

NO. 49762-0-II

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

STATE OF WASHINGTON, Respondent

v.

DARRELL DUANE CLASSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01711-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Classen's convictions for Kidnapping in the First Degree and Attempted Kidnapping in the First Degree do not violate double jeopardy.**
- II. Classen had the benefit of effective assistance of counsel.**
- III. The imposition of the filing fee does not violate equal protection.**
- IV. The \$200 filing fee is mandatory.**

STATEMENT OF THE CASE

Darrell Classen (hereafter 'Classen') was charged by information with Harassment death threats while armed with a deadly weapon, Kidnapping in the First Degree while armed with a deadly weapon, two counts of Assault in the Second Degree, one with the Good Samaritan aggravator, and one count of Attempted Kidnapping in the First Degree. CP 27-28. The matter proceeded to trial on October 17, 2016 whereat the State presented testimony from 10 witnesses. Those witnesses included: Crista Cole (victim of counts 1, 2, 3, and 5), Eva Scherer (victim of count 4), three police officers: Sergeant Deborah Libbey, Officer Scotland Hammond, and Sergeant Blaise Geddry; and five eye-witnesses: Manual Martinez, Jason Vandyke, Ronnie Thomas, Steven Kemp, and Tivona Clark. RP 74-239.

The evidence established that Ms. Cole knew Classen as an acquaintance for about a year prior to the incident which led to the charges. RP 76. On the morning of September 5, 2015, Ms. Cole was at her house in Portland, Oregon when Classen came by. RP 77. Ms. Cole had plans to meet someone so she and her infant son were leaving and offered Classen a ride. RP 78-79. Classen accepted her offer and asked Ms. Cole to take him “right down the street.” RP 79. Ms. Cole got in the driver’s seat of her vehicle and Classen got in the front passenger seat. RP 79. Ms. Cole’s infant son was in the back seat of the car behind the driver’s seat. RP 80. Ms. Cole drove Classen down the street, but once there he refused to exit Ms. Cole’s car. RP 81. Ms. Cole tried to convince Classen to get out of her car, but he said he would not get out. RP 81. Classen then began to poke Ms. Cole in the ribs and grabbed her hair; she thought he was playing around at first. RP 81. But then Classen began talking to himself and saying that Ms. Cole was a “cop.” RP 82. Classen’s actions then progressively got worse and Ms. Cole felt like she could not stop the car. RP 83.

After Classen poked Ms. Cole in the ribs, he then started punching her in the ribs, then punching her in the head and elsewhere. RP 84. At this point, Ms. Cole was still driving her car and they were in NE Portland, Oregon. RP 84-85. Classen was directing Ms. Cole where to go at times,

but then she took over and tried to stay on main roads because she felt it was not safe to go down back roads. RP 85. Ms. Cole felt like she could not get out of the car and did not feel safe. RP 85. During the drive, Classen took a pair of scissors and cut a chunk of Ms. Cole's hair off of her head, and then took duct tape and taped her hands to the steering wheel. RP 86. Classen soon undid the tape from Ms. Cole's hands due to worries other people driving would see her hands taped to the steering wheel. RP 87. Ms. Cole was crying at points while Classen had her restrained in the car, so Classen told her to fix her makeup. RP 87. Classen also took a white bandana and stuffed it down the front of his pants and rubbed his crotch with it and then stuck the bandana in Ms. Cole's face. RP 88. At one point Classen also put his hand on Ms. Cole's crotch and rubbed it. RP 88. Classen told Ms. Cole he was going to "rape" her and "fuck" her son. RP 89. Classen also told Ms. Cole he was going to slit her throat; Ms. Cole was scared and believed he was going to kill her. RP 89. Classen had the scissors in his hand as he said he would slit her throat and he appeared angry. RP 89-90. During the car ride, Classen used the scissors to cut Ms. Cole resulting in marks on her arm. RP 91. Ms. Cole did not try to fight back because she was scared for her infant son's safety. RP 90. Ms. Cole's fear of what Classen would do to her that day was

based on her knowledge that he was involved in a street gang called Brood. RP 90.

