

NO. 48072-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

THOMAS SAUNDERS LOMAX,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

OFFICE AND POST OFFICE ADDRESS

County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

T A B L E S

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE..... 2

ARGUMENT 3

1. The court was within its discretion to order ankle restraints on the last day of trial to address a security concern..... 3

The court did not defer to corrections staff by in ordering restraints..... 2

The trial court has discretion to require shackles..... 3

Restraints which are not visible do not prejudice a defendant. 5

2. The court did not err when it did not allow a witnesses juvenile dispositions to be used to impeach her..... 5

Juvenile adjudications are presumed inadmissible. 6

Defendant’s confrontation right is not implicated..... 8

Defendant can show no prejudice from the exclusion of the juvenile adjudications..... 9

3. The prosecutor argued that Ms. McCarthy’s testimony was reliable in the context of the other evidence, and did not “vouch.” 10

Prosecutorial misconduct and improper vouching defined. ... 11

The State’s argument was that Ms. McCarty’s testimony was reliable in the context of the other evidence. 11

Even if the argument was improper, there was no prejudice. 13

4. Cumulative error doctrine is not applicable. 14

Cumulative error doctrine is limited to trials riddled with error or fundamentally unfair. 14

5. A statute mandates imposition of a DNA fee, so in absence of a statute allowing the court to waive the fee, there is no error.. 15

The fee is mandated by statute. 15

Defendant failed to preserve this issue for appeal.	16
Imposition of the DNA fee implicates neither equal protection nor substantive due process.	17
Imposing additional DNA fees on recidivists is not discriminatory.	18
6. The J&S contains a provision to allow for no sample to be taken if a sample is already on file.	19
7. The State concedes that there is a scrivener’s error in the judgment & sentence.	20
8. The issue of appellate costs is not yet ripe.	20
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)... 9

State v. Afeworki, 189 Wn. App. 327, 358 P.3d 1186 (2015)..... 3, 4, 5

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 21

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991)..... 21

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 17

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 15

State v. Gerard, 36 Wn. App. 7, 671 P.2d 286 (1983) 6, 7, 9

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000)..... 15

State v. Hartzog, 96 Wash.2d 383, 635 P.2d 694 (1981)..... 3

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 8

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 11

State v. Mathers, 193 Wn. App. 913 (2016) 16, 17, 18

State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996) 8

State v. Moten, 95 Wn. App. 927, 976 P.2d 1286 (1999)..... 20

State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013)..... 16

State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015)..... 3

State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006)..... 11, 13

U.S. v. Cazares, 788 F.3d 956 (9th Cir. 2015)..... 5

Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985) 3

Statutes & Rules

CrR 7.8..... 20

ER 609 6, 7, 8

RCW 43.43.754 15, 18

RCW 43.43.7541 15, 16

RESPONSE TO ASSIGNMENTS OF ERROR

1. **The court was within its discretion to order ankle restraints on the last day of trial to address a valid security concern because this is within the court's discretion.**
2. **The court did not err when it did not allow juvenile dispositions be used to impeach a witness because those adjudications are presumptively inadmissible, and no case supports the argument that such a ruling implicates the confrontation right.**
3. **The prosecutor argued that Ms. McCarthy's testimony was reliable in the context of the other evidence, and did not "vouch," so there was no misconduct.**
4. **Cumulative error doctrine is not applicable because the assignments of error are not errors.**
5. **A statute mandates imposition of a DNA fee, so in absence of a statute allowing the court to waive the fee, there was no error.**
6. **Because the judgment & sentence allows the DNA sample not to be taken if a sample is on file, there was no error.**
7. **The J&S does contain a scrivener's error as to the offense date.**
8. **The issue of whether to award the State appellate costs is not yet ripe for review.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the statement of the factual and procedural history in appellant's brief, with the following additions:

 Mariah McCarty testified that she "hung out" with Defendant in Fall of 2013. Verbatim Report of Proceedings 8/19/15 at 379. She testified that she and Defendant drove to the Hoquiam Castle at about midnight one night. *Id.* at 380. She testified that she parked next to a brick wall in front of the Hoquiam Castle, and identified the house from a photo (exhibit 17,) but said that the wall she parked next to did not look like the wall in the photo. *Id.* at 381-82.

