COA NO. 44077-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYSON MAXWELL,

Appellant.

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

The Honorable Carol Murphy, Judge

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining To Assignments Of Error 1

B. STATEMENT OF THE CASE 1

a. Procedural Facts 1

b. Trial 3

C. ARGUMENT 9

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM 9

a. No Principal Liability 9

b. No Accomplice Liability 14

2. THE COURT VIOLATED MAXWELL'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE. 17

a. A Portion Of The Jury Selection Process Was Not Open to The Public. 18

b. The Trial Court's Failure To Justify The Closure Requires Reversal Of The Convictions 19

3. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE DRUG COURT FEE AS PART OF THE JUDGMENT AND SENTENCE 26

4. THE TRIAL COURT ERRED WHEN IT FOUND MAXWELL HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS 29

TABLE OF CONTENTS

Page

D. CONCLUSION 31

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Carle,
93 Wn.2d 31, 604 P.2d 1293 (1980) 28

In re Pers. Restraint of Domingo,
155 Wn.2d 356, 119 P.3d 816 (2005) 15

In Re Pers. Restraint of Fleming,
129 Wn.2d 529, 919 P.2d 66 (1996) 28

In re Pers. Restraint of Morris,
176 Wn.2d 157, 288 P.3d 1140 (2012) 25

In re Pers. Restraint of Orange,
152 Wn.2d 795, 100 P.3d 291 (2004) 19, 24

Pierce County v. Magnuson,
70 Wn. 639, 127 P. 302 (1912) 26

State v. Anderson,
96 Wn.2d 739, 638 P.2d 1205 (1982) 17

State v. Bahl,
164 Wn.2d 739, 193 P.3d 678 (2008) 27

State v. Baldwin,
63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991) 31

State v. Bertrand,
165 Wn. App. 393, 267 P.3d 511 (2011),
review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012) 29-31

State v. Bone-Club,
128 Wn.2d 254, 906 P.2d 325 (1995) 20, 23, 24

State v. Brightman,
155 Wn.2d 506, 122 P.3d 150 (2005) 20, 23

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Burch,
65 Wn. App. 828, 830 P.2d 357 (1992) 22

State v. Callahan,
77 Wn.2d 27, 459 P.2d 400 (1969) 10, 11

State v. Chouinard,
169 Wn. App. 895, 282 P.3d 117 (2012),
review denied, 176 Wn.2d 1003 (2013) 10-13

State v. Collins,
76 Wn. App. 496, 886 P.2d 243,
review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995); 13

State v. Colquitt,
133 Wn. App. 789, 137 P.3d 892 (2006) 10, 17

State v. Cook,
__Wn. App. __, 293 P.3d 1237 (2013) 23

State v. Cote,
123 Wn. App. 546, 96 P.3d 410 (2004) 11

State v. DeVries,
149 Wn.2d 842, 72 P.3d 748 (2003) 17

State v. Easterling,
157 Wn.2d 167, 137 P.3d 825 (2006) 19

State v. Eilts,
94 Wn.2d 489, 617 P.2d 993 (1980),
overruled by statute on other grounds,
State v. Barr, 99 Wn.2d 75, 658 P.2d 1247 (1983) 28

State v. Enlow,
143 Wn. App. 463, 178 P.3d 366 (2008) 10, 11

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Ford,
137 Wn.2d 472, 973 P.2d 452 (1999) 27

State v. Galbert,
70 Wn. App. 721, 855 P.2d 310 (1993) 13

State v. George,
146 Wn. App. 906, 193 P.3d 693 (2008) 10, 12, 13

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 9

State v. Hundley,
126 Wn.2d 418, 895 P.2d 403 (1995) 9, 17

State v. Hunter,
102 Wn. App. 630, 633-34, 9 P.3d 872 (2000),
review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001) 28

State v. Israel,
113 Wn. App. 243, 54 P.3d 1218 (2002),
review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003) 15, 16

State v. Lakotiy,
151 Wn. App. 699, 214 P.3d 181, 189 (2009),
review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010) 11