During the car ride, Classen would at times attempt to control the car by putting his foot over on the driver's side of the vehicle and press the gas pedal and telling her to "go 80." RP 92. Ms. Cole's vehicle could not reach 80 mph. RP 92. Classen kept Ms. Cole in the car for a couple of hours. RP 94. At one point, Ms. Cole got onto interstate 205 heading north into Vancouver, Washington. RP 94. While Ms. Cole drove on the bridge into the State of Washington, Classen continued hitting her and making threats. RP 95. Ms. Cole's car ran out of gas on the Washington side of the interstate bridge so Ms. Cole pulled her car over. RP 96. Classen was upset and continued to hit her and threaten her. RP 96. Ms. Cole decided that she needed to try to escape. RP 97. As the car slowed down, she slightly opened her door and held it so that it appeared shut so that Classen would not notice. RP 97-98. Ms. Cole did not feel like she could get away if she stopped to get her son out of the car; she did not want to leave him, but she felt like she had no choice. RP 98. Ms. Cole then ran out into traffic on I-205; she ran in front of cars, waving her arms, yelling for help, trying to get someone to stop and help her. RP 98-99.

After Ms. Cole left the car, Classen got out and chased after her. RP 99. Classen was able to push Ms. Cole so that she fell down; she

landed on her knees, hurting herself, but got up and started running again. RP 99-100. Ms. Cole ran up to a truck and screamed for help; soon several men got out of their cars and blocked Classen from her. RP 100-01. Ms. Cole then immediately ran back to her car to get her infant son out; a woman on the side of the road tried to help her. RP 101. Ms. Cole then remembers that police came and she went to the hospital. RP 102.

Several eye-witnesses gave their accounts of what happened that day. Mr. Manuel Morales Martinez testified that he was driving his gray truck on I-205 north when he saw a man and a woman in front of him, the woman asking for help and the man trying to grab her. RP 113-14. The woman was saying "help." RP 114. As the woman was by Mr. Morales Martinez's door, the man grabbed her by the neck and pushed her against the side view mirror of Mr. Morales Martinez's car. RP 114. Mr. Morales Martinez's son got out of their truck, and Mr. Morales Martinez soon followed him. RP 115. They separated the man and woman and more people came to help them. RP 115. The man kept trying to grab the woman; the woman left the immediate area and Mr. Morales Martinez and others restrained the man until police arrived. RP 115-16.

Jason Vandyke testified he was driving north on I-205 into Vancouver when he saw a car off to the side of the road on the right-hand side. RP 120-21. Mr. Vandyke then saw a woman running across the

freeway. RP 121. She appeared scared and was screaming. RP 121. Mr. Vandyke saw a man, whom he identified in court as Classen, chasing the woman. RP 122-23. Classen caught up with the woman and punched her with a closed fist; the woman stood back up quickly and continued screaming. RP 123-24. Mr. Vandyke pulled over and got out of his car; he saw the woman near a truck just ahead of him and it appeared as if she was trying to get into the truck. RP 121. As Mr. Vandyke got out of his car, the woman and Classen had gone back across to the other side of the freeway, but there was still traffic on the freeway so Mr. Vandyke was not able to immediately follow them. RP 125. Mr. Vandyke saw the woman go to her car, and then saw a second woman on her cell phone standing between Classen and the victim at her car. RP 125. Classen slapped the second woman and then went running down the road; Mr. Vandyke headed over there as well and three other men were surrounding Classen and they went about restraining him. RP 125-26.