 On the last day of trial the court was informed that Defendant had made statements to the corrections staff that he intended to flee, should the opportunity present itself. *Id.* at 411-12. The court considered this a significant security concern. *Id.* at 412. The court ordered the corrections officers to shackle his legs. *Id.* The court knew that there was a panel blocking the jury's view of Defendant's feet. *Id.* Defendant was given an opportunity to move if he felt the restraints would be less visible from another position, but he declined. *Id.* at 412-43.

In closing argument the State framed the case as a “whodunit,” and that the “Straw-Ber-Rita” can and Ms. McCarty’s testimony were the most important evidence. *Id.* at 422.

The State argued that Ms. McCarty knew more than she was willing to testify to, and pointed out that she refused to testify. *Id.* at 426. The State also pointed out that, as an accomplice, her testimony should be subjected to special scrutiny. *Id.* at 427. Finally, the State argued that her reluctance to testify fully and her failure to identify a wall in a photograph as the wall she parked next to was an indication that her testimony was not fabricated or influenced by improper motivate, because if it was, she would have simply identified the wall in the photo. *Id.* at 428.

ARGUMENT

1. The court was within its discretion to order ankle restraints on the last day of trial to address a security concern.

Defendant’s first assignment of error¹ is that he was deprived of a fair trial because the court ordered his ankles shackled on the last day of trial. Defendant claims that the judge simply deferred to corrections staff’s request for the shackles, but this claim is unsupported in the record.

¹ In Defendant’s brief there are two assignments of error listed in the table on contents on this topic, but the body of the brief only addresses it in one section.

The record indicates that the court was responding to a security concern raised by corrections staff.

The court did not defer to corrections staff by in ordering restraints.

The record indicates that the court made the decision to shackle Defendant after corrections staff raised a concern. Defense council first noted that Defendant had been fitted with restraints, and the court replied,

I was informed that Mr. Lomax had made statements to correction staff that given the opportunity to flee that he intended to do so and I felt that that was a sufficient security concern for Mr. Lomax to be shackled and I instructed the court administrator to tell the corrections officers that I - I wanted Mr. Lomax to be shackled the remainder of the trial.

VRP at 411:24-12:6.²

This quote contains no indication that the trial court deferred to a request by corrections staff. On the contrary, it is clear that the court made its own decision after corrections staff brought Defendant's statements of his intentions to the court's attention. There is no indication that corrections staff even suggested, let alone requested this or any restraint.

² The Verbatim Report of Proceedings indicate that this exchange took place sometime after 12:45 PM on August 19, 2015, shortly before Defendant presented his sole witness. See VRP at 360, 405, 456.

Defendant's allegation is without support and should be rejected by this court.

The trial court has discretion to require shackles.

“[A] trial court has broad discretion to determine which security measures are necessary to maintain decorum in the courtroom and to protect the safety of its occupants.” *State v. Afeworki*, 189 Wn. App. 327, 352, 358 P.3d 1186 (2015) (citing *State v. Damon*, 144 Wash.2d 686, 691, 25 P.3d 418 (2001).) “[I]t is particularly within the province of the trial court to determine whether and in what manner, shackles or other restraints should be used. *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015) *review denied*, 183 Wn.2d 1025, 355 P.3d 1154 (2015). The reasons for the court's decision must be founded upon a factual basis set forth in the record. *State v. Hartzog*, 96 Wash.2d 383, 400, 635 P.2d 694 (1981). “Prison officials are well positioned to assist the trial court in deciding matters of courtroom security.” *Walker* at 797. “Although prisoner status, standing alone, may not warrant shackling... it may justify the trial judge's concern for security.” *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985) (citing *U.S. v. Esquer*, 459 F.2d 431, 433(7th Cir. 1972) and *Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982) internal citations omitted.).