State v. Leyerle,
158 Wn. App. 474, 242 P.3d 921 (2010) 23

State v. McDaniel,
155 Wn. App. 829, 230 P.3d 245,
review denied, 169 Wn.2d 1027, 241 P.3d 413 (2010) 16

State v. Moen,
129 Wn.2d 535, 919 P.2d 69 (1996) 28

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Murray,
118 Wn. App. 518, 77 P.3d 1188 (2003) 26, 28

State v. Nolan,
98 Wn. App. 75, 988 P.2d 473 (1999),
aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000) 26

State v. Paulson,
131 Wn. App. 579, 128 P.3d 133 (2006) 26

State v. Phelps,
113 Wn. App. 347, 57 P.3d 624 (2002) 27

State v. Pringle,
83 Wn.2d 188, 517 P.2d 192 (1973) 27

State v. Rhone,
168 Wn.2d 645, 229 P.3d 752 (2010) 23

State v. Roberts,
142 Wn.2d 471, 14 P.3d 713 (2000) 15

State v. Rotunno,
95 Wn.2d 931, 631 P.2d 951 (1981) 16

State v. Slert,
169 Wn. App. 766, 282 P.3d 101 (2012) 21

State v. Spruell,
57 Wn. App. 383, 788 P.2d 21 (1990) 11

State v. Theroff,
33 Wn. App. 741, 657 P.2d 800,
review denied, 99 Wn.2d 1015 (1983) 27

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Trout,
125 Wn. App. 403, 105 P.3d 69,
review denied, 155 Wn.2d 1005, 122 P.3d 185 (2005) 15

State v. Wise,
176 Wn.2d 1, 288 P.3d 1113 (2012) 19, 20, 23-25

FEDERAL CASES

Batson v. Kentucky,
476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 22

Georgia v. McCollum,
505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) 22

In re Oliver,
333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948) 20

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 9, 17

Powers v. Ohio,
499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) 22

Presley v. Georgia,
558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) 20, 24

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) 19, 24

OTHER STATE CASES

People v. Harris,
10 Cal. App. 4th 672, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992),
review denied, (Feb 02, 1993) 20, 22

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

Chapter 9.41 RCW 10

RAP 2.5 28

RCW 2.28.170(2) 27

RCW 9A.08.020(3)(a) 14

RCW 9.41.040(1)(a) 10

RCW 9.94A.030(30) 28

RCW 10.01.160(2) 26, 27

RCW 10.01.160(3) 30, 31

Sentencing Reform Act 26, 28

U.S. Const. amend. I 19

U.S. Const. amend. VI 19

U.S. Const. amend. XIV 3

Wash. Const. art. I, § 3 9

Wash. Const. art. I, § 10 19

Wash. Const. art. I, § 22 19

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support the conviction for unlawful possession of a firearm.

2. The court violated appellant's constitutional right to a public trial during the jury selection process.

3. The court erroneously imposed a drug court fee as part of the judgment and sentence. CP 60.

4. The court erred when it found appellant has the current or future ability to pay legal financial obligations. CP 59.

Issues Pertaining to Assignments of Error

1. Must appellant's conviction for unlawful possession of a firearm be reversed because the evidence is insufficient to show appellant possessed the firearm or that he acted as an accomplice to this crime?

2. The court conducted a portion of jury selection at a private sidebar proceeding at the clerk's station. Where the court did not analyze the requisite factors before doing so, did the procedure violate appellant's constitutional right to public trial?

3. Did the court exceed its statutory authority when it imposed a drug court fee where appellant did not participate in drug court?

4. Absent an inquiry into the appellant's individual circumstances, did the court err when it found the current or future ability to pay legal financial obligations?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Tyson Maxwell with (1) first degree unlawful possession of a firearm (count I); (2) possession of a controlled substance (methamphetamine) with intent to deliver (count II); (3) possession of a controlled substance (oxycodone) with intent to deliver (count III); (4) possession of a controlled substance (marijuana) with intent to deliver (count IV); (5) making a false or misleading statement to a law enforcement officer (count V); (6) unlawful use of drug paraphernalia (count VI); and (7) possession of a controlled substance (MDMA) with intent to deliver (count VII). CP 10-11; 2RP[1] 485-86.

