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Nov 23, 2015
Court of Appeals
Division III
State of Washington

No. 33074-5-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

DAVID R. JOHNSON, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. WAS THE COURT'S FINDING THAT THE DEFENDANT WAS ARMED WITH A FIREARM AT TIME OF THE OFFENSES SUPPORTED BY SUBSTANTIAL EVIDENCE?
2. SHOULD THIS COURT CONSIDER THE ISSUE OF WHETHER THE TRIAL COURT ADEQUATELY CONSIDERED THE APPELLANT'S ABILITY TO PAY PURSUANT TO STATE v. BLAZINA, WHERE THE APPELLANT FAILED TO OBJECT BELOW?
3. HAS THE APPELLANT DEMONSTRATED RCW 43.43.7541 TO BE UNCONSTITUTIONAL?
4. DID THE COURT ERR IN ORDERING THE APPELLANT TO SUBMIT TO COLLECTION OF HIS DNA AFTER BEING CONVICTED OF TWO VIOLENT FELONIES?
5. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN DETERMINING THAT THE CRIMES OF BURGLARY IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE CONSTITUTED THE SAME CRIMINAL CONDUCT?

II. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT THE APPELLANT WAS ARMED WITH A FIREARM AT THE TIME OF THESE OFFENSES.
2. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUE OF WHETHER THE TRIAL COURT ADEQUATELY CONSIDERED THE APPELLANT'S ABILITY TO PAY PURSUANT TO STATE v. BLAZINA, WHERE THE APPELLANT FAILED TO OBJECT BELOW.
3. RCW 43.43.7541 IS CONSTITUTIONAL AND THE APPELLANT HAS FAILED TO DEMONSTRATE OTHERWISE.

4. THE COURT PROPERLY ORDERED THE APPELLANT TO SUBMIT TO COLLECTION OF HIS DNA AFTER BEING CONVICTED OF TWO VIOLENT FELONIES.
5. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CRIMES OF BURGLARY IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE CONSTITUTED THE SAME CRIMINAL CONDUCT.

III. STATEMENT OF THE CASE

In the very early hours of June 10, 2014, the Appellant, David R. Johnson, and his accomplice and co-Appellant, Ralph E. Whitlock, went to the residence of Tanya Routt in Clarkston, Washington for the purposes of robbing Routt. Report of Proceedings (hereinafter RP) at 248. About four weeks prior to this incident, Mr. Johnson had stayed at Routt's residence for two weeks. RP 180. Routt had been involved with selling drugs and Mr. Johnson was aware of this fact. RP 192.

Prior to the arrival of Mr. Whitlock and Mr. Johnson, Ms. Routt had left the residence sometime between 11:00 p.m. and 1:30 a.m. and was gone until morning. RP 185 -190. Present in the residence were Lisa Jones, Damien Hester, Crista Ansel, Ms. Routt's two daughters, Ms. Jones' daughter, and three unidentified friends of Mr. Hester who were from Orofino, Idaho. RP185. Mr. Whitlock and Mr. Johnson arrived sometime after 1:00 a.m. RP 248. They approached the residence from the back through the yard. RP 248. Mr. Whitlock and Mr. Johnson had been dropped off in the rear alley by Jacob Gustafson who was instructed to come back and pick them up shortly thereafter. RP 383 - 384.

Damien Hester and Lisa Jones went outside to smoke a cigarette and Lisa saw two men in back yard. RP 247, 570-1. Mr. Whitlock and Mr. Johnson approached and began talking with Jones

and Hester. RP 247, 570-1. Mr. Whitlock claimed he had left some laundry at the house and asked if he could come in. RP 249. Jones told him that Routt was not home and that he couldn't come in (RP 249) and she told him he needed to talk to Routt. RP 249. After Mr. Hester and Ms. Jones returned into the house, Mr. Whitlock and Mr. Johnson entered the residence. RP 252, 254, 309, 310. Mr. Whitlock went into the hallway leading to Routt's bedroom and attempted to turn the handle on the bedroom door which was locked. RP 254. Jones again told him that he couldn't go into Routt's room. 254-5. Mr. Whitlock told Jones that there was nothing she could do to stop him. RP 256. Mr. Whitlock then told Jones that, out of respect for her brother, he would let her leave and that she should get her daughter and her belongings and just leave. RP 257. Jones roused her daughter from sleep, quickly gathered her belongings, and left with an individual named Ryan Blue¹. RP 257.