Some factors that a trial court may consider include:

- the seriousness of the present charge;
- the defendant's temperament and character;
- the defendant's past record;
- past escapes or escape attempts, and evidence of current escape plans;
- threats to harm others or cause a disturbance;
- self-destructive tendencies;
- the risk of mob violence or of attempted revenge by others;
- the possibility of rescue by other offenders still at large;
- the size and the mood of the audience;
- the nature and physical security of the courtroom; and
- the adequacy and availability of alternative remedies.

Afeworki at 358 (citing *Damon*.)

In the instant case Defendant had threatened to flee, and he was facing a mandatory life sentence. It was reasonable for the court to infer that Defendant might feel he had nothing to lose by trying to run, and that he might use violence to escape, because no court could inflict any additional confinement upon him.

The court was justified in taking the modest security step of ordering ankle restraints to prevent any such attempt, and acted within its discretion. This court should uphold that decision.

Restraints which are not visible do not prejudice a defendant.

“Visibility of the shackles is critical to the determination of the due process issue.” *U.S. v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015) (citing *U.S. v. Mejia*, 559 F.3d 1113, 1117 (9th Cir.2009).) A restraint that is not visible to observers does not implicate the prejudice to a defendant’s presumption of innocence that visible shackles do. *Afeworki* at 353.

In the instant case the court noted that the jury’s view of the ankle restraints was blocked by a panel. VRP at 412. Defendant claims that trial counsel did not agree that the shackles were not visible, but the record indicates that the court gave Defendant the opportunity to alter his positions in relation to the jury if he felt moving would better obscure the jury’s view, but Defendant declined.

In short, there is every indication that the jury could not see the shackles. In the absence of any indication of actual prejudice, this court should uphold the decision to shackle Defendant, and uphold his conviction.

2. The court did not err when it did not allow a witnesses juvenile dispositions to be used to impeach her.

Defendant next claims that the court erred when it did not allow him to impeach the State’s witness, Mariah McCarty with her juvenile dispositions. He further claims this deprived him of his “right to impeach”

the witness, conflating it with the right to confront witnesses. However, no case stands for the proposition that a defendant has such a right, and juvenile adjudications are presumptively *not* admissible.

Juvenile adjudications are presumed inadmissible.

The admissibility of juvenile adjudications to impeach a witness is governed by ER 609(d), which reads,

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Washington courts have long held that “[w]hen juvenile adjudications are sought to be admitted solely for general impeachment the trial court has broad discretion on admissibility[.]” *State v. Gerard*, 36 Wn. App. 7, 11, 671 P.2d 286, 288 (1983) (citing *State v. Temple*, 5 Wash.App. 1, 4, 485 P.2d 93 (1971).)

Further, courts draw a distinction between adult convictions of dishonesty, whose admissibility is governed by ER 609(a), and juvenile

adjudications, the admissibility of which is governed by ER 609(d). Under ER 609(d) "...the court is not specifically directed to balance probity and prejudice and the general presumption is that juvenile adjudications are inadmissible." *Gerard* at 11. To admit a juvenile adjudication for general impeachment, such as in the instant case, a party must make "a positive showing that the prior juvenile record is necessary to determine guilt" or innocence for the adjudications to be admitted. *Id.*

In the instant case Defendant made no showing that Ms. McCarty's juvenile dispositions were relevant to whether Defendant burgled Hoquiam's Castle. Ms. McCarthy was a reluctant, if not hostile witness who refused to answer questions on direct examination. She was an accomplice in Defendant's crime, and the jury were aware she had been granted immunity to testify. Further, they were instructed to subject her testimony to heightened scrutiny. CP at 36. Her previous involvement in car thefts would have added nothing.