A jury convicted on all counts. CP 50-56. The court sentenced Maxwell to 100 months total confinement. CP 61. This appeal timely follows. CP 68-79.

[1] The verbatim report of proceedings is referenced as follows: 1RP - 9/26/12 (voir dire); 2RP - three consecutively paginated volumes consisting of 9/26/12, 9/27/12 and 9/28/12; 3RP - 10/2/12.

2. Trial

A woman named Jisu Kim rented a hotel room at the Comfort Inn in Lacey for one night. 2RP 54, 56-57, 244, 302-33, 311. She checked in during the afternoon. 2RP 317. Kim said she was checking in with her boyfriend. 2RP 303. Maria Ruiz, the hotel manager, was shown a photograph of Anthony Banek at trial and said he looked similar to the person Kim identified as her boyfriend. 2RP 57, 80, 319, 322-23.

After check-in, Ruiz saw that man and another woman who had accompanied Kim moving things into the room. 2RP 303, 307-08. Ruiz recognized Tyson Maxwell as a man hanging around outside the hotel while the others moved their belongings into the room. 2RP 302, 308-09, 324-25.[2]

Kim went down to the front desk around 5:30 the next morning and asked for the return of her room deposit. 2RP 298. Kim said people were in the room that she did not know and she did not want to be responsible for them. 2RP 57.[3] The night auditor returned the deposit. 2RP 298-99.

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[2] Ruiz was certain Tyson Maxwell was not the man identified by Kim as her boyfriend. 2RP 308.

[3] An officer testified at trial that Ruiz told him this upon his arrival at the scene. 2RP 57. Ruiz testified at trial that Kim said she had to leave the room because she had gotten into a fight with her boyfriend and he did not want her there. 2RP 298.

Later in the morning, Ruiz checked on the room intending to tell the people inside that they had to vacate because they did not rent the room. 2RP 299. Ruiz unsuccessfully attempted to awaken the two men inside. 2RP 58, 299. A maintenance man entered the room and yelled at them, but the men gave little to no response. 2RP 58, 300.

Ruiz called 911. 2RP 300. Police arrived at about 10 a.m. 2RP 56. Ruiz led the police to the hotel room, where officers knocked on the door and announced their presence. 2RP 59. Receiving no answer, officers entered the room using the manager's key. 2RP 59-60. Two men were inside, each sleeping on separate beds. 2RP 60, 79, 246. The officers shook the men awake. 2RP 60-61. The men seemed dazed. 2RP 61.

Drugs and drug paraphernalia were sitting on a table. 2RP 62-64. The two men, later identified as Maxwell and Banek, were handcuffed. 2RP 64. Maxwell, who had an outstanding warrant for his arrest, gave officers a false name. 2RP 65, 67-68, 92. Banek gave a false first name. 2RP 66-67, 252.

Maxwell told police that a female he met the night before took him back to her hotel room. 2RP 92, 253. He described her as a small Asian female, which matched Kim's general description. 2RP 213-14, 253, 319-20.

While officers detained Maxwell and Banek in the room and waited for judicial authorization to conduct a search, Maxwell attempted to conceal a wad of money underneath the pillow of the bed he was on. 2RP 93, 254-55, 281-82. Some $20 bills were sticking out of his pants pocket. 2RP 93, 95. The total amount of money recovered was $2001 in varying denominations, including a large number of $20 bills. 2RP 98-100. Maxwell denied having anything in the room except the $20 bills sticking out of his pocket. 2RP 92, 125, 253, 284. A hollow pen and piece of tinfoil were found next to the wad of money. 2RP 94-96, 257.