Hester had retreated to the basement area where he told Crista Ansel that her "brother"² Ralph was there. RP 307. Hester was very upset. RP 307. Ansel went upstairs and saw Mr. Whitlock and Mr. Johnson. RP 308-9. She saw Jones packing up to leave. RP

¹ Mr. Blue appears to be one of the three people who were visiting from Orofino, Idaho.

²Ansel testified that Ralph was "like a brother to me." RP 305, In 10.

308-9. Ansel spoke to Mr. Whitlock who asked her why she was there and stated that he never would have come to the residence if he had known Ms. Ansel was staying there. RP 309. Ansel saw Mr. Johnson in the kitchen with a silver handgun. RP 310-13. Ansel testified that Mr. Johnson had the pistol out, pointing it at her and the others and said, "Don't do anything stupid." Ansel confronted Mr. Whitlock about his presence and his intentions and he claimed that he wanted to see if Routt had his electronic equipment (a TV) which he stated had been stolen from him. RP 312. She testified that Mr. Whitlock had a crowbar up his sleeve, and threatened to break down the bedroom door. RP 313, 314. Ansel told him that he wasn't going to break down the door, and she opened the bedroom door by "popping" the lock and showed him that his TV wasn't in the bedroom. RP 313. She then took him downstairs and showed him other bedrooms to prove that his stolen electronics weren't in the house. RP 314. Ansel then asked Whitlock to just leave and he told her it was too late and that he was sorry. RP 316. Mr. Whitlock then shut the basement bedroom door, trapping Ansel inside. RP 316, 318.

Mr. Whitlock then went upstairs and he and Mr. Johnson removed a security camera system with a monitor from Routt's bedroom along with a dial entry safe. RP 193. Inside the safe was methamphetamine, pills, and three thousand dollars (\$3,000.00) cash, as well as other personal records. RP 194. Mr. Whitlock and

Mr. Johnson took the property that they stole from the house and got into Gustafson's waiting vehicle. RP 385. When they were approaching his vehicle from the residence, Gustafson observed Mr. Johnson had a handgun in his right hand and he was carrying a flat screen. RP 385. Mr. Whitlock then told Gustafson to "keep his mouth shut" and take them back to Kelly McDonough's.³ RP 387. Gustafson drove Mr. Whitlock and Mr. Johnson to Kelly McDonough's apartment where he dropped them off, along with the safe and the security system and monitor. RP 387.

Mr. Johnson was (ultimately) charged by information with the crimes of Burglary in the First Degree and Robbery in The First Degree, both with Deadly Weapon and Firearm Enhancements. Amended Information, Clerk's Papers (hereinafter CP) 83 - 84.

On December 8, 2014, Mr. Whitlock and Mr. Johnson were tried to bench, and at the conclusion thereof, the Court took the matter under consideration. RP 679. Thereafter, the Trial Court prepared findings and found both Mr. Whitlock and Mr. Johnson guilty of Burglary in the First Degree and Robbery in the First Degree. Amended Findings fo Fact and Conclusions of Law, CP 98 - 103. The Court further found that Mr. Johnson was Mr. Whitlock's accomplice

³Gustafson testified that he had met up with Whitlock and Johnson at Kelly McDonough's residence prior to driving them to Tonya Routt's house. RP 380 - 381.

and that Mr. Johnson was armed with a firearm during the commission of these crimes. CP 98 - 103.

A sentencing hearing for Mr. Johnson was held on December 22, 2014, at the conclusion of the sentencing for Mr. Whitlock. RP 70.⁴ Over the State's objection, and in keeping with the finding of same criminal conduct entered in Mr. Whitlock's sentencing immediately prior, the Trial Court determined that the charges of Burglary in the First Degree and Robbery in the First Degree were the same criminal conduct, and sentenced Mr. Johnson to one-hundred eighty (180) months (base of 60 months with an additional 60 months each for the two firearm enhancements, to be served consecutively). RP 81-82, Judgement and Sentence, (*hereinafter: J & S*) CP 160 - 199.

