

NO. 48014-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLINTON LAVERNE KING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00491-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in requiring King to register as a felony firearm offender when the court considered King's criminal history and risk to the community?
2. Whether the court made a sentencing error by neglecting to designate a time period for the suspended portion of a misdemeanor sentence?
3. Whether the trial court exceeded its statutory authority by ordering King to pay the victim assessment fee and criminal filing fee on two judgment and sentences arising from the same case?
4. Whether the Court should review the constitutionality of the imposition of the \$100 DNA fee required under RCW 43.43.7541 when King did not object at sentencing?
5. Whether the court should review King's claims of due process and equal protections violations when he has not established manifest error under RAP 2.5 (a)?
6. Whether RCW 43.43.7541 violated King's right to equal protections when all similarly situated defendants are treated exactly the same because they are all required to pay the fee each time they are sentenced for a new felony conviction.

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II. STATEMENT OF THE CASE

On June 16, 2015, a jury found Mr. King guilty of Making False or Misleading Statements to a Public Servant, a gross misdemeanor, but could not reach a verdict on the charge of Unlawful Possession of a Firearm in the Second Degree. CP 34, 35.

On July 29, 2015, Mr. King was sentenced on the gross misdemeanor to a period of 364 days with 244 days suspended. CP 26. The court did not impose a term of suspension for the 244 days which were suspended. CP 26.

The court also imposed Legal Financial Obligations (LFOs) as follows: \$500 crime victim assessment and \$200 criminal filing fee. CP 29. King did not object to any of the LFOs. RP 248–49 (sentencing hearing July 29, 2015).

[MR. STALKER:] So when it comes to -- he'll let you talk in a minute. When it comes to legal financial obligations, Mr. King, as I mentioned has a lot of previous convictions. I have no doubt that he is still paying on many of those. I don't know what his total legal financial obligation costs are per month, but I suspect they are probably in the hundreds of dollars at this point since he has so many cases. And I -- it absolutely makes no sense to impose a fine on Mr. King at that point. It's not required. It's not really helpful. He doesn't really have the ability to pay it off especially if he's going to spend a significant amount of time in jail, and he's going to be retried on the other case in which he's looking at 5 years. So, I just don't think that Mr. King has the capacity to pay significant legal financial obligations. In addition, my -- I don't have the order appointing us right now, it might be in my file somewhere but I believe the Court found Mr. King indigent so I believe it would be appropriate not only to not impose a fine but to waive other legally discretionary financial obligations such as court costs and the attorneys fees. And there is a

\$500 victim's assessment that the Court is required to impose. So I would ask -- I guess the Court has to impose that, and I don't think any further legal financial obligations are necessary.

THE COURT: All right, thank you. Uh, Mr. King, anything you'd like to say?

THE DEFENDANT: Um, just, uh, I was in jail for 40 days until I posted bail and I'm waiting for a print out in the mail from John Casey and I did a little over 60 days of home monitoring and I paid for it and it was accounted for. Just throw that in for consideration.

RP 248–49 (sentencing hearing July 29, 2015).

A retrial on the firearm charge was rescheduled and on Aug. 25, 2015, a jury found King guilty of the charge of Unlawful Possession of a Firearm in the Second Degree. CP 26. King was sentenced for the firearm charge on Sept. 8, 2015. CP 11–24.

The court imposed the following Legal Financial Obligations (LFOs): \$500 victim assessment fee, \$200 criminal filing fee, \$100 DNA fee, for a total of \$800. CP 17–19. The \$500 court appointed attorney fee was waived. CP 18. King did not object to any of the above LFOs imposed. RP 432–33 (sentencing hearing Sept. 8, 2015).

MR. STALKER: Thank you. Well, I guess let's start with the attorneys fees since it was the last thing brought up. Um, Mr. King is indigent. He's been found indigent by this Court. He's going to be serving a sentence within the 43 to 57 month range. He has many, many felony convictions and frankly, once he does serve his sentence it's going to be hard for him to find gainful employment. So I think it would be appropriate for the Court to waive the non-mandatory legal financial obligations in this case, especially the attorneys fees. So I'm going to ask the Court not to impose those and only impose the

mandatory fees.

RP 432–33 (sentencing hearing Sept. 8, 2015).

THE COURT: Mr. King, anything you want to say?

THE DEFENDANT: No -- I've had a lot of problems throughout my life and I really appreciate a, uh, second, third chance, you know.

RP 436.

