned about on that document. I'd like to see that though. And I'll talk with counsel about it as we look at jury instructions. No longer need an instruction about the defendant choosing not to testify so the issue would be what we tell a jury about considering prior convictions. There would be two purposes: One purpose would be for impeachment. That's the standard jury instruction. The other purpose would be as a prerequisite element of a charged offense, and that is the prior conviction for delivery to a person under the age of 18. So are both counsel available now to talk with me?

RP 212-13. The court went on to address a contempt issue regarding Neill, and then recessed. "We'll be in recess and I'll see counsel in chambers." RP 213-15. When court reconvened, the jury was present, instruction packets were distributed, and the court began to read the instructions. RP 215-16.

The rights of both a defendant and the public to open and public trials are protected by the Sixth Amendment to the United States Constitution and the Washington Constitution, art. I, §§ 10, 22. Whether a violation of the right to a public trial has occurred is reviewed de novo. State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

No Washington court has ever held that the right to a public trial is absolute. State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (A criminal defendant does not have the right to "a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.").[3] The public trial right includes adversary proceedings such as the taking of evidence, suppression hearings, voir dire, and jury selection. Id. at 114. By contrast, when the subject of a proceeding deals with "purely ministerial or legal issues that do not require the resolution of disputed facts," there is no right to be present. Id.

The federal constitution guarantees a criminal defendant the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend

[3] A petition for review of Sadler has been stayed by the Supreme Court pending a final decision in State v. Wise, 148 Wn. App. 425, 200 P.3d 266 (2009), *review granted*, 170 Wn.2d 1009 (2010).

against the charge," but not when his "presence would be useless, or the benefit but a shadow." Snyder v. Massachusetts, 291 U.S. 97, 105-07, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934) (*overruled in part on other grounds sub nom.* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Washington Constitution protects the purposes of a public trial, which are ensuring a fair trial, reminding the officers of the court of the importance of their functions, and encouraging witnesses to come forward. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

When a court does close any portion of a trial, it must first conduct the analysis set forth in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and enter findings to support the closing.

This court has addressed the question of whether a chambers jury instruction conference violates the right of either the public or the defendant to a public trial in State v. Bennett, 168 Wn. App. 197, 275 P.3d 1224 (2012). That case discussed the functional difference between the rights of the defendant and the public, Id. at 203-04. Driscoll correctly quotes the Bennett court:

"We agree with our Supreme Court, *Sadler* and *Sublett*[4] and hold that there is no per se rule that the issues raised during in-chambers conferences are not subject to public scrutiny and the defendant's right to be present." Bennett, 168 Wn. App. at 205. On the other hand, there is no per se rule that in-chambers conferences *are* public proceedings.

The court in Bennett held that the in-chambers jury instruction conference did not violate the right of either the defendant or the public to an open and public trial. Id. at 207. This result was based on the lack of a record as to what was discussed in chambers. The burden is on the appellant to show an error, and in that case "a complete absence of a record relating to the challenged action cannot compel appellate review." Id. at 207, n. 9. In Bennett, the judge and counsel met in chambers to "finalize" the jury instructions, and afterwards the court stated on the record that they had gone over the instructions, copied and collated them, and the defendant stated that he had no objections. Id. at 200.

Driscoll maintains that in his case there is an adequate record and that it shows that factual issues were discussed. On the contrary, this record is even more sparse than that in Bennett, and

[4] State v. Sublett, 156 Wn. App. 160, 181-82, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010).

nothing indicates that the court discussed disputed matters of fact. The court made no record after the conference about the subjects discussed, nor did either side voice any exceptions.

First, the court indicated that it believed the issue of any redactions to the judgment and sentence entered as Exhibit 11 had been resolved. Even if that were not the case, the only issues would have been what information to let the jury see, not what the evidence was. It was a strictly legal decision. Any discussion about the limiting instruction would also have been about the proper law to give the jury. The convictions themselves were in evidence and there was no need to make any factual finding. Driscoll is likely correct that the judge and counsel would have been discussing the testimony, Appellant's Opening Brief at 28, but there were no factual issues to decide. The discussion would have been about fitting those facts into the instructions to be given, which is a legal determination. "What we tell the jury about considering prior convictions," RP 212, is also a legal decision. There were no facts to be decided upon.