Both the Appellant and the State filed timely notice of appeal to this court. The Appellant challenges the sufficiency of the evidence to support the imposition of the Firearm Enhancement, as well as imposition of certain legal financial obligations. The State preserves its objection to the Court's determination that the two charges constituted the same criminal conduct. The Appellant has, to date, not filed a *Pro Se* Brief.

⁴ It should be noted that the trial transcripts are common to both Mr. Whitlock and Mr. Johnson's cases and only one set, with common page numbering. However, for all other hearings, Mr. Johnson's transcripts are numbered independent of Mr. Whitlock's transcripts.

IV. DISCUSSION

1. SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT THE APPELLANT WAS ARMED WITH A FIREARM AT THE TIME OF THESE OFFENSES.

Mr. Johnson first claims that there was insufficient evidence to support the Trial Court's finding that he **was** armed with a firearm at the time of commission of the crimes of Burglary in the First Degree and Robbery in the First Degree. The relevant standard has been stated as follows:

The test for determining the sufficiency of the evidence is whether, ***after viewing the evidence in the light most favorable to the State***, any rational trier of fact could have found guilt beyond a reasonable doubt.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*Emphasis added*). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt. See State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); State v. Mathe, 35 Wn.App. 572, 580-581, 668 P.2d 599 (Div. I, 1983). To continue with the analysis:

Neither does this rule undermine the deference courts traditionally give to the jury or other trier of fact to resolve conflicts in testimony, weigh evidence and draw reasonable inferences therefrom.

State v. Gerber, 28 Wn.App. 214, 216, 622 P.2d 888 (Div. I, 1981).

The Appellant herein complains that, since the firearm involved herein was not recovered, there is insufficient evidence that the

handgun was a true and functional firearm. Brief of Appellant, p. 12. However, as stated in State v. Bowman, 36 Wn.App. 798, 803, 678 P.2d 1273 (Div. I, 1984), "The State need not introduce the actual deadly weapon at trial." As the courts of this state have further declared:

While evidence of the deadly weapon and firearm was circumstantial, "[i]n determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."

State v. Mathe, at 582. (Citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); and State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). "Circumstantial evidence is as probative as direct evidence." State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (Div. III, 1992). Courts must defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. See State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (Div. III, 1998).

In State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980), the Supreme Court clarified the quantum that is necessary: "The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon . . .". Here, two persons testified that Mr. Johnson displayed a handgun.⁵ Crista Ansel testified that Mr.

⁵ While claiming to challenge the Court's finding regarding this weapon being a pistol, (Brief of Appellant, pp. 1, 5, fn. 1), the Appellant fails to meaningfully develop this argument or the significance thereof. As such, this

Johnson had the pistol, and was pointing at her and others. RP 311-12. She described it as a silver pistol about the size of her hand. RP 311. She further testified that while he was pointing it, he stated, "Don't do anything stupid."

Jacob Gustafson testified that, when Mr. Johnson exited the house he was carrying a flat-screen TV and had a handgun in his right hand. RP 385-386. He was not able to tell the color as the gun was silhouetted against background lighting, but he did describe to the Trial Court the size of the gun.⁶ RP 385-386.

Mr. Johnson's physical act of pointing the gun at persons in the house and his thinly veiled verbal threat not to "do anything stupid" can commonly and ordinarily be understood as a threat to "shoot" his victim and necessarily implied that he a firearm capable of killing or seriously injuring his victims. See State v. Hentz, 99 Wn.2d 538, 541, 663 P.2d 476 (1983). Further, the fact that he continued to carry the pistol in his right hand when exiting the house with the TV is strongly suggestive that the pistol was a real, functional firearm and not a toy. If it were merely a prop, he certainly would have tucked it away in his

claim should not be considered as it is inadequately addressed therein. See State v. Wheaton, 121 Wn.2d 347, 850 P.2d 507 (1993).