A marijuana pipe, a methamphetamine pipe, a baggie containing 1.5 grams of marijuana, a baggie containing .1 gram of crystal methamphetamine and MDMA pills were on a table next to Maxwell's bed. 2RP 62-63, 128-31, 142-44, 169, 172, 174, 223-24, 247-48 291-92. There was a burnt piece of aluminum foil near the pipe and a hollowed out pen. 2RP 62-64, 130. A hollow pen is used to ingest smoke from prescription pills heated on the tinfoil. 2RP 63-64, 98. A partially charred oxycodone tablet in tinfoil was also recovered. 2RP 148-49, 171, 224, 229, 259.

Inside a nightstand between the two beds, officers recovered several documents with prices, names and dates, which appeared to be pay-owe sheets used in drug dealing. 2RP 131, 133-42, 230-31. One of

the entries after the number "5" stated "cover Tys." 2RP 138. A knife was also in the nightstand. 2RP 131.

Police found a canister containing 14 oxycodone pills inside a pillowcase on Banek's bed. 2RP 144-45, 170, 225. A stolen laptop and four cell phones were also in the room. 2RP 129-30, 132, 156-57. A knife was found in Maxwell's pocket. 2RP 80.

A loaded .357 revolver was found underneath the mattress of Banek's bed. 2RP 145-46, 160, 225-26, 260. Police recovered this firearm while Maxwell and Banek were still in the room. 2RP 296. Three .357 bullets were in a backpack in a closet. 2RP 132, 232.

A jail recording of a phone conversation between Maxwell and Kim, which took place the day after the arrest, was admitted into evidence. 2RP 184-87, 210. The two talked about the previous day's events. 2RP 187-202. Kim told Maxwell that she left the room because he was being mean to her. 2RP 191.

At one point, Kim asked "what's gonna happen to you?" 2RP 191. Maxwell replied, "I don't really know" and went on to say "I got a pistol charge now (inaudible)." 2RP 191-92. Kim said, "I know they're charging you. I looked. I looked it (inaudible). But, like, it wasn't even yours, the gun. I mean, like they aren't even yours." 2RP 192. Maxwell replied, "I don't know." 2RP 192. Kim said, "What do you mean you

don't know? Do you even care?" 2RP 192. Maxwell replied "(inaudible) everything, all my shit was in that room. Do you know what happened to it?" 2RP 192. Kim said she called police because her stuff was in there and was told it was for evidence. 2RP 192. Maxwell said police only found some money on him. 2RP 200-01.

Maxwell told Kim that the gun found by the police was not under his bed. 2RP 196. When Kim referenced the unlawful possession of oxycodone and firearm possession charges, Maxwell replied, "Those weren't mine, neither." 2RP 197. Kim said "What?" 2RP 197. Maxwell then said "The too-nam. You know what that is? You remember what I told you?" 2RP 197. After Kim said she knew, Maxwell said "I still have my too-nam on me, right now." 2RP 197. An officer testified to his belief that "too-nam" was a reference to pills, although he did not know the meaning of that term. 2RP 212-13, 233.

In the recording, reference was made to "Jeanine" and "Lacey" as two people who were also in the hotel room but left before police arrived. 2RP 190-91, 194. At one point during the conversation, Kim said, "everybody was smoking in there." 2RP 199.

Banek testified at trial for the defense. 2RP 349-394. He had earlier pleaded guilty to offenses associated with events at the hotel. 2RP 350-52. Banek said he had known Maxwell for a few months. 2RP 356.

Maxwell was in a physical relationship with Kim at the time. 2RP 360. Kim was not Banek's girlfriend. 2RP 360-61. Maxwell had gone to the hotel with Banek, Kim and "Jennifer." 2RP 361. Kim and Jennifer rented the room because they had valid identification. 2RP 362. Banek and Kim each paid half to rent the room. 2RP 363.

According to Banek, Maxwell, Kim and Jennifer left in the afternoon and returned to the room at about one o'clock in the morning. 2RP 354, 364-65. They drank alcohol and passed out. 2RP 354, 368. The two women left later that morning. 2RP 354. Banek passed out from drugs and alcohol but woke up when police arrived. 2RP 354, 365, 368.