Ronnie Thomas testified that he was heading home from work driving on I-205 north when traffic started coming to a standstill just before the exit onto State Route 14, the first exit after the I-205 bridge in Vancouver, Washington. RP 131. Mr. Thomas saw a bunch of people standing on the side of the road, and then saw one man chasing another man. RP 131. Mr. Thomas pulled his car over, and saw a man he identified

in court as Classen hit a woman. RP 132. The woman had her hands up as if to tell Classen to “calm down” and he saw Classen “haul off” and hit her hard with an open hand. RP 133. Several men, including Mr. Thomas, then chased Classen as he started to run south on the freeway, and took him to the ground. RP 133-34. Mr. Thomas grabbed Classen’s hands as another man slammed him to the ground from behind. RP 135. Classen continued trying to get away from them, but two men held him down and Mr. Thomas grabbed a leather strap from his car and tied Classen’s hands behind his back. RP 135-36. Mr. Thomas and another man then stayed on top of Classen until the police arrived. RP 136.

Steven Kemp was also driving north on I-205 on Saturday, September 5, 2015 when he noticed a lot of people off to the right side of the freeway. RP 211. A woman then ran in front of Mr. Kemp’s car as he was in the right lane of the freeway. RP 212. The woman was frantic, yelling “help me, help me.” RP 212. The woman sounded terrified. RP 213. Mr. Kemp pulled his car over and saw a man was chasing the woman; they ran out into traffic and then Mr. Kemp saw them near a white-looking pickup truck. RP 213-214. The man grabbed the woman by the side of the head and hit it into the side of the pickup. RP 214. By this time Mr. Kemp was out of his vehicle and was on his phone with 911. RP 214. He saw the man yelling at the woman; he was then chased off by

some other people. RP 214-15. The man tried to come back towards the woman again maybe 5 to 10 minutes later; he seemed determined to get the woman. RP 215. Mr. Kemp and some other men got in between him and the woman and chased him down. RP 215. As Mr. Kemp was on the phone with 911 the dispatcher asked him to find out what condition the woman was in, so Mr. Kemp went to the woman and found she was very frantic, upset, and scared. RP 216.

Tivona Clark was driving from Portland to Vancouver on I-205 on this same date when she saw a car, a station wagon, that appeared possibly broken down on the side of the freeway. RP 220-21. She saw two people running towards the center of the freeway; one of the persons, a woman, was waving her arms trying to get someone to stop and help. RP 221. The second person, a man, was chasing her. RP 222. Traffic was still passing by, but the woman was “running everywhere” trying to get away. RP 222. Ms. Clark had her four daughters in her car with her, but she stopped her vehicle and saw the woman was now by the station wagon directly in front of Ms. Clark’s car. RP 223. Ms. Clark realized the man was chasing the woman and the woman was trying to get away from him, so Ms. Clark motioned for her to come into her car. RP 223. Ms. Clark had her oldest daughter call 911, and the woman jumped into the front passenger seat of Ms. Clark’s car. RP 224. Ms. Clark noticed the woman’s hair was falling

out and she had blood on her face. RP 224. The woman was very upset, she appeared to be “going crazy.” RP 224. Ms. Clark waited until the police came, and gave a statement to police. RP 224.

Eva Scherer is a firefighter for the City of Vancouver. RP 227. On September 5, 2015, Ms. Scherer was off-duty traveling home from Bend, Oregon, driving north on I-205 on her way home. RP 228. Ms. Scherer noticed a vehicle pulled over close to the exit for SR 14 on the right side of I-205. RP 228. A woman was standing by the car, waving her arms wildly, appearing to be asking for help. RP 229. Ms. Scherer slowed her vehicle and began to change lanes to pull over when the woman ran in front of her car. RP 229. Ms. Scherer swerved around the woman and pulled over. RP 230. The woman was gesturing frantically and was still in the middle of traffic. RP 230. Ms. Scherer saw there was a passenger in the stopped vehicle and as Ms. Scherer called 911 she saw the passenger, a man, get out of the car. RP 230. The man began to chase the woman into traffic. RP 231. Many cars were swerving and several stopped. RP 231. The man took the woman to the ground. RP 231. Ms. Scherer relayed what she saw to 911 dispatch, but she lost sight of what was happening due to the other cars in traffic blocking her view. RP 231. Ms. Scherer then saw the woman run back to her car and tried to get to the rear passenger seat on the driver’s side because there was an infant child in the car. RP 231-32.