⁶ Mr. Gustafson described the gun as "standard size" (RP 385) and used his hands to describe the length for the court (RP 386). The actual size description demonstrated by Mr. Gustafson was not estimated or verbally expressed by either the witness, counsel, or the Trial Judge and therefore, did not make it into the record.

pants or in a pocket, it having served its purpose.⁷ This would have freed up his strong hand for the task of carrying his newly gotten booty. Instead, he kept the firearm at the ready, should he encounter any further resistance to the robbery plan. During trial, Mr. Johnson testified on his own behalf and denied that he had any weapon, much less a pistol. RP 502. His controverted protestations of being unarmed is further evidence his “consciousness of guilt” and are circumstantial evidence that object he carried was a functional firearm and not a “prop” - a toy or a non-functional firearm. The Trial Court was in the best position to judge the weight of his testimony in light of all other testimony and evidence educed at trial.⁸ See State v. Boot, *supra*. With evidence showing Mr. Johnson’s actions of pointing the pistol at the victims, threats used to coerce compliance, continuing to carry the pistol in his right hand while carrying other items, coupled with the testimony of two witnesses who described the pistol at trial, the there was more than sufficient proof for the Trial Court to find that the Appellant was armed with a firearm during the commission of the crimes of Burglary in the First Degree and Robbery in the First Degree.

⁷ Had the pistol been merely a toy, he also would have wanted to hide it from view as soon as possible lest his bluff be discovered.

⁸ The Trial Court did, in fact find Mr. Johnson’s trial testimony to be not credible. CP 98 - 103, Finding 18.

2. THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUE OF WHETHER THE TRIAL COURT ADEQUATELY CONSIDERED THE APPELLANT'S ABILITY TO PAY PURSUANT TO STATE v. BLAZINA, WHERE THE APPELLANT FAILED TO OBJECT BELOW.

The State recognizes that RCW 10.01.160(3) requires the trial court to make an individualized inquiry into the defendant's current and future ability to pay prior to imposing costs. See State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry includes evaluating a defendant's financial resources, incarceration, and other debts, including restitution. Blazina, 182 Wn.2d at 838-39. However, where, as here, the Appellant failed to object below, this Court should decline to entertain this issue pursuant to RAP 2.5. See State v. Duncan, 180 Wn. App. 245, 249-50, 327 P.3d 699 (2014), *review granted*, 183 Wn.2d 1013, 353 P.3d 641 (August 5, 2015).

Refusal to entertain issues for the first time on appeal is based upon well settled issues of jurisprudence: "insistence on issue preservation is to encourage 'the efficient use of judicial resources.'" See State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011)(*quoting State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)):

Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

See id. Here, it will not encourage the efficient use of resources to require the transport of the Appellant back to the Asotin County for a

hearing which would have been completely unnecessary had the Appellant simply raised any objection and prompted the Trial Court to inquire.

It should be further recognized that the directive of RCW 10.01.160(3) to inquire regarding ability to pay, as more further described in Blazina, only applies to imposition of discretionary costs.

For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account.

State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755, 758 (Div. II, 2013)(Citing State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (Div. III, 2013). Further, the Court's decision to impose a fine pursuant to RCW 9A.20.021 does not require inquiry into the offender's ability to pay. See State v. Clark, ___ Wn.App. ___, ___ P.3d ___, 2015 Wash.App. LEXIS 2869 (Div. III, November 19, 2015). Of the financial obligations imposed herein, only the Sheriff's service costs, witness costs, and court appointed attorney costs are at issue.

This issue was also raised on appeal by the Co-Appellant, Mr. Whitlock. However, Mr. Johnson's case differs in one key respect: unlike Mr. Whitlock, Mr. Johnson testified at trial. In Mr. Johnson's matter, there is evidence in the record that, Mr. Johnson will have the ability to pay upon release. At trial, Mr. Johnson testified that he has been previously employed as a cook. RP 477. Further, the trial

testimony makes clear that Mr. Johnson is an able-bodied individual who is certainly capable of performing manual labor.⁹ The Appellant instead relies on the fact that he is a convicted felon as an excuse and reason he will be unemployable. RP 483. If the Appellant's logic were to prevail, then no legal financial obligations could ever be appropriate for any felony conviction. Clearly, felons are employable. There may be certain opportunities which are forfeited by virtue of the offender's decision to commit a serious crime, but that fact, in and of itself, is insufficient to render the offender perpetually indigent. While he may be currently indigent due to his incarceration, there is good cause to believe that he will have the ability to pay.

The State would agree that, should State prevail on cross-appeal, and the matter be remanded to correct the Appellant's offender score, it would then be necessary to hold a new sentencing hearing. In that event, it would be appropriate to remand the issue of discretionary costs to the Trial Court for consideration at a new sentencing hearing. At that time the court could inquire regarding Mr. Johnson's ability to pay.