Further, the court was aware that Defendant was implicated in two of Ms. McCarty's juvenile adjudications. CP at 29. Therefore, Ms. McCarthy's previous adjudications were potentially prejudicial to Defendant because they may have contained evidence of his prior bad

acts. The trial court denied the motion in its discretion, and this court should uphold that ruling.

Defendant's confrontation right is not implicated.

Defendant claims that not admitting this evidence deprived him of the right to confront witnesses, and cites a footnote in *State v. McDaniel* for this proposition. However, the footnote in *McDaniel* was concerned only with *adult* prior convictions admitted under ER 609(a), not juvenile adjudications. See *State v. McDaniel*, 83 Wn. App. 179, 188 n. 5, 920 P.2d 1218, 1223 (1996). As the *Gerard* court observed, because of the different standards in admitting adult and juvenile convictions, "...the caselaw under ER 609(a) should not be indiscriminately applied to ER 609(d)." *Gerard* at 12.

Further, the *McDaniel* court expressly declined to rule on the ER 609 issue, because the appeal was decided on different grounds. See *McDaniel* at 188 n. 5. Even if *McDaniel* were applicable to juvenile adjudications, footnote 5 is merely dicta.

Defendant also points to *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983), to support his proposition that failure to admit the juvenile adjudications is tantamount to a violation of the confrontation right. *Hudlow* points to *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed.

2d 347 (1974) pronouncement that, “any attempt to limit meaningful cross-examination, whether it be by legislative act, judicial pronouncement or court ruling upon the admissibility of evidence, court rule, or the common law, must be justified by a compelling state interest....”

However, the *Gerard* court specifically addressed *Davis*' applicability, and pointed out that “*Davis* holds only that prior juvenile adjudications are admissible to show bias or motive in testifying.” *Gerard* at 11 (citing *State v. Wilson*, 16 Wash.App. 434, 438, 557 P.2d 18 (1976).) In the instant case the juvenile adjudications were sought to be used only for general impeachment, not to show any bias or motive.

Because the Defendant cannot show that Ms. McCarty's juvenile adjudications were necessary to determine Defendant's guilt or innocence, or to show bias or motive, the decision does not implicate his right to confront the witness. He was given an opportunity to cross-examine Ms. McCarty. The sixth amendment requires nothing more.

Defendant can show no prejudice from the exclusion of the juvenile adjudications.

Even assuming, *arguendo*, that it was error to exclude Ms. McCarty's juvenile record, there was no prejudice. As noted above, Ms. McCarty was obviously an accomplice in Defendant's instant crime, and

the jury were warned to be cautious in evaluating her testimony, and told that she had received immunity for her part in the crime.

Defendant claims that, without Ms. McCarty's testimony, the jury were "left to speculate how a can with Mr. Lomax's DNA on the lid made its way into an area often open to the public." Brief of Appellant at 21.

No speculation would have been necessary. The can alone put Mr. Lomax at the scene of the crime. Ms. McCarty's testimony may have made the State's case stronger, but even had she been impeached, her testimony merely confirmed what the can already indicated. Defendant was the burglar. His conviction should be upheld.

3. The prosecutor argued that Ms. McCarthy's testimony was reliable in the context of the other evidence, and did not "vouch."

Defendant next claims that the prosecutor committed misconduct by "vouching" for witness Mariah McCarty in closing argument. This claim is unsupported by the record, and is based upon an out-of-context, partial quote from a longer argument. However, even if the argument were improper, Defendant fails to establish prejudice, so his claim of misconduct fails

Prosecutorial misconduct and improper vouching defined.

“To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial.” *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646, 655 (2006) (citing *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).)

“Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony.” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389, 392 (2010) (citing *U.S. v. Brooks*, 508 F.3d 1205, 1209 (9th Cir.2007).) In the instant case Defendant claims that the prosecutor expressed an opinion.

