SUPREME COURT NO. 93629-3

NO. 73562-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN GROTHAUS,

Petitioner.

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

The Honorable Marybeth Dingledy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Kevin Grothaus was the appellant below.

B. COURT OF APPEALS DECISION

Grothaus requests review of the decision entered by Division One of the Court of Appeals in State v. Grothaus on August 1, 2016.[1]

C. ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it concluded petitioner's claim that RCW 43.43.7541's mandatory DNA fee and RCW 7.68.035's mandatory Victim Penalty Assessment (VPA) violate substantive due process was not ripe for review?

2. Did the Court of Appeals err when it concluded that petitioner failed to demonstrate a manifest error subject to review under RAP 2.5(a)(3)?

3. Do RCW 43.43.7541 and RCW 7.68.035 violate substantive due process when applied to defendants who have not been found to have the likely ability to pay their mandatory fees?

4. Given Washington's current legal financial obligation (LFO) enforcement scheme, do this Court's holdings in State v. Curry[2]

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[1] This decision is attached as Appendix A. The court granted a motion for reconsideration regarding the cost bill on September 1, 2016. Appendix C.

[2] 118 Wn.2d 911, 829 P.2d 166 (1992).

and State v. Blank[3] require that in order to satisfy constitutional due process, trial courts must conduct an ability-to-pay inquiry at the time the statutorily mandated LFOs are imposed?

D. REASONS TO ACCEPT REVIEW

Review is warranted under RAP 13.4(b)(1), because Division One's conclusion that Grothaus' substantive due process challenge was not ripe for review conflicts with this Court's decision in State v. Blazina, 182 Wn.2d 827, 832 n.1, 344 P.3d 680 (2015) (clarifying that a challenge to the trial court's authority to issue an LFO order is ripe for review regardless of whether the defendant faces incarceration for nonpayment).

Review is warranted under RAP 13.4(b)(2), because Division One's decision in Grothaus conflicts with Division Two's unpublished decision in State v. Graham, __ Wn. App. __, 2016 WL 3598554, which held the exact same substantive due process challenge as raised by Grothaus was ripe for review, citing Blazina for support.[4]

Review is warranted under RAP 13.4(b)(3), because Grothaus' substantive due process challenge raises a significant question of law under U.S. Const. amends. V, XIV, § 1 and Wash. Const. art. I, § 3. The

[3] 131 Wn.2d 230, 930 P.2d 1213 (1997).

[4] Division Two rejected Graham's substantive due process challenge on other grounds. Currently, there is a motion for reconsideration pending. Should that be denied, a petition for review will be forth coming.

case also raises the question of whether this Court's due process analysis in Blank and Curry should be applied broadly by the Court of Appeals as a barrier to judicial consideration of other types of due process challenges to LFO statutes.

In this context, review is warranted under RAP 13.4(b)(1) because the case raises the question of whether Blank and Curry – when considered in the context of Washington's current LFO collection scheme – now require trial courts to consider a defendant's likely ability to pay before imposing mandatory LFOs; and whether, as a result, Grothaus' case conflicts with those decisions.

Finally, review is warranted under RAP 13.4(b)(4) because Grothaus' substantive due process challenge raises an issue this Court recognizes as one of substantial public interest. See, Blazina, 182 Wn.2d at 835 (noting there are "[n]ational and local cries for reform of broken LFO systems"). An LFO order imposes an immediate debt upon a defendant subjecting him to a myriad of penalties arising from enforced collection efforts. The societal hardships created by the erroneous imposition of LFOs cannot be understated.

A study by the Washington State Minority and Justice Commission concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

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

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)[5]; see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships). These realities amply demonstrate that the judicial review of Washington laws authorizing the mandatory imposition of LFO debt is an issue of substantial public interest.

It is particularly important that Grothaus' constitutional challenge to RCW 43.43.7541 be determined by this Court. As Division One's decision demonstrates, it is reluctant to address the merits of constitutional challenges to LFO statutes, and buttresses this reluctance by citing this Court's decisions in Blazina, Blank, and Curry. Appendix A. This Court should grant review to provide indigent defendants meaningful substantive review of constitutional challenges to Washington's LFO statutes.

[5] See: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

E. RELEVANT FACTS

Grothaus is indigent and the trial court waived all discretionary fees and costs, but it imposed the VPA and DNA fee as mandated by law. CP 18, 74-80.

On appeal, Grothaus asserted the Legislative mandate that trial courts impose a DNA fee and VPA on all defendants violates substantive due process when applied to those lacking the likely ability to pay. It is irrational to attempt to effectively fund a DNA database or victim's services by imposing fees on someone who cannot pay. Brief of Appellant (BOA) at 9-22; Reply Brief of Appellant (RBOA) at 1-10.

In response, the State claimed the issue was not ripe, was not subject to review under RAP 2.5, and was previously settled by this Court in Curry and Blank. Brief of Respondent (BOR) at 13-18. Division One agreed, holding the issue was not ripe for review and was not reviewable as a manifest constitutional error. Appendix A at 6-7 (citing State v. Shelton, __ Wn. App. __, __ P.3d __ (2016)).[6]

[6] In Grothaus' case, Division One did not fully analyze the issue in the decision but instead incorporated its recent ruling in State v. Shelton. Appendix A at 4-5. Because Shelton provides the substance of Division One's decision here, petitioner has attached a copy of the Shelton decision as Appendix B and will cite to it as is appropriate.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW IS WARRANTED TO SETTLE WHETHER A CONSTITUTIONAL CHALLENGE TO THE LFO STATUTES IS RIPE FOR REVIEW REGARDLESS OF WHETHER IMPRISONMENT IS AT STAKE FOR NON-PAYMENT.