Ms. Scherer approached the woman and asked if she needed help; the woman kept repeating “he’s going to kill me, he’s trying to kill me.” RP 232. The woman appeared terrified and in fear for her life. RP 232-33. The woman managed to get the infant car seat out of her car and Ms. Scherer told her to go to the front of her own vehicle, trying to get the woman to a safe area. RP 233. At this point Ms. Scherer noticed the woman had some cuts and abrasions to her body including cuts on her arms, blood on her knee, and a big chunk of hair that appeared as if it had been ripped out. RP 233.

Then the man approached where Ms. Scherer was. RP 234. Ms. Scherer identified this man in court as Classen. RP 234. Ms. Scherer put her arms up and said “please, sir, stay with your vehicle; please stay where you are.” RP 234. The man continued to approach Ms. Scherer; he appeared agitated and made references to being an undercover cop and that he needed the woman back as she was his test subject. RP 234. Ms. Scherer continued to tell Classen to stay where he was, but he continued moving closer. RP 235. Several bystanders had moved closer to them as well. RP 235. Classen then told Ms. Scherer that he would take her instead and told her to get into the car. RP 235. Classen then hit Ms. Scherer in the face, hitting her ear, her jaw, and the eye area on the left side. RP 236. The blow caused pain and made Ms. Scherer’s ears ring. RP 236. Ms. Scherer

had bruising to her face from the blow. RP 238. The bystanders then jumped in and chased Classen eventually tackling him to the ground. RP 237. Ms. Scherer then went to the woman who was still very frightened and saying over and over “he said he’d kill my baby. He’s going to kill me.” RP 237. Ms. Scherer stayed until the police arrived. RP 237.

Deborah Libbey is a sergeant with the City of Vancouver Police Department. RP 140. Sgt. Libbey has been a police officer for over 23 years. RP 140. At about 3pm on September 5, 2015, Sgt. Libbey was at West Precinct when the call came out about a “rolling disturbance” on northbound I-205. RP 142-43. Sgt. Libbey headed out to the call, but was some distance away; it took her approximately 15 minutes to appear on the scene. RP 144-45. Before she arrived, Sgt. Libbey was given information from dispatch that a man was in custody. RP 145. Two officer units were ahead of Sgt. Libbey trying to get to the scene and medical units were arriving. RP 145. As Sgt. Libbey arrived at the scene, she saw cars stopped everywhere and a lot of people moving around. RP 146. She saw a man in the back of another officer’s patrol car and saw an ambulance. RP 146. At this point Sgt. Libbey was trying to figure out the logistics of where everyone involved was and what was going to happen next. RP 146. Sgt. Libbey talked to a paramedic at the ambulance and asked if the woman was stable. RP 147. The woman was identified as Crista Cole; she

was traumatized. RP 147-48. Sgt. Libbey saw Ms. Cole lying in a gurney in the back of the ambulance; she looked as if she had been through a traumatic incident. RP 148. Sgt. Libbey conferred with other officers on the scene and they decided to impound the vehicle, Ms. Cole's 1992 Ford Taurus station wagon. RP 150. Sgt. Libbey sealed it up with evidence tape, and then followed the tow truck that came and took the vehicle back to West Precinct. RP 150.