3. RCW 43.43.7541 IS CONSTITUTIONAL AND THE APPELLANT HAS FAILED TO DEMONSTRATE OTHERWISE.

⁹ The nature and manner in which these crimes were committed demonstrates his physical abilities.

The Appellant next claims that RCW 43.43.7541 is unconstitutional as a violation of substantive due process. Brief of Appellant, p. 21. RCW 43.43.7541 plainly and unambiguously provides that the \$100.00 DNA database fee is mandatory for all such sentences. See State v. Thornton, 188 Wn. App. 371, 374-375, 353 P.3d 642 (Div. III, 2015).

As a starting point, statutes are presumed to be constitutional, and the burden to show unconstitutionality is on the party challenging the statute. See In re Marriage of Johnson, 96 Wn.2d 255, 258, 634 P.2d 877 (1981). "A party challenging a statute's constitutionality bears the heavy burden of establishing its unconstitutionality." Larson v. Seattle Popular Monorail Auth., 156 Wn.2d 752, 757, 131 P.3d 892 (2006). This standard is met only if argument and research show that there is no reasonable doubt that the statute violates the constitution. Larson, at 757 (*Citations omitted*), (*statute must be unconstitutional "beyond question"*); Nebbia v. New York, 291 U.S. 502, 537-38, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (*every possible presumption is in favor of a statute's validity, and although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless "palpably" in excess of legislative power*).

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 218-219, 143 P.3d 571, (2006) (*citing Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1994)). In assessing a challenge to statute under substantive due process, the Court must first determine the level of review to be applied to state action, which requires identification of the nature of the right involved. *See id.* at 219. State action which impinges upon a fundamental right is subject to strict scrutiny. *See In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). Here, the Appellant concedes that a fundamental right is not implicated and as such, the statute is subject to the least rigorous "rational basis standard." *Brief of Appellant*, p. 22. The rational basis test is the most relaxed form of judicial scrutiny. *State v. Shawn P.*, 122 Wn.2d 553, 859 P.2d 1220 (1993). Under this test, the challenged law must be rationally related to a legitimate state interest. *See Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997); *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (Div. I, 1998), *cert. denied*, 527 U.S. 1041 (1999).

In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state

interest. See Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993); See also Seeley, 132 Wn.2d at 795.

In 2002, the legislature created a DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as "important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts." *Id.* To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: "Every sentence ... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account." *Id.* Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database[.]" RCW 43.43.7532.

Here, the Appellant concedes the legitimacy of the State's interest in retention of convicted felony offender's DNA profiles. Brief of Appellant, p. 23. The Appellant instead mounts his attack on the mandatory imposition of this assessment on the indigent.

It should be noted that the fee is set at one hundred dollars (\$100.00). See RCW 43.43.7541. Other mandatory assessments imposed by statute are substantially larger. See eg. RCW 69.50.430 (*requiring imposition of a one thousand dollar (\$1,000.00) fine for certain felony violations of RCW 69.50*), RCW 36.18.020(2)(h) (*mandatory two hundred dollar (\$200.00) criminal filing fee*), and RCW 7.68.035 (*requiring imposition of a five hundred dollar (\$500.00) crime victim compensation assessment*).¹⁰

The Appellant claims that the blanket imposition of the DNA fee does not further the State's interest identified above. The Appellant does so without regard to any facts, but rather, merely his personal opinions on efficacy of such mandatory imposition. The Appellant asserts that the imposition of the fee does not further the State's interest. His argument relies on the central, but unspoken, assumption that all offenders who are convicted are thus indigent. Upon this unsubstantiated and gross mischaracterization, the Appellant builds his argument. There is nothing in the record to support this oft repeated but factually unsupported assumption. The Appellant's claims to the contrary notwithstanding, being convicted of a felony does not equate to "perpetually and hopelessly indigent."

¹⁰ The Appellant makes no claims as to the constitutionality of either the criminal filing fee or the Crime Victims Compensation assessment, both of which were imposed by the Court herein. CP 160 - 199.

The Appellant's argument conflates the issue of collection with the imposition of the fee in the first place, which will be discussed later herein.