The Court of Appeals held Grothaus' constitutional challenge to RCW 43.43.7541 and 7.68.035 was not ripe for review. Appendix A at 6-7. A similar argument was made in Blazina, however, and was categorically rejected by this Court. Blazina, 182 Wn.2d at 832, n.1.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id. Division One correctly decided the issue raised by Grothaus is primarily legal and the challenged action is final. Appendix B at 10. However, it incorrectly concluded that Grothaus' constitutional claim requires further factual development. Id.

In reaching its ripeness holding, Division One essentially reasons that until Grothaus is facing imprisonment for willful nonpayment, he cannot challenge RCW 43.43.7541 and RCW 7.68.035 as an unconstitutional regulatory act by the State. Appendix B at 9. It relies on

this Court's decision in Curry. Id. However, while Curry does state that the constitutional principles raised there were only implicated if the defendant faced imprisonment due to his indigence, (Curry, at 917-18), this holding does not apply here.

Curry and Grothaus raised completely different constitutional challenges. In Curry, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its future enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. 118 Wn.2d at 917. This is not the same due process issue raised by Grothaus.

Rather than challenging the constitutionality of the LFO statutes based on the fundamental unfairness of its future enforcement potential, Grothaus asserts RCW 43.43.7541 and RCW 7.68.035 do not rationally serve any legitimate State interest when applied to those who cannot pay. In other words, while Curry asked this Court to consider whether the speculative future operation of a statute would be unconstitutional, Grothaus asks it to consider whether the statutes – as they operate at this moment – are unconstitutional. These are two completely different due process challenges. Hence, Division One's attempt to apply Curry as a barrier to review of Grothaus' constitutional challenge is fundamentally flawed.

Once Grothaus' particular due process challenge is properly recognized, it becomes apparent that no further factual development is necessary for review. The trial court imposed the DNA fee pursuant to RCW 43.43.7541. It imposed the VPA pursuant to RCW 7.68.035. It never made a legitimate finding Grothaus has the ability – or likely future ability – to pay LFOs. As was the case in Blazina, the facts necessary to decide this issue (the statutory language and the sentencing record) are fully developed. Either the sentencing court applied statutes that are unconstitutional as applied to those who are not shown to have the ability to pay, or it did not. No further factual development is necessary.

This Court should accept review and clarify that Curry does not create a ripeness barrier to other types of constitutional challenges to LFO statutes. Instead, Blazina's holding on ripeness controls.

2. REVIEW IS WARRANTED TO CLARIFY THAT SUBSTANTIVE DUE PROCESS CHALLENGES ASSERTING THESE MANDATORY LFO STATUTES SERVE NO RATIONAL STATE INTEREST IS SUBJECT TO REVIEW UNDER RAP 2.5(a)(3).

Division One wrongly concluded Grothaus' substantive due process challenge "is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3)." Appendix A at 4. This Court should grant review under RAP 13.4(b)(3) to clarify that this type of constitutional challenge to mandatory LFO statutes is reviewable under RAP 2.5(a)(3).

Under RAP 2.5(a)(3), generally the appellate court "may refuse to review any claim of error which was not raised in the trial court." However, there are exceptions. One exception is that "a party may raise ... manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). This exception recognizes that "[c]onstitutional errors are treated specially because they often result in serious injustice...." State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46, 49 (2014) (citation omitted).

Grothaus raises a manifest constitutional error. BOA at 4-8. An error is "manifest" under RAP 2.5(a)(3), if it is a constitutional error that actually had practical and identifiable consequences on trial or sentencing. Id. at 583. Grothaus asserts it is a violation of substantive due process under both the state and federal constitutions for the Legislature to mandate that trial courts impose a DNA fee and VPA upon those not shown to have the ability – or likely future ability – to pay. Thus, Grothaus raises a constitutional error.

Moreover, this error had a practical and identifiable consequence on Grothaus' sentence. Indeed, the fees were mandatorily imposed upon him pursuant to the challenged statute. Contrary to Division One's holding, this case meets the review criteria under RAP 2.5(a)(3). This Court should grant review to clarify RAP 2.5(a)(3) should not be applied

as a barrier to review of constitutional challenges to LFO statutes. RAP 13.4(b)(3).

3. REVIEW IS WARRANTED BECAUSE WHETHER RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.

Unless this Court issues a decision explicitly declaring RCW 43.43.7541 and RCW 7.68.035 unconstitutional as applied, trial courts will continue on a daily basis to mandatorily impose the DNA fee and VPA on destitute defendants, which serves only to exacerbate their indigence and the resulting costs to society. The public has a substantial interest in avoiding these costs, and therefore review is warranted under RAP 13.4(b)(4).

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19. It requires that

"deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221(2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54. To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id.

Although the rational basis standard is a deferential one, it is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As this Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny);

Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

RCW 43.43.7541 mandates all felony defendants pay the DNA fee. On its face, this mandate appears to rationally serve the State's interest in funding the collection, analysis, and retention of a convicted offender's DNA profile. RCW 43.43.752-7541. However, as applied to defendants who lack the likely ability to pay, the mandatory imposition of this fee does not rationally serve this interest or any legitimate state interest.