Officer Scotland Hammond with the Vancouver Police Department was a patrol officer on duty on September 5, 2015. RP 162. He was dispatched to the incident occurring on I-205 northbound, and once he arrived at the scene he was directed by a sergeant to go to the hospital to make contact with the victim, Ms. Cole. RP 163. Officer Hammond then went to the hospital and contacted Ms. Cole. RP 163. Officer Hammond saw Ms. Cole had a bruise on her head, scratches on her knees and forearms, as well as some scratching and bruising down around her left shoulder and armpit area. RP 164, 167. Officer Hammond identified several photographs he took of Ms. Cole and her injuries that day at the hospital; these photographs were admitted into evidence. RP 164-68; Ex. 1-4, 6-8. Ms. Cole expressed her fear to Officer Hammond that someone might come after her. RP 170. Ms. Cole told Officer Hammond that

Classen had inflicted her injuries in Portland and that he had continued to hit her as they were on the bridge. RP 171.

Blaise Geddry is a patrol sergeant for the Vancouver Police Department. RP 174. He was on duty on September 5, 2015 and responded to this incident on I-205 northbound. RP 175. Sgt. Geddry arrived at the scene, on I-205 close to the SR-14 interchange in the City of Vancouver, Clark County, State of Washington. RP 175-76. When Sgt. Geddry arrived, several other officers were already on scene. RP 176. Sgt. Geddry saw several cars pulled over, some to the median, and some stopped on the roadway. RP 176. Sgt. Geddry attempted to contact witnesses to piece together what had happened. RP 176. He contacted Jason Vandyke, one of the eye-witnesses, and then he contacted the victim, Crista Cole. RP 177. Ms. Cole was in the back of the ambulance; she was scared and looked as if she had been crying. RP 177. He identified the vehicle involved as a station wagon; Sgt. Geddry then approached the station wagon and saw a pair of scissors on the dashboard. RP 178. Sgt. Geddry then spoke with Eva Scherer who described the situation to him. RP 178. Sgt. Geddry then spoke with Classen who was in the back of a patrol vehicle. RP 178-79. Sgt. Geddry observed that Classen's muscles were twitching and he was smacking his lips as if he were thirsty. RP 180. Classen did not respond to Sgt. Geddry's questions such as what his name

was and the statements he made were nonsensical; he also made odd noises. RP 180. Sgt. Geddry opined Classen was under the influence. RP 180.

The next day, on September 6, 2015, Sgt. Geddry contacted Ms. Cole who was at her mother's house in Vancouver. RP 181. When he saw her the next day, Sgt. Geddry noticed Ms. Cole had bruising all up and down the right side of her body. RP 182. Her eye was swollen, there was bruising on her head, face and arms. RP 182. Ms. Cole also had cuts on her arm, abdomen and leg. RP 182. Sgt. Geddry took photographs of Ms. Cole's injuries on September 6, 2015 and these photographs were admitted as exhibits 9-15. RP 182-85; Ex. 9-15. The injuries that Sgt. Geddry observed were consistent with Ms. Cole's account of what had happened. RP 185.

Sgt. Geddry then contacted Ms. Cole again on September 8, 2015 and took additional photographs of her injuries. RP 200. The photographs were admitted as exhibits 33-35. RP 200-01; Ex. 33-35.

Sgt. Geddry obtained a search warrant for the vehicle. RP 180-81. He took photographs of the vehicle that were admitted as exhibits 16-32. RP 187-91; Ex. 16-32. Of note in the vehicle, Sgt. Geddry observed a sweatshirt with a large amount of hair lying on it, a curling iron that Classen had used to hit Ms. Cole, scissors lying on the dashboard, duct

tape, and a rag that Classen had stuffed down his pants and then rubbed in Ms. Cole's face. RP 188-91. Sgt. Geddry seized a pair of blue scissors that he found on the vehicle's dashboard that were admitted into evidence as exhibit 38. RP 191-95; Ex. 38. The sweatshirt with the chunk of hair on it was admitted as exhibit 39. RP 195-98; Ex. 39.