The deputy prosecutor also requested the court to impose a felony firearm registration requirement. RP 430–31. The State referred to King's criminal history and prior firearms convictions as well as King's risk to community safety. RP 431. King's criminal history included 9 prior felonies and the current conviction was his 3rd firearm offense. RP 432.

King's trial counsel argued that the circumstances of the offense did not create an issue for community safety. RP 435–36. The trial court, referring to King's extensive criminal history and 3 firearm convictions, disagreed with trial counsel on the issue of community safety. RP 437–38. The trial court concluded that King was a danger to the community (RP 439) and that the felony firearm registration requirement was appropriate. RP 440.

The court checked off the boxes in section 2.6 of the judgment and sentence indicating that the defendant committed a felony firearm offense, that the court considered the defendant's criminal history, and that based upon that, the defendant should register as a felony firearm offender. CP 14.

III. ARGUMENT

A. THE COURT PROPERLY IMPOSED THE FIREARM REGISTRATION REQUIREMENT.

Mr. King argues that the trial court abused its discretion in requiring Mr. King to register as a felony firearm offender because the court did not consider all relevant factors under RCW 9.41.330 (1). In particular, Mr. King argues the court only considered one factor: criminal history.

(1) On or after July 28, 2013, whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, *the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333* and may, in its discretion, impose such a requirement.

(2) In determining whether to require the person to register, the court shall consider all *relevant* factors including, but not limited to:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330 (1), (2) (emphasis added).

In interpreting a statute, we do not construe a statute that is unambiguous. If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined within the context of the entire statute.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or

superfluous. The meaning of a particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole.

Davis v. State ex rel. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (citations omitted)).

Here, RCW 9.41.330 (1) states that “the court must consider whether *to impose* a requirement” and then directs the court to consider all relevant factors, including at least the 3 enumerated factors which are part of a non-exclusive list. Each of the enumerated factors, if relevant because they are supported by facts, supports imposing the requirement. There is nothing mitigating about the factors because they lean only in the direction of imposing the requirement. Therefore, it is clear that the purpose of the statute is for the court to consider whether to impose the firearm registration requirement in positive terms. The presence of one relevant factor may be sufficient.

There is nothing in RCW 9.41.330 which indicates that the registration requirement may not be justified by one factor alone, especially when the other two factors are irrelevant because they don't apply. A different reading renders the statute superfluous. For instance, a person may have been convicted of a particularly egregious drive by shooting assault with an assault style firearm but might have no other criminal history and no prior

acquittal by reason of insanity. Would this not warrant a registration requirement on its own, notwithstanding the lack of evidences supporting the other two factors? The statute only requires that the court consider *relevant factors* which warrant the imposition of the requirement.

King cites to *In re Marriage of Mathews*, a case reviewing an award of maintenance in a divorce case for the proposition that a decision that “does not evidence a fair consideration” of requisite statutory factors constitutes an abuse of discretion. 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

Mathews has minimal application to the facts of this case because of the different purposes of the statutes at issue. RCW 26.09.080 (disposition of property and liabilities) provides a list of factors that must be considered for the balancing of equities. *See Mathews*, 70 Wn. App. 121 (“The paramount concern is the economic condition in which the decree will leave the parties.”). Each factor may lean one direction or another towards one former spouse or the other. *See* 26.09.080.

The factors provided under RCW 9.41.330 are factors that lean one way only, towards imposing the registration requirement. These factors are not mitigating or balancing factors. Thus, the statutory factors themselves have a different purpose.

Nevertheless, the record shows that the trial court’s decision imposing

the firearm registration requirement is evidenced by “fair consideration” of the relevant factors. The trial court considered Mr. King’s criminal history and dangerousness to the community. King’s prior felonies were provided and considered by the court. RP 430, 437–40. The State recited those felonies on the record as felony possession of a firearm in the second degree, three counts of possession of methamphetamine, forgery, possession of ephedrine or pseudoephedrine with intent to manufacture, possession of a stolen firearm, possession of over 40 grams of marijuana, and a juvenile offense of taking a motor vehicle without permission. The offense for which Mr. King was being sentenced was his 3rd felony firearm offense. RP 432. Thus, the trial court was keenly aware of Mr. King’s prior criminal history as it was discussed extensively during sentencing. RP 429–33, CP 14.

The trial court also strongly disagreed with defense counsel as to Mr. King’s community safety risk. RP 437–39. The court based its reasoning on the defendant’s criminal history and the facts of the case. RP 437–38. The judge concluded, “I think you are a danger to the community” RP 439.