RCW 7.68.035 mandates that all convicted defendants pay a $500 VPA. On its face, this serves the State's interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, however, while this may be a legitimate interest, there is nothing reasonable about funding a victim's services program by imposing fees on those who do not have the ability – or likely future ability – to pay.

First, imposing these fees on indigent persons does not rationally serve a legitimate financial interest. As this Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. When applied to such defendants, the fees are utterly pointless. There is no way to effectively fund victim services by

imposing fees the defendant cannot ever pay. Likewise, there is simply no reasonable way to effectively fund the DNA database by requiring imposition of fees on people who cannot pay them.[7]

Second, as this Court recognizes, the State's interest in deterring crime via enforced LFOs is not rationally served. Id. This interest is instead undermined because imposing LFOs on indigent persons inhibits re-entry into society and "increase[s] the chances of recidivism." Id. at 836-37.

Third, the State's interest in uniform sentencing is not rationally served by imposing mandatory LFOs on persons lacking the ability to pay. This is because defendants who cannot pay are subject to lengthier involvement with the justice system and often pay considerably more LFO debt than defendants who can pay off the fees quickly. Id. at 836-37.

Finally, the State's interest in enhancing offender accountability is not served. In order to foster accountability, a sentencing condition must

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[7] The government acknowledged the fiscal futility of imposing a mandatory DNA fee upon indigent persons when, in 2009, the Legislature made the DNA collection fee mandatory rather than discretionary, despite recognition it would do little to help fund the database:

> This bill will...require all felony offenders to pay the full amount of the $100 fee, no longer allowing the court to reduce the fee for findings of undue hardship. However, the collection rate is expected to be very low for these cases, so it is assumed there will be no significant change to revenue for felony matters.

Washington State Office of Financial Management, Multiple Agency Fiscal Note Summary, 2.S.H.B. 2713 (3/ 28/2008).

be something that is achievable. If it is not, the condition actually undermines efforts to hold a defendant accountable

In sum, there is no rational basis for imposing mandatory DNA-collection fees or VPAs on defendants who cannot pay. As such, RCW 43.43.7541 and RCW 7.68.035 violate substantive due process as applied to these individuals. This Court should grant review to decide this significant public issue and to put an end to these fees being ordered on a daily basis without regard to a defendant's ability to pay. RAP 13.4(b)(4).

4. REVIEW IS WARRANTED BECAUSE THE DECISION IN GROTHAUS CONFLICTS WITH THIS COURT'S DECISIONS IN CURRY AND BLANK

Division One held that substantive due process challenges like Grothaus' are foreclosed by this Court's ruling in Curry. Appendix B at 9. However, when Curry and its progeny Blank are considered in light of the realities of Washington's current LFO collection scheme, they actually support Grothaus' position that an ability-to-pay inquiry must occur at the time the DNA fee and VPA are imposed. Division One's holding, however, results in just the opposite – rote imposition of mandatory LFOs without concern for ability to pay. This Court should grant review to clarify that Curry and Blank, when considered in the context of the modern day LFO collection scheme, require sentencing courts to conduct

an ability-to-pay inquiry before imposing any LFOs, including the DNA fee and VPA.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collections methods through a variety of different entities, and the authorization of numerous additional sanctions and penalties. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). Importantly, this cycle does not conform to the necessary constitutional safeguards established by this Court in Curry and Blank.

In Blank, this Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). It reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

This Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for such an inquiry:

* "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

* "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point." Id.

* "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry: (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and (3) before any other "sanction" for nonpayment is imposed. Id. Unfortunately, neither the Legislature nor the trial courts are currently complying with Blank's directives.

Given Washington's current LFO collection scheme, the only way to effectively comply with Blank's due process requirements is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time LFOs are imposed. Although Blank says that prior case law "suggests" that such an inquiry is not required at sentencing, this Court

simply was not confronted with the realities of the State's current collection scheme in that case.

Today, Washington's LFO system consists of a complicated patchwork of enforced collection procedures and a myriad of penalties and sanctions before which there is no inability-to-pay inquiry. The reality is that onerous and relentless enforced collection procedures, sanctions, and penalties may begin long before an indigent person is faced with imprisonment for failure to pay.

First, under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This mechanism of enforcement has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Blazina, 182 at 836 (citation omitted) (explaining that on average, a person who pays $25 per month toward his or her LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.). Yet, there is no requirement for the courts

to conduct an inquiry into ability to pay before interest is assessed upon unpaid mandatory LFOs.

Washington law also authorizes an annual fee of up to $100 to go to the court clerk for any unpaid account. RCW 36.18.016 (29). There is no ability-to-pay inquiry before this additional sanction is imposed.

Washington law permits courts to use private collection agencies or county collection services to actively enforce collection of LFOs. RCW 19.16.500; 36.18.190. There is nothing in the statutes that prohibits the courts from using collection services immediately after sentencing. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. In fact, the statutes authorize that when accounts are assigned to such agencies, the court clerks may impose a transfer fee equal to "the full amount of the debt up to one hundred dollars per account." RCW 19.16.500. This means the DNA fee can be doubled by a clerk's decision to transfer a defendant's account to a collection service. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement to collect mandatory LFOs. Id.

Washington law also permits courts to order "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding

LFO payments, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with additional sanctions. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection mechanism may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Employers are permitted to charge an additional "processing fee" when this enforced collection method is used. RCW 9.94A.7705. Again, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to wage garnishment and assignments.