To the contrary, the statutory imposition of a mandatory DNA fee will further the goals of the State: to fund the creation and maintenance of the DNA database. This "user" fee is appropriate since it was the actions of the offender that result in conviction and the need to record the DNA profile. The fee is clearly rationally related to the State's legitimate goals. Just as imposition of the court filing fee reimburses the State for the need to file charges, (See RCW 36.18.020(2)(h)), this fee helps to offset the costs necessary to establish and maintain the DNA database.

Finally, and most importantly, our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). Such procedural safeguards currently exist in the form of statutes and case law authorizing remission and precluding incarceration for nonpayment. See RCW 10.01.160(4). See also State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). The Appellant has failed to demonstrate that RCW 43.43.7541 violates substantive due process beyond a reasonable doubt.

4. THE COURT PROPERLY ORDERED THE APPELLANT TO SUBMIT TO COLLECTION OF HIS DNA AFTER BEING CONVICTED OF TWO VIOLENT FELONIES.

Finally, the Appellant complains that the trial court abused its discretion when it ordered him to provide a DNA sample. RCW 43.43.754(1)(a) requires that a biological sample be collected for the purposes of DNA identification analysis from, *inter alia*, every person convicted of a felony. Under RCW 43.43.754(2), a sample is not required if the Washington State Patrol crime laboratory already has a sample from the individual pursuant to a qualifying offense. The Appellant's argument in this regard is predicated on an assertion that he previously provided a DNA sample at the time of his previous 2003 convictions in Asotin County, Washington, for Residential Burglary and Assault in the Third Degree. CP 160 - 199.

First, it should be recognized that the Appellant failed to object to collection of his DNA at the time of sentencing. As discussed above, this Court should decline to consider this pursuant to RAP 2.5. See State v. Duncan, *supra*. Any error, assuming one occurred, is neither constitutional nor manifest. As such, this Court should pass upon consideration of this issue as the Appellant failed to properly preserve it below.

Reaching the merits and as a preliminary matter, there is nothing in the statute which precludes collection of a second or subsequent DNA sample from an offender, nor does it preclude a

court from ordering an offender to submit to subsequent sampling of his or her DNA. The plain language of the statute reads:

If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a *subsequent submission is not required to be submitted.*

RCW 43.43.754(2)(*Emphasis added*). The language used in this statute does not create a prohibition to collection or submission of a subsequent DNA sample nor does it preclude the Court from ordering an offender to provide a sample. Rather, the statute merely allows that multiple samples from the same individual are not required by the statute. See State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (*use of "may" and "shall" in the statute indicates that the Legislature intended the two words to have different meanings: "may" being directory, and "shall" being mandatory*). The statute confers discretion on the Court to require a DNA sample be taken on subsequent qualifying convictions. Legally, the Appellant's argument is flawed.

Factually, the Appellant's argument fails as well. While the State does not dispute that, at the time of his 2003 convictions, the law directed collection of a DNA sample, there is no evidence in the record that a DNA sample was in fact collected. The Appellant's argument is based upon an *ipso facto* assumption that because the law provided for collection, collection necessarily occurred. Here,

there is nothing factual in the record to support the Appellant's claim on appeal that a sample was clearly unnecessary. As such, the record is insufficient to grant the relief sought. See State v. Thornton, 188 Wn. App. at 374.(citing Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (Div. I, 1994) (*a party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors*). At sentencing, the Appellant provided no further help in clarifying the issue. When given the opportunity to address the court he only offered: "Nah, I'm good. I ain't got nothing to say to you." Under these circumstances, it cannot be said that the Trial Court abused it's discretion.

5. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE CRIMES OF BURGLARY IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE CONSTITUTED THE SAME CRIMINAL CONDUCT.

By way of cross appeal, the State would charge that the Trial Court erred, as a matter of law, in finding that the crimes of Burglary in the First Degree and Robbery in the First Degree constituted the same criminal conduct. Because the clear authority is contrary to the Trial Court's conclusion, this Court should remand for resentencing with instruction to the Trial Court that the two charges cannot be considered same criminal conduct.

'Same criminal conduct' means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve *the same victim*.

See RCW 9.94A.589(1)(a). (*Emphasis added*).