Moreover, there is no record showing that the other two factors, acquittal by reason of insanity and propensity for violence, were relevant factors. If there *was* evidence of propensity for violence and/or an acquittal by reason of insanity, then the trial court would have been even more disposed towards imposing the registration requirement than it already was.

The record shows that the court considered the defendant's criminal history and dangerousness to the community. Consideration of those relevant factors is evidence of "fair consideration" because those factors alone justify the registration requirement. Therefore, the trial court did not abuse its discretion by imposing the felony firearm registration requirement.

B. THE COURT ERRED BY NEGLECTING TO IMPOSE A PERIOD OF SUSPENSION.

The State concedes that the sentencing court erred by not designating a specific time period for the suspension of a sentence. This error was most likely unintentional and may be corrected under CrR 7.8. *See State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (citing *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)).

The State requests that the case be remanded to the sentencing court to correct the misdemeanor judgment and sentence by including a definite period for the suspended portion of the sentence.

C. THE STATE CONCEDES THAT THE COURT SHOULD ONLY IMPOSE ONE VICTIM ASSESSMENT FEE AND ONE COURT FILING FEE IN THIS CASE.

RCW 7.68.035 requires that the court impose a \$500 victim assessment fee for a felony or gross misdemeanor. The assessment "shall be five hundred dollars for each case or cause of action that includes one or

more convictions of a felony or gross misdemeanor” RCW 7.68.035 (1)(a). The assessment is to be imposed on a per case or cause of action basis. *Id.*

“Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” RCW 36.18.020 (2)(h).

Here, King was convicted of Unlawful Possession of a Firearm in the Second Degree and Providing False or Misleading Statements to Law Enforcement which originated from the same case. The charges were not severed. Rather, the two convictions simply resulted from two separate trials after a hung jury on the felony count. Both charges remained part of the same case.

Therefore, the State requests that this case be remanded to the trial court to vacate the victim assessment fee and filing fee on one of the judgment and sentences only.

D. THE COURT SHOULD DECLINE TO REVIEW THE IMPOSITION OF THE MANDATORY DNA FEE BECAUSE IT WAS IMPOSED WITHOUT OBJECTION.

Mr. King did not challenge the constitutionality of the DNA collection fee at sentencing before the trial court and this Court need not address the argument on appeal. *See State v. Stoddard*, 192 Wn. App. 222, 226, 366 P.3d 474 (2016) (declining to review the constitutionality of the

DNA fee as applied because the challenge was not raised before the trial court).

Mr. King cites to *State v. Ford*, 137 Wn.2d 472, 477–78, 973 P.2d 452 (1999) as a basis for his appeal. However, “[u]npreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.” *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

Mr. King did not object to the imposition of the \$100 DNA fee and the issue is not reviewable as a matter of right. Therefore, this Court need not review the claim on appeal. *See State v. Kuster*, 175 Wn. App. 420, 426, 306 P.3d 1022 (2013) (declining to review imposition of mandatory fee).

E. THE COURT SHOULD DECLINE REVIEW IMPOSITION OF THE DNA FEE BECAUSE THERE WAS NO SHOWING OF MANIFEST ERROR AND THE DNA FEE MAY BE IMPOSED AT SENTENCING WITHOUT RAISING CONSTITUTIONAL CONCERNS.

Mr. King argues, on grounds of indigency, that the mandatory imposition of the DNA collection fee violates substantive due process as applied. King did not object to the imposition of the DNA fee at sentencing.

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: . . . (3) manifest error affecting a constitutional right. . . .

RAP 2.5 (a).

“An issue generally cannot be raised for the first time on appeal

unless it is a ‘manifest error affecting a constitutional right.’” *State v. Fenwick*, 164 Wn. App. 392, 399, 264 P.3d 284 (2011) (citing RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

“[W]e determine whether the alleged error is ‘manifest.’” *Id.* at 400 (citing *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007)).

“‘Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice.’” *Id.* (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). “‘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.’” *Id.* (citing *O’Hara*, 167 Wn.2d at 99).

Here, Mr. King’s due process claim is not reviewable for the first time on appeal under RAP 2.5 (a) because the record does not establish that Mr. King is not able to pay or will be unable to pay in the future. Mr. King did not provide any evidence of his assets, income, or debts except for the stated existence legal financial obligations (LFOs) he owes for prior criminal convictions. As to the outstanding LFOs for his prior criminal convictions Mr. King provided no evidence regarding how much he owes or what his payment amounts are. Mr. King also did not provide any evidence that he was not employable.