Banek insisted the drugs in the hotel room were his.[4] 2RP 352-53. He acknowledged he was a drug dealer. 2RP 364, 368. He denied selling drugs with Maxwell. 2RP 386. Banek testified the gun was his. 2RP 353. He kept the gun concealed under the mattress. 2RP 355. He did not want anyone to know he had a gun in the room. 2RP 355. The shells were in his backpack. 2RP 355. Both Banek and Maxwell had previously been convicted of a serious offense. 2RP 296, 376.

[4] Banek told police at the scene that none of the property in the room was his. 2RP 253.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

The State failed to prove Maxwell was guilty of the crime of first degree possession of a firearm either as a principal or as an accomplice. The evidence is insufficient to show Maxwell was guilty as a principal because the "possession" element of the crime was not proven beyond a reasonable doubt. The evidence is insufficient to show Maxwell was guilty as an accomplice because the evidence does not establish he knowingly aided Banek in committing this crime. The conviction must therefore be reversed and the charge dismissed with prejudice.

a. No Principal Liability.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In determining the sufficiency of evidence, existence of a fact

cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

A person is guilty of first degree unlawful possession of a firearm if the person owns or has in his possession or control a firearm after having previously been convicted of a serious offense as defined by chapter 9.41 RCW. RCW 9.41.040(1)(a).

Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). The evidence does not show Maxwell had actual possession of the gun. The gun was underneath the mattress of the bed on which Banek was lying. 2RP 145-46, 160, 225-26, 260.

The State therefore needed to prove Maxwell had constructive possession. Constructive possession means the defendant has dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003 (2013). "The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control." State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

Maxwell was in proximity to the gun found underneath Banek's bed mattress insofar as it was a small, standard-sized hotel room. 2RP 62.

But mere proximity to contraband is insufficient to show constructive possession. Chouinard, 169 Wn. App. at 899; State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990).

Even mere proximity combined with evidence of momentary handling is insufficient to show constructive possession of contraband. State v. Lakotiy, 151 Wn. App. 699, 715, 214 P.3d 181, 189 (2009), review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010); see Spruell, 57 Wn. App. at 388-89 (sitting next to cocaine and momentary handling of cocaine insufficient to show possession); State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (passenger in vehicle where drugs found and fingerprints on jar containing drugs insufficient to show possession); Enlow, 143 Wn. App. at 469-70 (hiding in truck and fingerprints on items insufficient to show constructive possession of truck containing components of methamphetamine manufacture); Callahan, 77 Wn.2d at 30-31 (sitting next to drugs, earlier handling of drugs, and admitted possession of drug paraphernalia insufficient to show possession of drugs).

Here, there is no evidence that Maxwell even handled the gun found under the mattress. There was no evidence presented showing Maxwell's fingerprints on the gun and no testimony otherwise showed Maxwell touched the gun at any time.

Mere proximity to contraband and knowledge of its presence is insufficient to establish constructive possession. George, 146 Wn. App. at 923. In Chouinard, this Court held the evidence was insufficient to convict for firearm possession because the State demonstrated only the defendant's proximity to the weapon and his knowledge of its presence. Chouinard, 169 Wn. App. at 899, 903.

Here, the State did not even establish Maxwell's knowledge of the firearm's presence in the hotel room. There was no evidence that the gun was protruding from the underneath the bed mattress and was therefore visible to Maxwell before police recovered it. Banek testified he kept the gun hidden. 2RP 355. There was no testimony that Maxwell made any movements toward the gun while police were present or even looked in the direction where the gun was hidden.

Nor did the State prove Maxwell had dominion and control over the premises. "Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found." Chouinard, 169 Wn. App. at 899-900.

But here, Maxwell did not own the hotel room. He was not even the person who registered for the room. Kim was the renter. 2RP 54, 56-57, 244, 302-03, 311. And Banek was the one who paid half for the room.

2RP 363. Maxwell neither rented the room nor helped pay for it. He did not live there. The rental was for one night. 2RP 311. He had a temporary, transient connection to the premises.[5] There was no evidence he even had a key to the room.