These examples show that under Washington's current LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms

may be used immediately after the judgment is entered. Hence, if the constitutional requirements set forth in Curry and Blank are to be met under the current LFO collection scheme, trial courts must conduct an ability-to-pay inquiry when any LFOs are imposed.

When Curry and Blank are appropriately considered within the context of Washington's current LFO collection scheme, they actually support the proposition that an ability-to-pay inquiry must occur at the time the trial court imposes the DNA-collection fee or VPA. Unfortunately, just the opposite will happen if Division One's decision in Grothaus' case stands. As such, this Court should grant review and determine whether the decision in Grothaus conflicts with this Court's holdings in Blank and Curry. RAP 13.4(b)(1).

G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 2nd day of ~~August~~ September 2nd, 2016.

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APPENDIX A

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

STATE OF WASHINGTON, Respondent,	)	No. 73562-4-I
v.	)	UNPUBLISHED OPINION
KEVIN LEE GROTHAUS, Appellant.	)	FILED: August 1, 2016

SCHINDLER, J. — A jury convicted Kevin Lee Grothaus of trafficking in stolen property in the first degree and theft in the second degree. Grothaus argues improper opinion testimony violated his constitutional right to a fair trial. Grothaus also challenges imposition of the mandatory victim penalty assessment under RCW 7.68.035 and the mandatory DNA[1] fee under RCW 43.43.7541. We affirm the conviction and entry of the judgment and sentence.

Grothaus worked as a carpenter and owned a carpentry business. His neighbor Joe Myers owned a construction company.

In November 2012, Grothaus asked Myers to hire him as a carpenter. Myers agreed to hire Grothaus as an hourly wage employee. Myers provided Grothaus with a company truck, a cell phone, and a number of tools including air compressors, nail

[1] Deoxyribonucleic acid.

guns, sanders, drills, saws, and ladders. Between December 2012 and March 2013, Grothaus pawned a number of Myers' tools as collateral for the loans he obtained.

Myers frequently visited the jobsites where Grothaus worked. Myers noticed Grothaus was sometimes not present. Myers also noticed Grothaus did not have all of the tools that Myers had provided. When asked, Grothaus told Myers the missing tools were at his father's house.

On March 5, 2013, Myers fired Grothaus. Myers told Grothaus to return the company truck and "make sure all the tools are in the truck." Grothaus returned the truck but "a lot" of the tools were missing. Myers wrote Grothaus a letter identifying the missing tools and demanded that he return the tools.

In a letter to Myers, Grothaus promised to return the tools the next week but did not do so. Myers contacted the police.

Snohomish County Sheriff's Office Detective Stephen Clinko located a number of the missing tools in pawnshops. Specifically, three pawnshops in Everett and one in Marysville. Detective Clinko recovered 16 tools Grothaus pawned between December 12, 2012 and March 2, 2013 to secure loans totaling $1,190. Grothaus admitted he did not return the tools to Myers. Grothaus told Detective Clinko he intended to redeem the tools from the pawnshops and return them to Myers but had not done so.

The State charged Grothaus with trafficking in stolen property in the first degree in violation of RCW 9A.82.050(1) and theft in the second degree in violation of RCW 9A.56.040(1)(a).

The defense filed a number of motions in limine including a motion to "[e]xclude testimony from any witness that gives an opinion or conclusion as to whether [Grothaus]

committed the crime charged." The prosecutor agreed that whether Grothaus committed the charged crimes was an "ultimate issue[ ] for the jury" and did not "intend to ask [witnesses] if [Grothaus is] guilty of committing the crime or anything." The court granted the defense motion in limine. The court ordered the prosecutor to inform witnesses of the court's pretrial rulings.

The State called a number of witnesses to testify at trial including Myers and Detective Clinko.

During Myers' testimony, the prosecutor asked if Grothaus had permission to pawn the tools Myers had provided.

> 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 give him that say-so?

In response, Myers stated, "That's theft. No." Defense counsel objected to the response and moved for a mistrial.

The court denied the motion for a mistrial. The court ruled the jury could ignore the improper testimony if instructed to do so. Defense counsel agreed the court's proposed curative instruction was acceptable.

> THE COURT: . . . What I'm going to do when the jurors come back in, I'm going to let them know the answer to the last question was no, that the remainder of the answer will be stricken, and they should ignore that.
> [DEFENSE COUNSEL]: Thank you, Your Honor.
> THE COURT: Is that okay with you, [defense counsel]?
> [DEFENSE COUNSEL]: Yes, Your Honor.

The court instructed the jury to disregard the improper testimony.

> THE COURT: 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.

Grothaus testified on behalf of the defense. The jury convicted Grothaus as charged.

Grothaus argues Myers' improper opinion testimony concerning his guilt violated his constitutional right to a fair trial. The State concedes Myers' testimony "That's theft" was an improper opinion on guilt but argues any prejudice was cured by the court's instruction to disregard the testimony. We agree.

As a general rule, no witness may offer testimony in the form of an opinion regarding the defendant's guilt or veracity. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Opinion testimony on guilt is unfairly prejudicial and violates the defendant's constitutional right to a jury trial. Quaale, 182 Wn.2d at 199; Kirkman, 159 Wn.2d at 927.