During closing arguments, the prosecutor specified that the completed kidnapping count was for Classen abducting Ms. Cole, terrorizing her, and bringing her into Washington State. RP 301. The prosecutor then argued,

She then escapes. Runs out of the car, trying to get help for her and her child. The kidnapping is over. She has gotten loose. At that point, the defendant had some choices to make. He could have let her go. He could have been done. Nobody made him chase after her. Nobody made him run across the freeway. Nobody made him tackle her, beat her some more, run away from the men, get past the people there trying to top him, hit Eva. Those are all new crimes that he committed. Those are all new choices that he made to do (inaudible).

RP 301.

The jury returned guilty verdicts on all five counts. RP 306-309; CP 68-72. Additionally, the jury found Classen was armed with a deadly weapon when he committed felony harassment as charged in count 1, and when he committed kidnapping in the first degree as charged in count 2. CP 73-74. The jury also found that Classen committed assault in the

second degree as charged in count 4 against a victim who was acting as a Good Samaritan. CP 75.

The trial court sentenced Classen to a total sentence of 240 months, scoring count 5, the attempted kidnapping in the first degree at an offender score of 0 and running it consecutive to count 2 the kidnapping in the first degree, as serious violent offenses pursuant to RCW 9.94A.589(b). CP 80-83. The trial court also imposed an exceptional sentence by running 15 months of the sentence on count 4 consecutive with the sentence on count 2. CP 81. The trial court also imposed the deadly weapon enhancements to counts 1 and 2. CP 82. The trial court waived discretionary legal financial obligations and imposed a \$200 criminal filing fee. CP 84. This timely appeal follows.

ARGUMENT

I. Classen's convictions for Kidnapping in the First Degree and Attempted Kidnapping in the First Degree do not violate double jeopardy.

Classen argues that his convictions for Kidnapping in the First Degree and Attempted Kidnapping in the First Degree violate double jeopardy as his actions constituted one offense. Classen was properly convicted of two counts for separate offenses and his convictions for

Kidnapping in the First Degree and Attempted Kidnapping in the First Degree should be affirmed.

In a double jeopardy analysis, when the convictions at issue are under the same statutory provision, the “unit of prosecution” analysis applies. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). In this analysis, an appellate court looks to what act or course of conduct the legislature defined as the punishable act. *Id.* Here, Classen was convicted for both a completed and an attempted kidnapping under RCW 9A.40.020(1)(c) and (1)(d). A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent to inflict bodily injury her or inflict extreme mental distress on her or a third person. RCW 9A.40.020(1)(c) and (d). “Abduct” means to restrain a person by secreting or holding her in a place where she is not likely to be found. RCW 9A.40.010(2)(a). “Restrain” means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with her liberty. RCW 9A.40.010(1).

No case law in the State of Washington directly addresses whether kidnapping is a continuing course of conduct crime or whether it is defined by a specific act. In 1988, Division 1 of this Court discussed kidnapping in terms of sufficiency of the evidence in *State v. Dove*, 52 Wn.App. 81, 757 P.2d 990 (1988). There, this Court discussed that

kidnapping is completed “when all its essential elements are completed,” but also found that the crime continues “as long as the unlawful detention of the kidnapped person lasts.” *Dove*, 51 Wn.App. at 87-88. Thus, essentially the Court in *Dove* found that a kidnapping is committed as soon as every element is met, but that the crime also continues until the victim is released. *Id.* The *Dove* Court discussed the scale of shortest time period a kidnapping could be completed to the longest time a kidnapping could last. However, the Court did not discuss this issue in terms of double jeopardy therefore the discussion the Court engaged in is dicta as it applies to this Court’s current analysis of the unit of prosecution for kidnapping.

When our legislature has not clearly set forth the unit of prosecution for an offense, and our State Courts have not discussed the issue, looking to other States’ jurisprudence can be helpful. *See State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014).