His status is more analogous to a temporary resident in a house or a passenger in a car, in which case he cannot be deemed to have dominion and control over the premises. See State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (temporary residence, personal possessions on the premises, and knowledge of the presence of the drug is insufficient to prove constructive possession), review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995); State v. Galbert, 70 Wn. App. 721, 727-28, 855 P.2d 310 (1993) (temporary residence in house, defendant sleeping inside, and proximity to drugs insufficient to show dominion and control over premises or drugs); George, 146 Wn. App. at 920 (insufficient evidence to support a finding of dominion and control over vehicle where defendant was passenger, not driver or owner); Chouinard, 169 Wn. App. at 902 (same).

[5] Officer Miller testified that, in his experience, people often transact drugs out of hotels because "[i]t's just very transient. You can go get a room, do your business, get out, and then get another room before you set up a pattern where people are reporting suspicious activity or a lot of trafficking or stuff like that." 2RP 238.

Looking at the evidence in the light most favorable to the State, the evidence does not establish Maxwell possessed the firearm. He therefore cannot be guilty of the crime on a theory of principal liability.

b. No Accomplice Liability.

Moreover, the evidence is insufficient to support Maxwell's conviction of unlawful possession of a firearm in the first degree based on accomplice liability. A person is guilty of a crime as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). An accomplice liability theory must therefore be based on facts showing Maxwell solicited, commanded, encouraged, requested, or aided Banek's unlawful possession of a gun. The record does not establish this necessary fact.

The State argued Maxwell and Banek acted in concert. 2RP 434-35. Evidence supports accomplice liability on the drug charges. But accomplice liability on the drug charges is no substitute for accomplice liability on the firearm charge. Those are separate analyses. There is no evidence showing Maxwell engaged in any action that could reasonably be construed as knowingly aiding or assisting Banek in possessing the gun. There is no evidence showing Maxwell even knew Banek had a gun.

Accomplice liability attaches only when a person acts with knowledge of the specific crime that is charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000). Stated another way, accomplice liability follows only where the State proves the accomplice has general knowledge of *the* specific crime the principal intends to commit, rather than general knowledge that the principal intended *a* crime. Roberts, 142 Wn.2d at 512–13. The Supreme Court has accordingly rejected the "in for a dime, in for a dollar" theory of complicity wherein accomplice liability strictly attaches for any and all crimes that follow. Id.; In re Pers. Restraint of Domingo, 155 Wn.2d 356, 365-66, 119 P.3d 816 (2005).

The evidence does not establish Maxwell knew Banek possessed a firearm let alone that Maxwell aided that crime. An accomplice must have specific knowledge of the general crime charged and aid in the planning or commission of that crime. State v. Israel, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003); State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69, review denied, 155 Wn.2d 1005, 122 P.3d 185 (2005).

Viewing the evidence in the light most favorable to the State, the evidence at most may have showed Banek's act of possessing a firearm was

foreseeable. One officer testified most drug dealers carry weapons to protect themselves. 2RP 68, 175. But it is not enough that Maxwell may have anticipated that Banek would have a gun. "[F]oreseeability is not sufficient to establish accomplice liability." Israel, 113 Wn. App. at 288. Maxwell may have conducted himself in a manner that ultimately led to Banek's foreseeable act of firearm possession, but the evidence is insufficient to convict him as an accomplice to that act.

Mere presence at the commission of the crime, even coupled with assent to the crime or knowledge that the presence will aid in the commission of the crime, is insufficient to show accomplice liability. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); State v. McDaniel, 155 Wn. App. 829, 863, 230 P.3d 245, review denied, 169 Wn.2d 1027, 241 P.3d 413 (2010). It must be established that Maxwell was ready to assist in the crime of unlawful firearm possession. Rotunno, 95 Wn.2d at 933. A person present at the scene cannot be deemed ready to assist a crime that he does not know exists. The State did not prove Maxwell had knowledge that he was aiding in the specific crime of unlawful firearm possession.

Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a

reasonable doubt. Hundley, 126 Wn.2d at 421-22. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Id. (quoting Winship, 397 U.S. at 364). In the end, whether Maxell possessed the gun as a principal or aided in the commission of the possession of that gun rests on guess, speculation, or conjecture, which is insufficient to prove the fact of such agreement under a sufficiency of evidence standard. Colquitt, 133 Wn. App. at 796. "No reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422.

Maxwell's unlawful firearm conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE COURT VIOLATED MAXWELL'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

The parties exercised peremptory challenges in a manner that was not open to the public. The court erred in conducting this portion of the jury selection process in private without justifying the closure under the

standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions.

a. A Portion Of The Jury Selection Process Was Not Open to The Public.

Jury selection took place on September 26, 2012. 1RP. The venire panel was publicly questioned on the record in the courtroom and excusals for cause were made. 1RP 11-131. The court then told the jury how the remaining portion of jury selection would take place:

> The next step in this process, ladies and gentlemen, is the part where we actually choose the jurors in this case. During that process, the lawyers will be having a discussion with the clerk to my left, and some of those discussions are going to involve maybe looking out at your numbers and indicating their preferences and some discussions that *the whole idea is that you don't hear what's going on.* So I'm going to ask you please to not try to hear what's going on up here at the clerk's station. And to aid in that process, you may have discussions amongst yourselves about anything unrelated to this case . . . I would ask that you generally remaining your places, although you may stand if that's more comfortable for you. After we've had these discussions up here, I will get your attention, and then we will seat our jury.

1RP 131-32 (emphasis added).

Peremptory challenges were then exercised off the record. 1RP 132. After the challenges took place, the court went back on the record

and announced those who would serve as jurors for the trial. 1RP 132-34. A jury was subsequently sworn in. 1RP 135.

b. The Trial Court's Failure To Justify The Closure Requires Reversal Of The Convictions.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173–74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6. The public nature of trials is a check on the judicial system, provides for

accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. at 6.

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (holding peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993).

Here, the trial judge conducted a portion of the jury selection process in private. The trial court violated Maxwell's constitutional right

to a public trial by directing peremptory challenges to be exercised during a private proceeding at the clerk's station. 1RP 131-32. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings at the clerk's station were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised off the record, which demonstrates they were done in a way that those in the courtroom would not be able to overhear. In fact, the judge told jurors the challenges would be exercised at the clerk's station for that very reason. 1RP 131.

As a practical matter, the judge might as well have conducted the peremptory challenge process in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (dismissal of jurors during a courtroom sidebar discussion is a portion of jury selection held outside the public's purview). What took place at the clerk's station should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place.

The ultimate composition of the jury was announced in open court. But the selection process was actually closed to the public because which

party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. Harris, 10 Cal. App. 4th at 683 n.6. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Id.

While 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, 48-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). A prosecutor is forbidden from using peremptory challenges based on race or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (race); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992) (gender).

It is particularly important that the peremptory challenge process be open to the public to serve as a check upon the removal of potential jurors on the impermissible basis of race or gender. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Improper removal of potential jurors occurs through the exercise of peremptory challenges. See, e.g.,

State v. Cook, __Wn. App. __, 293 P.3d 1237, 1238-39 (2013); State v. Rhone, 168 Wn.2d 645, 648-51, 229 P.3d 752 (2010).

The public trial right encompasses 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. Brightman, 155 Wn.2d at 514; State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010). Having the peremptory process of jury selection open to the public acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place and holds the court accountable by requiring careful scrutiny of whether the removal of a potential juror is justified by a non-discriminatory reason.

Conducting peremptory challenges in a private manner that excluded the public from observing that process violated Maxwell's right to a public trial. *Before* a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone

present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[6]

There is no indication the court considered the Bone-Club factors before conducting the private jury selection process at issue here. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22. Appellate courts do not

[6] The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller. Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 130 S. Ct. at 724 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because a portion of jury selection was not open to the public, Maxwell's constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Maxwell's convictions must be reversed due to the public trial violation. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Maxwell's public trial right before the peremptory challenges were exercised in secret. There is no waiver. Reversal of the convictions is required.

3. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE DRUG COURT FEE AS PART OF THE JUDGMENT AND SENTENCE.

The court imposed a $100 "Thurston County Drug Court Fee." CP 60. There is no statutory authority to impose that fee because Maxwell did not participate in drug court. The fee is illegal and must be removed from the judgment and sentence.

A court may impose only a sentence that is authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

It has long been held "costs are the creature of statute" and that "there is no inherent power in the courts to award costs, and that they can be granted in any case or proceeding solely by virtue of express statutory authority." Pierce County v. Magnuson, 70 Wn. 639, 641, 127 P. 302 (1912); accord State v. Nolan, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999), aff'd, 141 Wn.2d 620, 8 P.3d 300 (2000).

RCW 10.01.160(2) provides "Costs shall be 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."

Maxwell did not participate in drug court.[7] The cost of drug court is not a cost "limited to expenses specially incurred by the state in prosecuting" Maxwell. RCW 10.01.160(2). There is no statutory basis to impose a drug court cost on a defendant who did not participate in drug court.

"A trial court's sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is *void*." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983)). Sentencing provisions outside the authority of the trial court are illegal. State v. Pringle, 83 Wn.2d 188, 193-94, 517 P.2d 192 (1973).

Maxwell did not object to the drug court fee, but "established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), accord State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "[A] sentencing error can be addressed for the first time on appeal under

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[7] See RCW 2.28.170(2) (defining "drug court" as "a court that has special calendars or dockets designed to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing offenders by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.").

RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

Erroneous imposition of legal financial obligations without statutory authority falls within this established rule. Moen, 129 Wn.2d at 543-48 (challenge to untimely restitution order may be raised for first time on direct appeal);[8] see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation, reviewable for first time on appeal), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001).

When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). "When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Murray, 118 Wn. App. at 522. The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d

[8]Restitution is a legal financial obligation. RCW 9.94A.030(30).

75, 658 P.2d 1247 (1983). This Court should strike the illegal imposition of the drug court fee from the judgment and sentence.

4. THE TRIAL COURT ERRED WHEN IT FOUND MAXWELL HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay legal financial obligations, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). The record does not reflect any such consideration here. The trial court's finding on Maxwell's ability to pay must therefore be stricken. CP 59.

The court ordered Maxwell to pay (1)$465.10 court costs; (2) $200 criminal filing fee; (3) $15.10 witness costs; (4) $250 jury demand fee; (5) $2000 drug enforcement fund; (6) $100 drug court fee; (7) $100 crime lab fee; (8) $100 DNA collection fee. CP 60. The court also imposed a $500 victim penalty assessment. CP 60.

The judgment and sentence provides "[a]ll payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, *commencing immediately*[.]" CP 61 (emphasis added).

RCW 10.01.160(3) provides "The 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." This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04.

In the judgment and sentence, the following pre-printed, generic language is found:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the 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. RCW 9.94A.753.

CP 59.

Maxwell challenges this pre-formatted finding on the ground that the record reveals no such consideration took place. 3RP 19-20. While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404.

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Maxwell had the present or future ability to pay his legal financial obligations. The court simply imposed these costs. 3RP 19-20. Cf. 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)).

Accordingly, the court's determination that Maxwell had the present or future ability to pay the legal financial obligations was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405. Moreover, before the State can collect legal financial obligations, there must be a properly supported, individualized judicial determination that Maxwell has the ability to pay. Id. at 405 n.16.

D. CONCLUSION

For the reasons set forth, Maxwell requests reversal of the convictions, dismissing count I with prejudice. Maxwell further requests remand with an order to strike the unauthorized drug court fee and the unsupported finding on ability to pay legal financial obligations from the judgment and sentence.

DATED this 26th day of March 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 440747-6-II
	)	
TYSON MAXWELL,	)	
	)	
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 29TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYSON MAXWELL
DOC NO. 821115
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MARCH 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 29, 2013 - 2:24 PM

Transmittal Letter

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Court of Appeals Case Number: 44077-6

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