However, improper opinion testimony may be cured by instructing the jury to disregard the improper testimony and does not always require reversal. State v. Hager, 171 Wn.2d 151, 159, 248 P.3d 512 (2011); see State v. Haq, 166 Wn. App. 221, 264-65, 268 P.3d 997 (2012) (holding that although witness's testimony was improper, defendant was not denied the right to a fair trial because the court instructed the jury to disregard the improper testimony); State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) (same). We "presume jurors follow instructions to disregard improper evidence." Haq, 166 Wn. App. at 264; State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) ("We presume that juries follow all instructions given.").

The record establishes the court instructed the jury to disregard Myers' testimony "That's theft." The court also instructed the jury that it was their "duty to decide the facts in this case based upon the evidence presented" and that if "evidence was not admitted

or was stricken from the record, then you are not to consider it in reaching your verdict."[2]

Grothaus claims the trial court should have instructed the jury that it was the jury's duty "to independently determine guilt . . . regardless of what [Meyers] or any witness thought about [Grothaus's guilt]." But because Grothaus did not object to the curative instruction the court proposed to give, he waived his right to argue for the first time that the curative instruction was deficient. RAP 2.5(a); see State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) (failure to request limiting instruction constitutes a waiver of right to assign error on appeal); State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007) (failure to request limiting instruction "waives any argument on appeal that the trial court should have given the instruction").

In any event, the improper comment on guilt was harmless beyond a reasonable doubt. The "untainted evidence is so overwhelming that it necessarily leads to the same outcome." In re Pers. Restraint of Cross, 180 Wn.2d 664, 688, 327 P.3d 660 (2014).

To convict Grothaus of theft in the second degree, the State had the burden of proving he "exert[ed] unauthorized control over the property . . . of another or the value

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[2] Jury instruction 1 states, in pertinent part:

> 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 the exhibits that I have admitted, during 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 inadmissible, 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.

(Emphasis added.)

thereof, with intent to deprive him or her of such property . . . which exceed(s) seven hundred fifty dollars in value."[3] RCW 9A.56.020(1)(a), .040(1)(a). Grothaus admitted there were only "a few" tools in the truck when he returned the truck to Myers and "certainly . . . a lot" of the tools were "missing." Grothaus testified he took tools belonging to Myers to pawnshops and used them as collateral for loans. Grothaus admitted he did not have the authority to pawn Myers' tools. Grothaus also admitted he knew Myers would not be able to "retrieve those items once [he] pawned them." The overwhelming untainted evidence supports the conviction.

At sentencing, the court waived all discretionary fees and costs but ordered Grothaus to pay the mandatory victim penalty assessment in the amount of $500, the mandatory DNA fee in the amount of $100, and restitution in an amount to be determined at a later hearing.

For the first time on appeal, Grothaus argues that as applied to an indigent defendant, imposition of the mandatory victim penalty assessment under RCW 7.68.035 and the mandatory DNA fee under RCW 43.43.7541 violates substantive due process.

In State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992), the Washington Supreme Court addressed a constitutional challenge to imposition of the victim penalty assessment and held constitutional principles are implicated only when the State seeks

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[3] Jury instruction 7 states:

To convict the defendant of the crime of theft in the second degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 23, 2012, though March 2, 2013, the defendant exerted unauthorized control over property of another or the value thereof;

(2) That the property exceeded $750 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of [the] elements, then it will be your duty to return a verdict of not guilty.

to enforce collection of the mandatory assessment. The court noted that "imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns." Curry, 118 Wn.2d at 917, n.3. In State v. Shelton, No. 72848-2-I, slip op. at 3 (Wash. Ct. App. June 20, 2016), we considered and rejected the same as-applied substantive due process challenge to the mandatory DNA fee statute. We held that until the State attempts to enforce collection of the DNA fee or impose sanctions for failure to pay, the claim is not ripe for judicial review and is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3). Shelton, slip op. at 11-12. We also held that "unlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay." Shelton, slip op. at 11.

We affirm the conviction and entry of the judgment and sentence.

WE CONCUR:

COX, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent,	)	No. 72848-2-I
v.	)	PUBLISHED OPINION
MICHAEL SHELTON, Appellant.	)	FILED: June 20, 2016

SCHINDLER, J. — For the first time on appeal, Michael Shelton contends that as applied to an indigent defendant, the statute that requires imposition of a mandatory deoxyribonucleic acid (DNA) fee violates substantive due process. Shelton also challenges the requirement to obtain a mental health evaluation. Because the substantive due process challenge to the DNA fee statute is not ripe for review and is not manifest constitutional error under RAP 2.5(a)(3), we affirm imposition of the DNA fee but remand to determine whether the statutory requirements to order a mental health evaluation are met.

On October 23, 2014, the State filed an amended information charging Shelton with assault in the second degree while armed with a deadly weapon. The State alleged Shelton used a bottle to assault the victim, inflicting substantial bodily harm. A jury

convicted Shelton as charged of assault in the second degree while armed with a deadly weapon.

The court imposed a sentence of 15 months confinement and 18 months of community custody. The court ordered Shelton to have no contact with the victim, submit a DNA sample, and obtain a substance abuse evaluation and mental health evaluation within 30 days of his release.

The court ordered Shelton to pay the mandatory victim penalty assessment in the amount of $500 and the mandatory DNA fee in the amount of $100. The court waived the imposition of all discretionary financial obligations and interest on the mandatory $600 obligation. The judgment and sentence states, in pertinent part:

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

. . . .

4.1 RESTITUTION, VICTIM ASSESSMENT, AND DNA FEE:

. . . .

[X] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment in the amount of **$500** (RCW 7.68.035 - mandatory).
Defendant shall pay DNA collection fee in the amount of **$100** (RCW 43.43.7541 - mandatory).