The State’s argument was that Ms. McCarty’s testimony was reliable in the context of the other evidence.

Defendant takes an isolated phrase from a longer argument and claims it amounts to misconduct. The State did not “assure” the jury that “she’s not making this up.” The State said,

There was no testimony of any quid pro quo of any offer of immunity in exchange for testimony. She was put on the stand, didn't want to testify given immunity so she couldn't be prosecuted and she still wouldn't tell - tell you everything, but she did tell you

enough. She did tell you enough. And she's not making this up, because if she were, well, she could say, oh, yeah, that's exactly the place. I mean[,] she knew the Hoquiam Castle, right[?] She knows what that is.

VRP 8/19/15 at 428. The obvious meaning is that Ms. McCarty's testimony should be considered reliable because it was imperfect.

In her testimony, Ms. McCarty said she drove Defendant to the Hoquiam Castle and parked next to a wall. Ms. McCarthy then identified Exhibit #17 as what she knows as the Hoquiam Castle, and said she parked where a police car was parked in Exhibit #17, but failed to identify the wall the police car was parked by as the wall she had parked by, despite the wall obviously being of no recent vintage. *See* Exhibit #17. Obviously, the prosecutor's argument is that, had Ms. McCarthy's testimony been a fabrication, or were she improperly motivated, she would have simply agreed that the wall in the photo was the wall that she had parked next by.

To state it another way, the fact that her testimony establishes her memory had faded on an incidental detail makes her testimony more believable. An improperly motivated witness would have lied about an

incidental detail like the wall, in hopes of not losing whatever reward was promised for an imperfect performance.

The prosecutor's argument also asserts that Ms. McCarty's reluctance to testify was more evidence of a lack of an improper motive. Ms. McCarthy refused to answer question about what Defendant had told her after he returned to the car with jewelry. The prosecutor's argument was that this demonstrated that her testimony was not simply designed to convict.

Defendant mischaracterizes the prosecution's closing argument by cherry picking an isolated phrase from a longer passage. He fails to prove improper vouching. This assignment of error should be rejected and the conviction upheld.

Even if the argument was improper, there was no prejudice.

Even assuming, *arguendo*, that the argument was improper, Defendant fails to establish that the outcome of the trial was affected. To prove prejudice Defendant must prove that there is a "substantial likelihood the misconduct affected the jury's verdict." *Id.* (quoting *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 481–82, 965 P.2d 593 (1998).)

Here, any prejudice is speculative. Ms. McCarty's testimony was reluctant, as Defendant concedes, but served to corroborate the DNA

evidence, and to establish that Defendant had jewelry with him when he fled. That Defendant actually managed to get away with jewelry was not essential to prove the case, because Mrs. Grow's testimony that Defendant was going through her drawers was enough to establish in intent to commit a crime within Hoquiam's Castle.

Looking at the case in the totality, it is clear that Defendant's DNA on a foreign can found at a crime scene was enough to convict Defendant in a case where identity was the one major issue. Even if the argument was improper, Defendant fails to show how the DNA evidence from the can would have been overlooked. He fails to meet his burden, and for that reason this assignment of error fails. The conviction should be upheld.

4. Cumulative error doctrine is not applicable.

Defendant next argues that cumulative error doctrine warrants reversal. Since the State disagrees that any of the previous assignments of error are actual errors, the State also disagrees that cumulative error doctrine warrants reversal.

Cumulative error doctrine is limited to trials riddled with error or fundamentally unfair.

Application of cumulative error doctrine "is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a

fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390, 399 (2000) (collecting cases.) “Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair.” *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653, 667 (2012) (citing *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 332, 868 P.2d 835 (1994).)

In the instant case the error complained of above are either factually or legally incorrect. Cumulative error doctrine is for multiple actual errors which render the process completely unreliable. Defendant fails to establish a fundamentally unfair trial. This court should uphold the jury’s verdict.