[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

See id. The same-criminal conduct test focuses on the extent to which a defendant's criminal intent, as objectively viewed, changes from one crime to the next. See State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The defendant bears the burden of proving that his offenses encompass the same criminal conduct. See State v. Williams, 176 Wn. App. 138, 142, 307 P.3d 819 (Div. III, 2013), *aff'd*, 181 Wn.2d 795 (2015).

The Court herein determined that the two crimes were "same criminal conduct." In so finding, the Court focused on the objective intent of Mr. Johnson in committing the two crimes. RP (Whitlock) 699.¹¹ In so ruling, the Court stated:

[T]he only reason for the burglary was to facilitate the robbery and so I think there is same criminal conduct under that analysis.

¹¹ The Court did not reiterate the reasons for finding "same criminal conduct" as to Mr. Johnson, instead relying on its oral pronouncement at Mr. Whitlock's sentencing which occurred immediately prior to Mr. Johnson's sentencing. RP 81.

RP (Whitlock) 699. The court limited its focus to time, place and intent and did not consider identity of victims in determining that the two crimes constituted same criminal conduct.

The victims of a burglary include the occupants of a residence and their guests—in this case, a total of at least seven people. See State v. Davison, 56 Wn. App. 554, 559-60, 784 P.2d 1268 (Div. I, 1990). Further, Tonya Routt, the homeowner, while not present at the time of the crime, was clearly a victim of the Burglary charge as it was her home that was unlawfully entered and it was her property that was taken. The State's information charged the Appellant with robbery of three other persons, which did not include Tonya Routt. Named therein as the victims were Damien Hester, Lisa Jones and/or Crista Ansel. The court entered findings after bench trial which included the findings that intimidation was used against Ansel and Hester to take Routt's property. Both Davison and State v. Davis, 90 Wn. App. 776, 954 P.2d 325 (Div. I, 1998) hold that a burglary of a home in which more than one person is present does not have the same victims for "same criminal conduct" purposes as an assault against one of the persons present in the course of the burglary. Davison, at 558 - 560; Davis, at 782. See also State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, (1987) ("*Convictions of crimes involving multiple victims must be treated separately.*"). The logic of these cases applies *a fortiori* where a burglary, such as the case at bar, has ten victims

(Routt, Ansel, Hester, Jones, three children, and three unidentified others) and a robbery during the course of the burglary having two victims (Ansel and Hester).

Simple plain language analysis of the statute makes clear that, even if the multiple victims between both counts were identical, these crimes cannot be treated as the “same criminal conduct.” The “same criminal conduct” analysis requires that the two crimes involve the same *victim* (singular) not the same *victims* (plural). See RCW 9.94A.589(1)(a). Under a plain reading of the language of the statute, multiple victims, even if the victims are all identical between counts, preclude a finding of “same criminal conduct.”

As a matter of law, the Trial Court abused its discretion in finding that the Burglary First Degree and Robbery First Degree, as charged and convicted herein, were the same criminal conduct. In treating these two crimes as “same criminal conduct, the Court miscalculated the Appellant’s offender score, which should have been two points greater. See RCW 9.94A.525(8). This Court should remand for resentencing with instruction to the Trial Court that, as a matter of law, these two crimes do not constitute “same criminal conduct.” In that event, this Court should then properly remand for the Trial Court to consider whether the Appellant has the ability to pay costs pursuant to 10.01.160(3).

V. CONCLUSION

The evidence produced at trial, when viewed in a light most favorable to the State, supports the Court's finding that the Appellant was armed with a firearm during the commission of the crimes charged. Pursuant to RAP 2.5, this Court should reject the Appellant's unpreserved claims concerning imposition of legal financial obligations, and order compelling submission to DNA testing. RCW 43.43.7541 is constitutional and the Appellant has failed to demonstrate otherwise beyond a reasonable doubt. Finally, this Court reverse the Trial Court's ruling that the two crimes constitute the "same criminal conduct" and should remand for resentencing with a corrected offender score. The State respectfully requests this Court enter such decision.

Dated this 20th day of November, 2015.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID R. JOHNSON,

Appellant.

Court of Appeals No: 330745

DECLARATION OF SERVICE

DECLARATION

On November 23, 2015 I electronically mailed, with prior approval from Ms. Gasch, a copy of the BRIEF OF RESPONDENT in this matter to:

SUSAN M. GASCH
gaschlaw@msn.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on November 23, 2015.



LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**