4.2 OTHER FINANCIAL OBLIGATIONS: . . .

(a) [ ] $ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); [X] Court costs are waived;

(b) [ ] $ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); [X] Recoupment is waived;

. . . .

(e) [ ] $ _____, $100 State Crime Laboratory Fee (RCW 43.43.690); [X] Laboratory fee waived;

(f) [ ] $ _____, Incarceration costs (RCW 9.94A.760(2)); [X] Incarceration costs waived;

. . . .

4.3 **PAYMENT SCHEDULE:** The **TOTAL FINANCIAL OBLIGATION** set in this order is $600.
Restitution may be added in the future. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:
. . . [X] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations . . . for crimes committed on or after 7/1/2000 . . . until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.
[X] Court Clerk's trust fees are waived.
[X] Interest is waived except with respect to restitution.

Substantive Due Process

Shelton contends that as applied to an indigent defendant, the DNA fee statute, RCW 43.43.7541, violates substantive due process.[1]

A statute is presumed constitutional and a party bears the heavy burden of establishing a statute unconstitutional beyond a reasonable doubt. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). An as-applied challenge to the constitutional validity of a statute is characterized by the "allegation that application of the

[1] The legislature amended the DNA fee statute, RCW 43.43.7541, in 2015 to add the language, "This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender's DNA as a result of a prior conviction." LAWS OF 2015, ch. 265, § 31. Because the remainder of the statute did not change and the amendment does not affect our analysis, unless otherwise noted, we refer to the current version of RCW 43.43.7541 throughout the opinion.

statute in the specific context" is unconstitutional. City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004).

The United States Constitution guarantees federal and state government will not deprive an individual of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1. Article I, section 3 of the Washington Constitution guarantees "[n]o person shall be deprived of life, liberty, or property, without due process of law." In analyzing a substantive due process challenge, our Supreme Court has held the Washington due process clause does not afford broader protection than the Fourteenth Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); Amunrud, 158 Wn.2d at 216 n.2; In re Pers. Restraint of Dyer, 143 Wn.2d 384, 393-94, 20 P.3d 907 (2001).

Substantive due process protects against arbitrary and capricious government action. Amunrud, 158 Wn.2d at 218-19. State interference with a fundamental right is subject to strict scrutiny. Amunrud, 158 Wn.2d at 220. Shelton concedes that because his challenge to the DNA statute does not affect a fundamental right, a rational basis standard of review applies. Under that deferential standard, "the challenged law must be rationally related to a legitimate state interest." Amunrud, 158 Wn.2d at 222.

DNA Fee Statute

In 1989, the legislature enacted a statute to use DNA identification as a tool for the investigation and prosecution of sex offenses and violent felony crimes. LAWS OF 1989, ch. 350. The legislature found the "accuracy of [DNA] identification . . . is superior to that of any presently existing technique" and recognized the "importance of this scientific breakthrough in providing a reliable and accurate tool for the investigation and prosecution of sex offenses as defined in RCW 9.94A.030(26) and violent offenses as

defined in RCW 9.94A.030(29)." LAWS OF 1989, ch. 350, § 1. The statute required every person convicted of a felony sex offense or violent offense to provide a blood sample for DNA "identification analysis and prosecution of a sex offense or a violent offense." LAWS OF 1989, ch. 350, § 4.

In 2002, the legislature amended the DNA statute to establish a DNA database that would contain DNA samples for all convicted felony offenders. LAWS OF 2002, ch. 289, §§ 1, 2. In addition to the importance of using the DNA database for the investigation and prosecution of criminal cases, the legislature found the DNA database is also an important tool for the exclusion of individuals subject to investigation or prosecution, the detection of recidivist acts, and the identification and location of missing and unidentified persons. LAWS OF 2002, ch. 289, § 1.

RCW 43.43.753 states, in pertinent part:

> **Findings—DNA identification system—DNA database—DNA data bank.** The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."
>
> The legislature further finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA database and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and other crimes as specified in RCW 43.43.754. DNA samples necessary for the identification of missing persons and unidentified human remains shall also be included in the DNA database.

The legislature required every person convicted of a felony offense to submit a DNA sample for DNA identification analysis. LAWS OF 2002, ch. 289, § 2. Former RCW 43.43.754(1) (2002) states, in pertinent part:

> Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis.

The legislature adopted a new section that required the court to impose a $100 DNA fee for collection of a DNA sample "unless the court finds that imposing the fee would result in undue hardship on the offender." LAWS OF 2002, ch. 289, § 4.[2] The new section states:

> NEW SECTION. **Sec. 4.** A new section is added to chapter 43.43 RCW to read as follows:
>
> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after the effective date of this act, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under section 5 of this act.

LAWS OF 2002, ch. 289.