The record in Driscoll's case indicates what the judge wanted to talk about, but there is no record of what was discussed. The fact that the limiting instruction given, CP 23-24, was more

complete than the State's proposed instruction, CP 59, gives no indication that there was any actual discussion, as the prosecutor must have instantly realized that the proposed instruction precluded the jury from considering the 2001 judgment and sentence as proof of the prerequisite conviction of a serious offense. "In general, in-chambers conferences between the court and counsel on legal matters are not critical stages of the proceedings except when the issues involve disputed facts." State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010).

Driscoll argues that because legal issues would have been discussed, the public had the right to be present. What the court said in Bennett was:

> Thus, even in proceedings involving purely legal matters, the public's presence *may* ensure the fairness of such proceedings, although the same cannot be said for ministerial or administrative matters that do not impact the defendant's rights. *But see In re Det. Of Ticeson*, 159 Wn. App. 374, 383-86, 246 P.3d 550 (2011) (holding that Washington law historically supports in-chambers conferences on purely legal issues).

Bennett, 168 Wn. App. at 204 (emphasis added, internal footnote omitted.) This is far from a holding that the public has a right to be present at instruction conferences.

As noted, the record here is silent about what did happen at the instruction conference and has only a couple of hints as to the subjects the court wanted to address. It is too thin a record to support a finding that the public's right to an open trial was violated. This court should hold that there was no violation of either the defendant's or the public's rights.

> 7. The record reflects that the court did give consideration to Driscoll's ability to pay his legal financial obligations before imposing them.

At sentencing, the court imposed a $500 crime victim assessment, $200 in court costs, $1000 to the Thurston County drug enforcement fund, a $100 Thurston County Drug Court fee, a $100 crime lab fee, and a $100 felony DNA collection fee. RP 42-43. Costs are authorized by statute. "[S]tatutes authorizing costs are in derogation of common law and should be strictly construed." State v. Moon, 124 Wn. App. 190, 195, 100 P.3d 357 (2004).

a. Crime victim assessment.

A crime victim assessment is required by RCW 7.68.035.

> When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that

> includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). Subsequent sections of this statute direct the collection and disbursement of this money to assist victims of crime.

The victim assessment of $500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991) (victim assessment is not a "cost"); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992). As such, it follows that the defendant's financial circumstances are irrelevant.

b. Court costs.

Court costs are allowed by RCW 10.01.160 and 9.94A.760(1). "The court *may* require a defendant to pay costs." RCW 10.01.160(1), emphasis added. Costs are limited to the expenses the State specifically incurred in prosecuting the defendant's case. RCW 10.01.160(2). Because the term "costs" refers to expenses incurred by the State, restitution and victim assessments would not be included as "costs." RCW 10.46.190

provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee "as provided for in civil actions." RCW 36.18.016(3)(b) allows a jury demand fee of $250 for a jury of twelve in criminal cases, the same amount as allowed in RCW 36.18.016(3)(a) for civil cases. The court is directed to take into account the financial resources of the defendant and not order costs if the defendant cannot pay them. RCW 10.01.160(3).

In Driscoll's case this category includes only the filing fee.

c. DNA collection fee.

A fee for DNA collection is required by RCW 43.43.7541: "Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars." (Emphasis added.) All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a "court-ordered legal financial obligation as defined in RCW 9.94A.030." RCW 43.43.7541. RCW 9.94A.030(29) provides, in part, that a "legal financial obligation" is an amount of money ordered by the court and may include, restitution, crime victims' compensation fees, court costs, drug funds, attorney fees, costs of

defense, fines, and "any other financial obligation that is assessed to the offender as a result of a felony conviction."

The imposition of a $100 DNA collection fee is mandatory, and has been since June 12, 2008. RCW 43.43.7541, State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009). Therefore, Driscoll's ability to pay was irrelevant to the imposition of that amount.

d. Thurston County drug enforcement fund and drug court assessment.