Furthermore, indigency for the purpose of hiring counsel is not by itself evidence of inability to pay the \$100 DNA fee. Therefore the record is

insufficient for review on this issue. See *State v. Stoddard*, 192 Wn. App. 222, 228–29, 366 P.3d 474 (2016) (“[T]he record contains no information, other than Stoddard’s statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge’s defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard’s due process argument.”).

Additionally, King has failed to establish actual prejudice because he has not established that the government has sought to enforce payment of the \$100 DNA fee and he is not faced with any impingement of his liberty interest.

Monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because “[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,” and “[i]t 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.” *State v. Blank*, 131 Wash.2d 230, 241, 930 P.2d 1213 (1997) (most alterations in original) (internal quotation marks omitted) (quoting *State v. Curry*, 118 Wash.2d 911, 917, 829 P.2d 166 (1992)); and see *State v. Thompson*, 153 Wash.App. 325, 336–38, 223 P.3d 1165 (2009) (DNA fee); *State v. Williams*, 65 Wash.App. 456, 460–61, 828 P.2d 1158, 840 P.2d 902 (1992) (victim penalty assessment).

State v. Kuster, 175 Wn. App. 420, 424–25, 306 P.3d 1022 (2013).

Mr. King has failed to establish a manifest error under RAP 2.5 (a) because there is no record to review the alleged violation of substantive due process do to an inability to pay and he has not established actual prejudice or any effort by the State to enforce payment of the \$100 DNA fee. Therefore, the Court should decline to review King's due process claim.

Mr. King also argues that RCW 43.43.7541 violates equal protections because it treats defendants different such that those who are sentenced more than once have to pay the fee multiple times. For the same reason as argued above, this claim is not reviewable under RAP 2.5 (a) because Mr. King has not established actual prejudice from an effort to enforce payment of the fee.

Moreover, King's argument lacks merit because the statute treats defendants that are *similarly situated* exactly the same way. *See State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004)(citing *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992) (“Under the equal protection clause of the Fourteenth Amendment and article 1, section 12 of Washington's constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.”)).

Under RCW 43.43.7541, all defendants pay the fee each time they are sentenced for a new felony crime. “The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of

RCW 43.43.754(1) and (2).” *State v. Thornton*, 188 Wn. App. 371, 375, 353 P.3d 642 (2015).

Mr. King did not establish a manifest error effecting a constitutional right under RAP 2.5 (a) because he did not establish actual prejudice and did not present a record sufficient to review his constitutional claims. Further, imposition of the DNA fee does not violate equal protections because RCW 43.43.7541 is applied exactly the same way to all persons sentenced for a felony conviction and the statute furthers a legitimate governmental purpose.

Therefore, the Court should either decline to review or affirm the imposition of the mandatory DNA fee.

IV. CONCLUSION

The record establishes that the court properly exercised its discretion when imposing the felony firearm registration requirement because it considered all relevant factors under RCW 9.41.330 (2) and considered Mr. King’s risk to the community as well.

The State concedes that the trial court erred by not designating a specific duration for the suspended portion of the sentence and by imposing 2 victim assessment fees and criminal filing fees under the same cause.

Mr. King did not object to the imposition of the DNA fee and did not establish an exception under RAP 2.5 (a). Finally, RCW 43.43.7541 does not violate equal protections because it affects all similarly situated persons

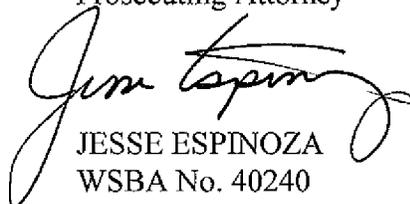
exactly the same.

For the foregoing reasons, the Court should decline to review the imposition of the DNA fee and should affirm the imposition of the felony firearm registration requirement. Additionally, the State requests that the case be remanded to the trial court to correct the misdemeanor judgment and sentence so that a period for the suspended sentence may be imposed and the criminal filing fee and victim assessment may be vacated.

Respectfully submitted this 2nd day of May, 2016.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

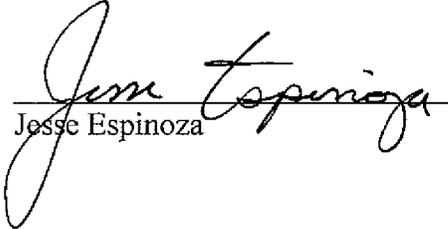
A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa Tabbut on May 2, 2016.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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