In 2008, the legislature amended the DNA fee statute to make the DNA fee mandatory without regard to hardship. LAWS OF 2008, ch. 97, § 3. The legislature deleted the language "for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on

---

[2] The imposition and recovery of court costs and fees was unknown at common law and is therefore entirely statutory. State v. Smits, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009); State v. Cawyer, 182 Wn. App. 610, 619, 330 P.3d 219 (2014).

the offender." LAWS OF 2008, ch. 97, § 3. As amended, the plain and unambiguous language of RCW 43.43.7541 states, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." Former RCW 43.43.7541 (2008) states:

> **DNA identification system—Collection of biological samples—Fee.** Every sentence imposed under chapter 9.94A RCW, for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

The statute states that 80 percent of the fee is dedicated to the DNA database account under RCW 43.43.7532. RCW 43.43.7541. RCW 43.43.7532 establishes a state DNA database account to use "only for creation, operation, and maintenance of the DNA database under RCW 43.43.754."[3]

Ripeness and RAP 2.5(a)(3)

For the first time on appeal, Shelton contends there is no rational basis to require imposition of the mandatory DNA fee at sentencing on an indigent defendant. Shelton concedes the mandatory DNA fee serves the legitimate purpose of funding the DNA database. Shelton claims that absent a determination at sentencing that he has "the ability or likely future ability to pay," the DNA fee statute violates substantive due process. The State asserts the as-applied substantive due process challenge to the DNA fee statute is not ripe for review and is not a manifest constitutional error subject to review

[3] In 2011, the legislature amended RCW 43.43.7541 to add that for "all other sentences," the DNA fee is "payable by the offender in the same manner as other assessments imposed." LAWS OF 2011, ch. 125, § 1.

under RAP 2.5(a)(3). We agree with the State.

A preenforcement constitutional challenge to the mandatory DNA fee statute is ripe for review on the merits if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015); State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). The court must also consider the risk of hardship to the parties "if we decline to address the merits of his challenge at this time." Cates, 183 Wn.2d at 534-35.

The due process clause protects an indigent offender from incarceration based solely on inability to pay court ordered fees. U.S. CONST. amends. V, XIV, § 1; Bearden v. Georgia, 461 U.S. 660, 664, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

In Fuller v. Oregon, 417 U.S. 40, 44-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the Supreme Court upheld an Oregon statute that included procedural and substantive safeguards designed to protect the rights of indigent defendants while authorizing reimbursement from offenders who had the ability to repay court costs.

In Bearden, the Court held that revocation of probation based on the failure of an indigent offender to pay fines violated due process. Bearden, 461 U.S. at 672-73. The Court held the "sentencing court must inquire into the reasons for the failure to pay." Bearden, 461 U.S. at 672. The sentencing court cannot deprive an offender "of his . . . freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." Bearden, 461 U.S. at 672-73. However, the Court held that if the offender "willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." Bearden,

461 U.S. at 668.

In State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), our Supreme Court addressed a constitutional challenge to the imposition of the mandatory victim penalty assessment. The court rejected the argument that "the statute could operate to imprison [defendants] unconstitutionally in the future if they are unable to pay the penalty." Curry, 118 Wn.2d at 917-18. Even though the statute contained no provision to waive the victim penalty assessment for an indigent defendant, the court held sufficient safeguards prevented incarceration for failure to pay the mandatory victim penalty assessment because the statute required a show cause hearing, the court had the discretion to treat a nonwillful violation more leniently, and incarceration would result only if the failure to pay was willful. Curry, 118 Wn.2d at 917-18.[4]

The court concluded constitutional principles are implicated only when the State seeks to enforce collection of the mandatory assessment and noted "imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns." Curry, 118 Wn.2d at 917 & n.3.

> "It is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency."

Curry, 118 Wn.2d at 917[5] (quoting State v. Curry, 62 Wn. App. 676, 681, 814 P.2d 1252

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[4] If an offender violates a condition of the judgment and sentence, the court may issue a summons for a show cause hearing. See RCW 9.94B.040(3)(b). If the court finds the violation is not willful, the court may modify the order. RCW 9.94B.040(3)(d); see also RCW 9.94A.6333. RCW 9.94A.6333 provides, in pertinent part:

> (1) If an offender violates any condition or requirement of a sentence, and the offender is not being supervised by the department, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.
>
> . . . .
>
> [(2)](d) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations.

[5] Internal quotation marks omitted, alteration in original.

(1991)).

Here, Shelton's as-applied substantive due process challenge is primarily legal and the challenged action is final. See Cates, 183 Wn.2d at 534. But his constitutional challenge requires further factual development, and the potential risk of hardship does not justify review before the relevant facts are fully developed. See Cates, 183 Wn.2d at 535.

A constitutional challenge to the DNA fee statute is not ripe for review until the State attempts to enforce collection of the fee. "[T]he relevant question is whether the defendant is indigent at the time the State attempts to sanction the defendant for failure to pay." Sanchez Valencia, 169 Wn.2d at 789;[6] see also State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013). Because the State has not sought to enforce collection of the DNA fee or impose sanctions for failure to pay the DNA fee, Shelton's as-applied substantive due process challenge to the DNA fee statute is not ripe for review. See Lundy, 176 Wn. App. at 108 (constitutional challenge to imposition of mandatory victim penalty assessment and DNA fee not ripe for review "until the State attempts to curtail a defendant's liberty interest by enforcing them"); see also State v. Ziegenfuss, 118 Wn. App. 110, 112, 74 P.3d 1205 (2003) (Because the defendant has not yet failed to pay nor been incarcerated or otherwise sanctioned for failure to pay, "her due process rights have not been violated and her argument is not yet ripe for review.").

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), does not support Shelton's argument that his constitutional challenge to the DNA fee statute is ripe for review. The court in Blazina did not address imposition of mandatory fees. The court held RCW

[6] Emphasis omitted.

10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay discretionary legal financial obligations. Blazina, 182 Wn.2d at 837-38. 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.

But unlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay.[7]

> [T]he legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing [mandatory legal financial] obligations. For victim restitution, victim assessments, [and] DNA fees, . . . the legislature has directed expressly that a defendant's ability to pay should not be taken into account. See, e.g., State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (2013).

Lundy, 176 Wn. App. at 102; see also State v. Thompson, 153 Wn. App. 325, 338, 223 P.3d 1165 (2009) (DNA fee required irrespective of defendant's ability to pay); Kuster, 175 Wn. App. at 425 (court need not consider "the offender's past, present, or future ability to pay" mandatory victim penalty assessment and DNA fee).

We hold that because imposition of the mandatory DNA fee does not implicate constitutional principles until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, the as-applied substantive due process challenge to

[7] The judgment and sentence clearly reflects the distinction between mandatory and discretionary financial obligations.

RCW 43.43.7541 is not ripe for review.[8]

The as-applied substantive due process challenge to the mandatory DNA fee statute is also not a manifest error subject to review under RAP 2.5(a)(3).[9] To review the merits of the constitutional challenge to the DNA fee statute for the first time on appeal, Shelton must show the error is manifest and implicates a constitutional interest. RAP 2.5(a)(3); State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Manifest error requires " 'a showing of actual prejudice.' " State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice means "the claimed error had practical and identifiable consequences." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); O'Hara, 167 Wn.2d at 99. Whether the error is identifiable and the defendant can raise a claim for the first time on appeal turns on whether the record is sufficient to determine the merits of the claim. O'Hara, 167 Wn.2d at 99; Kirkman, 159 Wn.2d at 935. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, Shelton cannot show his as-applied substantive due process claim is

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[8] The State also asserts Shelton does not have standing. A criminal defendant "always has standing to challenge his or her sentence on grounds of illegality." State v. Bahl, 164 Wn.2d 739, 750, 193 P.3d 678 (2008). However, a defendant does not have standing to challenge a statute on constitutional grounds unless the defendant can show harm. Cates, 183 Wn.2d at 540. Because Shelton cannot show harm until the State seeks to enforce collection of the DNA fee, he does not have standing.

[9] RAP 2.5(a)(3) provides, in pertinent part:

> **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . manifest error affecting a constitutional right.

manifest constitutional error under RAP 2.5(a)(3). We also note the record contains no information about future ability to pay the mandatory $100 DNA fee. See State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016).

Mental Health Evaluation

Shelton contends the court erred in ordering him to obtain a mental health evaluation as a condition of community custody.

The plain and unambiguous language of former RCW 9.94B.080 (2008)[10] states the court may order a mental health evaluation only if the court finds Shelton "is a mentally ill person as defined in RCW 71.24.025" and mental illness likely "influenced the offense." Former RCW 9.94B.080 states:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.[11]

Although the court found "mental health issues contributed to this offense" and "[t]reatment is reasonably related to the circumstances of this crime and reasonably necessary to benefit the defendant and the community," the court did not find Shelton "is a mentally ill person as defined in RCW 71.24.025." Former RCW 9.94B.080. The State concedes the court did not comply with the statutory requirements to order a mental

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[10] LAWS OF 2008, ch. 231, § 53.

[11] (Emphasis added.) In 2015, the legislature amended RCW 9.94B.080 to state consideration of a presentence report is no longer mandatory. LAWS OF 2015, ch. 80, § 1 ("An order requiring mental status evaluation or treatment may be based on a presentence report.").

health evaluation. We accept the concession as well taken, and remand to determine whether to order a mental health evaluation according to the requirements set forth in former RCW 9.94B.080.

Statement of Additional Grounds

Shelton makes a number of arguments in the statement of additional grounds including whether the State violated his right to a fair trial by failing to timely provide complete discovery. At our request, the State filed a response to the statement of additional grounds. The State concedes an inadvertent discovery violation occurred in failing to deliver certain discovery to Shelton until the day before trial but argues Shelton cannot show prejudice. We agree. A continuance is an appropriate remedy for noncompliance with the discovery rule. State v. Krenik, 156 Wn. App. 314, 321, 231 P.3d 252 (2010). Where the defense does not move for a continuance, the defendant cannot establish actual prejudice. Krenik, 156 Wn. App. at 321. Here, the court agreed to continue the trial but Shelton refused to do so. We reject the remainder of the arguments in the statement of additional grounds as without merit.

We affirm imposition of the mandatory DNA fee but remand to determine whether the statutory requirements to order a mental health evaluation are met.

WE CONCUR:

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN LEE GROTHAUS, Appellant.	)	No. 73562-4-I DIVISION ONE ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING COST BILL

After the court filed the opinion in this case on August 1, 2016, the State filed a cost bill seeking $4,378.84 in appellate costs. Appellant Kevin Lee Grothaus filed a motion for reconsideration and an objection to appellate costs. At the direction of the panel, the State filed a response.

The panel has considered the cost bill, the motion for reconsideration and objection, the State's response, and the nonexclusive factors in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016), and determined that the motion for reconsideration should be granted and the cost bill denied.

It is ORDERED that appellant Grothaus' motion for reconsideration is granted and the State's request for an award of any appellate costs is denied.

Done this 1st of September, 2016.

For the Court:

Judge

NIELSEN, BROMAN & KOCH, PLLC

September 02, 2016 - 12:04 PM

Transmittal Letter

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Case Name: Kevin Grothaus
Court of Appeals Case Number: 73562-4

Party Respresented:

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Trial Court County: Snohomish - Superior Court # ____

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- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

Client address unknown at this time

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