5. A statute mandates imposition of a DNA fee, so in absence of a statute allowing the court to waive the fee, there is no error.

Defendant next assigns error to the trial court’s imposition of a mandatory \$100 DNA fee. This issue was not preserved for appeal and is not of constitutional magnitude, so the court should not consider it.

The fee is mandated by statute.

Pursuant to RCW 43.43.7541, “[e]very sentence imposed for a [felony] must include a fee of one hundred dollars.” That same statute allows the fee to be waived for juvenile offenders if the State already has a

sample on file, but there is no such provision for adult offenders. *See* RCW 43.43.7541.

“Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA³ fees.” *State v. Mathers*, 193 Wn. App. 913 (2016) (collecting cases) (footnote added.) “Washington courts consistently treat the DNA and the VPA statutes as separate and distinct from the discretionary LFO statute and the restitution statute.” *Id.*

Because imposition of this fee is not discretionary, and courts have upheld the imposition, this court should uphold the imposition of the fee in this case.

Defendant failed to preserve this issue for appeal.

Generally, appellate courts “will not review any claim of error that was not raised in the trial court.” *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013) (citing RAP 2.5.) “This rule affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Id.* (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wash.2d 495, 498, 687 P.2d 212 (1984).)

³ Victim Penalty Assessment (RCW 7.68.035.)

This principle has been found to apply to legal financial obligations. “Unpreserved LFO errors do not command review as a matter of right....” *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680, 683 (2015).

Because Defendant failed to object to imposition of the fee below, this court should not consider the assignment of error and affirm the judgment on the grounds that the issue is not preserved for appeal.

Imposition of the DNA fee implicates neither equal protection nor substantive due process.

Defendant next argues that imposition of the fee violates equal protection and substantive due process. These issues were also decided by the *Mathers* court (*supra*), which rejected both arguments.

Concerning the equal protection argument, the *Mathers* court held that, “the imposition of DNA and VPA fees on [the defendant] did not violate equal protection.” *Id.*

The *Mathers* court also considered the substantive due process argument and noted, “In *Curry*, our Supreme Court held that the VPA statute did not violate due process because ‘no defendant will be incarcerated for his or her inability to pay the penalty assessment unless

the violation is willful.” *Id.* (quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166, 169 (1992).)⁴

When a person commits a felony, even if a sample has previously been taken a determination must be made that the sample is on file. *See* RCW 43.43.754(2). People who commit multiple felonies create a burden on the agency which is responsible for making that determination. Therefore, the fee is justified even in the case of a felon committing another felony.

These issues were recently decided by this court. This court should leave those decisions undisturbed and uphold the imposition of the DNA fee.

Imposing additional DNA fees on recidivists is not discriminatory.

Defendant claims that imposition of the DNA fee is discriminatory because those who commit multiple felonies are compelled to pay this fee more than people who commit only one felony. Should this court decide to reconsider this issue the State would point that, were this argument to be taken to its logical conclusion, it would also be discriminatory to

⁴ The opinion apparently mistakenly attributes the quote to *State v. Curry*, 62 Wn. App. 676, 681, 814 P.2d 1252, 1254 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992). In fact, that quote was in the Supreme Court case which followed.

sentence those with multiple felonies to longer sentences than those who have committed only one felony.

The obvious way to avoid the DNA fee (or longer incarceration) is to refrain from committing felonies. It can hardly be said to be discriminatory when the person's disadvantage is due to their own misconduct.

This court should uphold the imposition of the DNA fee.

6. The J&S contains a provision to allow for no sample to be taken if a sample is already on file.

Defendant alleges error and prejudice stemming from the court's mandate that he provide a DNA sample, because, given his criminal history, he obviously must have given a sample before. This argument ignores the plain language of the judgment & sentence, section 4.4, which reads, in relevant part, "This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense RCW 43.43.754." CP at 15.

Because the judgment & sentence already provides for no sample to be taken if the Washington State Patrol already has a sample, this assignment of error is without merit.