The Thurston County drug enforcement fund and drug court assessments are authorized by RCW 9.94A.030(26), which includes fees paid to a county or interlocal drug fund as a legal financial obligation. The court may impose legal financial obligations under 9.94A.760(1).

Even though Driscoll did not challenge these assessments in the trial court he may raise it for the first time on appeal. State v. Hunter, 102 Wn. App. 630, 634, 9 P.3d 872 (2000). The statute authorizing the drug fund contribution does not expressly limit it to drug-related crimes, but the court in Hunter found that to be a "reasonable and rather obvious" interpretation." Id. at 639. The court further found that it is analogous to a fine and held that the

trial court may impose no more than $20,000, which is the maximum fine set for any felony not otherwise statutorily fixed. RCW 9.92.010; Hunter, 102 Wn. App. at 639. The drug fund assessment is to be based upon the costs of the investigation in the defendant's case, and if the defendant challenges it the State must substantiate the amount. Id.

e. Crime lab fee.

The crime lab fee is required by RCW 43.43.690(1):

> (1) When a person has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

The language here is mandatory. If the defendant is acquitted of the charge associated with the crime lab fee, it cannot be imposed. Moon, 124 Wn. App. 193-94.

f. Enforcement of legal financial obligations.

The sentencing court retains jurisdiction to enforce the legal financial obligations, for crimes committed after July 1, 2000, until

they are satisfied, even if that exceeds the statutory maximum for the crime. RCW 9.94A.760(4).

g. Statutory relief.

A defendant always has the opportunity to seek relief from legal financial obligations.

> RCW 10.01.160(4): A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

If a court finds at a later time that the costs will impose a manifest hardship, it has the authority to modify the monetary obligations. Curry, 118 Wn.2d at 914. Courts may refuse to address a request for remission until the State attempts to collect the financial obligations. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511 (2011).

Challenges to sentencing conditions are not ripe for review until the State attempts to enforce them. With respect to financial obligations, the relevant question is whether the defendant is unable to pay them at the time the State attempts to collect them,

and whether the State seeks to impose sanctions for nonpayment. State v. Sanchez Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010). It is difficult for a sentencing court to make any realistic prediction about a defendant's ability to pay costs several years down the road when he is released from prison. "[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991).

RCW 10.01.160(4) provides a mechanism by which a defendant who is "not in contumacious default" of his legal financial obligations may seek remission for some or all of the costs. As noted above, he may not avoid restitution, the victim penalty assessment, or the DNA collection fee.

> Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his *present* ability to pay at the relevant time. In contrast, the inquiry at sentencing as to *future* ability to pay is somewhat speculative . . . .

Baldwin, 63 Wn. App. at 311, emphasis in original. *See also*, Bower, 64 Wn. App. at 813, Curry, 118 Wn.2d at 914, Bertrand, 165 Wn. App. at 405.

h. Standard of review

A trial court's determination of a defendant's resources is a factual one and is reviewed under the "clearly erroneous" standard. Balancing the defendant's ability to pay against the amount of the obligation is a matter of judgment, and reviewed for an abuse of discretion. Baldwin, 63 Wn. App. at 312.

Formal findings of fact are not required when the sentencing court imposes court costs. State v. Curry, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991), *affirmed* 118 Wn.2d 911, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991) (when the right to counsel is not impacted); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991); Bertrand, 165 Wn. App. at 404 (although there must be a sufficient record to permit review); State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (failure to enter formal findings before imposing costs not a constitutional error that requires resentencing). Driscoll's counsel was apparently retained, and no court-appointed attorney fees were imposed. CP 42.

A separate analysis is required when considering the different obligations imposed on the defendant. Baldwin, 63 Wn. App. at 309.

D. CONCLUSION.

None of the claims raised by Driscoll have merit and the State respectfully asks this court to affirm both convictions.

Respectfully submitted this 7th day of August, 2012.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of August, 2012, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

August 07, 2012 - 12:56 PM

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