In Texas, “the allowable unit of prosecution for” kidnapping “relates to the abduction of a victim.” *Gonzales v. State*, 270 S.W.3d 282, 288 (Tex. App.-Amarillo 2008). In New Mexico, “a kidnapping begins when the victim is initially confined and ends when the victim is released. This is the clearly stated unit of prosecution for a kidnapping.” *State v. Dombos*, 143 N.M. 668, 673, 180 P.3d 675 (2008 –NMCA- 035). And as Classen points out, Maryland, Arizona and Tennessee also have found that

kidnapping continues until the victim is released and is thus a continuing course of conduct crime. Br. of Appellant, p. 11; *State v. Stouffer*, 352 Md. 97, 114, 721 A.2d 207 (1998); *State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119 (Ct. App. 1995); *State v. Legg*, 9 S.W.3d 111, 117 (Tenn. 1999). These states' analyses make sense and it is difficult to imagine a different unit of prosecution for kidnapping that squares with our statutory language. Thus the State agrees the proper analysis for the unit of prosecution for kidnapping is one for offenses that involve a continuing course of conduct. Even under this analysis, double jeopardy does not bar Classen's convictions for kidnapping and attempted kidnapping.

The typical kidnapping scenario one conjures when thinking of this issue, is a stranger abduction of a child followed by a ransom note. The child may be held for days prior to being released, yet until the child gains freedom, the singular kidnapping offense continues. However, if that child gains freedom, the same defendant can commit a second kidnapping offense if the child is again abducted. To hold otherwise would give free reign to those who kidnap to continue kidnapping the same victim repeatedly, as there is no additional penalty. The case of *State v. Boswell*, 185 Wn.App. 321, 340 P.3d 971 (2014) is instructive on this issue.

In *Boswell*, the defendant was convicted of two counts of Attempted Murder against the same victim, occurring on the same day.

Boswell, 185 Wn.App. at 324-25. This Court determined whether *Boswell*'s two convictions for attempted murder violated double jeopardy as *Boswell* argued that the unit of prosecution should be defined by his intent to commit the murder. *Id.* at 328. However, this Court rejected *Boswell*'s argument, finding that under *Boswell*'s theory, "a defendant could only ever be charged with one count of attempted murder against one victim, regardless of how many attempts the defendant makes on the victim's life." *Id.* at 330. The Court noted that it must "not interpret statutes to reach absurd and fundamentally unjust results." *Id.* (quoting *The Boeing Co. v. Doss*, 180 Wn.App. 427, 437, 321 P.3d 1270 (2014) (quoting *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994))). Thus the Court in *Boswell* applied a continuing course of conduct analysis to determine when convictions based on the same statute would not violate double jeopardy. *Id.* at 331-32.

For crimes involving a continuing course of conduct, the unit of prosecution is based on whether there are multiple courses of conduct that are separate and distinct. *Id.* at 331. The Court considers several factors in determining whether there are multiple separate and distinct courses of conduct: the method used to commit the crime; the amount of time between the two courses of conduct; and whether the initial course of conduct was interrupted, failed or abandoned. *Id.* (citing to *State v. Hall*,

168 Wn.2d 726, 737-38, 230 P.3d 1048 (2010)). In *Boswell*, this Court found that the defendant used separate methods to commit the crimes, and only started the second method after the first course of conduct failed, therefore they were separated in time. *Id.* at 332. In using these factors, this Court found *Boswell*'s two convictions for Attempted Murder did not violate double jeopardy as each charge was based on separate and distinct conduct.

The same is true in *Classen*'s case. *Classen* initially began the first course of kidnapping by using deception to get the victim to comply with his desire to get her in the car and confine her – he asked her for a ride, thus used her acquiescence and free will to get her into the place where he then held her against her will. The second course of kidnapping did not begin until this course failed, when the victim escaped (thus gaining her liberty), and ran away. *Classen* then began his second course of attempted kidnapping by physically chasing the victim and using physical force against her to attempt to restrain her and move her back into the vehicle so he could once again abduct her.