7. The State concedes that there is a scrivener's error in the judgment & sentence.

The offense date, as alleged in the Information and proven at trial, was September 20, 2013. CP at 1. In the Judgment & Sentence, it was mistakenly recorded as "9/20/2014". CP at 12.

Clerical mistakes in judgments may generally be corrected by the court on motion of any party or the trial court. CrR 7.8 (a). However, because this case has been accepted for review, the trial court has only the authority granted by RAP 7.2, which does not include clerical corrections of judgments.

In the absence of any prejudice caused by the error, the proper remedy is for this court to direct the error be corrected. *See State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286, 1287 (1999). This court should uphold the conviction, but direct the date of the crime be corrected.

8. The issue of appellate costs is not yet ripe.

Finally, Defendant asks this court not to impose appellate costs if the State prevails and moves to impose costs. However, the State has not asked for costs, or even prevailed, at this point. The issue is not yet ripe.

"Three requirements compose a claim 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, 685 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wash.2d 238, 255–56, 916 P.2d 374 (1996).)

Further, "...the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 1119 (1991), *amended*, 837 P.2d 646 (Wash. Ct. App. 1992).

This court has the discretion to impose the costs, however, as of yet, there is no request for costs. This issue is not ripe because no party has yet prevailed. This issue should not be decided unless and until the State both prevails, and asks for costs.

CONCLUSION

Defendant's assignments of error one, two and three allege trial errors, but none of them are really errors. The record is clear that the court decided to order the shackles after Defendant threatened to flee, and there is no indication of simply deferring to corrections staff. Ms. McCarty's juvenile adjudications are presumed to be inadmissible, and so not admitting them was not error. Finally, the prosecutor did not vouch for

Ms. McCarty's veracity, but rather argued that the limited admissions and testimony she did give were reliable in light of the other evidence.

Because none of these alleged errors were really errors, applying cumulative error doctrine is a non sequitur.

Assignments of error five, six, and seven all allege error with sentencing. The DNA fee was assessed in accordance with statute and case law, so no error occurred in respect to that decision. Further, the Judgment & Sentence contains a provision permitting the appropriate agency not to take a new sample if one is already on file, so that assignment or error is without merit as well. However, there is one error; one digit in the date of the crime. The State will gladly fix that error and asks this court to direct that error be repaired.

But all the other assignments of error are without merit. This court should affirm the conviction.

DATED this 24th day of August, 2016.

Respectfully Submitted,

BY: /s Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

GRAYS HARBOR COUNTY PROSECUTOR

August 24, 2016 - 5:41 PM

Transmittal Letter

Document Uploaded: 5-480727-Respondent's Brief.pdf

Case Name: State of Washington v. Thomas S. Lomax

Court of Appeals Case Number: 48072-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

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:

No Comments were entered.

Sender Name: Jason F Walker - Email: jwalker@co.grays-harbor.wa.us

A copy of this document has been emailed to the following addresses:

ltabbutlaw@gmail.com

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS S. LOMAX,

Appellant.

No.: 48072-7-II

DECLARATION OF MAILING

DECLARATION

Sarah L. Wisdom, hereby declare as follows:

On the 25th day of August, 2016, I mailed a copy of the Brief of Respondent to Thomas S. Lomax, DOC #897441, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 25th day of August, 2016, in Montesano, Washington.

Sarah L. Wisdom

GRAYS HARBOR COUNTY PROSECUTOR

August 25, 2016 - 9:37 AM

Transmittal Letter

Document Uploaded: 5-480727-Lomax Declaration of Service.pdf

Case Name: State of Washington v.

Court of Appeals Case Number: 48072-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

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: Declaration of Mailing

Comments:

No Comments were entered.

Sender Name: Jason F Walker - Email: jwalker@co.grays-harbor.wa.us

A copy of this document has been emailed to the following addresses:

ltabbutlaw@gmail.com