Classen urges this Court to use the same factors the Supreme Court used in determining whether two courses of conduct occurred to support two separate assault convictions in *Villanueva-Gonzalez*. The Supreme Court identified these factors as “useful for determining whether multiple

assaultive acts constitute one course of conduct.” *Villanueva-Gonzalez*, 180 Wn.2d at 985. As assault is a different crime from kidnapping and its elements differ, the factors used by the Court in *Villanueva-Gonzalez* do not all make sense to apply to a kidnapping fact pattern. The factors the Court considered there include: “the length of time over which the assaultive acts took place; whether the assaultive acts took place in the same location; the defendant’s intent or motivation for the different assaultive acts; whether the acts were uninterrupted or whether there were any intervening acts or events; and whether there was an opportunity for the defendant to reconsider his or her actions.” *Id.* The factor which most seems to logically apply to kidnapping is whether the course of conduct was interrupted or whether there was an intervening act. In Classen’s case there was an intervening act or interruption in his original kidnapping – the victim escaped. She gained her freedom. As discussed above and by Classen in his brief, kidnapping is complete upon the victim gaining her freedom. Thus Classen’s initial kidnapping ended once the victim escaped. This interruption then allowed Classen an opportunity to reconsider, a space in time to renew his intent, and to choose to engage in criminal conduct again by attempting to gain control over the victim and abduct her for a second time. Thus Classen clearly engaged in two separate courses of conduct and his convictions do not violate double jeopardy.

Another case which may prove helpful in this analysis is *State v. Soonalole*, 99 Wn.App. 207, 992 P.2d 541 (2000). There, Division 1 of this Court considered what the unit of prosecution for child molestation was and whether under the fact pattern of his case, Soonalole was guilty of one or two counts of child molestation. In that case, the facts showed that Soonalole fondled the victim's breasts and rubbed the victim's thigh over her clothes while driving in a vehicle on the West Seattle Bridge. *Soonalole*, 99 Wn.App. at 210. Soonalole stopped touching the victim and continued driving, soon pulling the vehicle over into a wooded spot across from the Pacific Medical Center. *Id.* Soonalole started rubbing the victim's breasts and thighs again and tried to put his hand underneath her blouse and inside her pants. *Id.* This Court found that Soonalole committed two separate acts of child molestation against the victim because the time, location, and his intended purpose supported that he committed two separate acts. *Id.* at 214.

In its opinion in *Soonalole*, this Court discussed a significant concern regarding unit of prosecution analyses in continuing course of conduct cases. There, this Court quoted a Wisconsin case, stating,

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, -an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to

commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Soonalole, 99 Wn.App. at 213 (quoting *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979)). If double jeopardy bars a second conviction in Classen's fact pattern, then what would stop a kidnapper from repeatedly kidnapping those who have successfully escaped? The victim in this case escaped; the first kidnapping was completed, and Classen had time to consider his actions and chose to once again engage in criminal behavior aimed at kidnapping the victim once again. He clearly committed two separate and distinct courses of conduct that amounted to a completed kidnapping in the car across state lines into Washington, and another after the victim escaped from the car and ran across the interstate and Classen gave chase and attempted to abduct her anew. Double jeopardy has not been violated and Classen's two convictions should be affirmed.

II. Classen had the benefit of effective assistance of counsel.

Classen argues his attorney was ineffective for failing to request a voluntary intoxication instruction and for failing to request a lesser included of assault in the fourth degree. Classen has not shown his attorney's actions were not legitimate trial strategies, nor has he shown

any prejudice from his attorney's actions. Classen's claims of ineffective assistance of counsel fail.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)

(stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Classen cannot show his attorney's performance was deficient. Defense theory and strategies are often issues decided between the defendant and his attorney, weighing their options and considering the evidence and the likelihood of success with each potential strategy. *See generally, State v. Grier*, 171 Wn.2d 17, 31-44, 246 P.3d 1260 (2011). There is no evidence from trial or the way counsel approached the case to suggest that Classen's attorney did not act tactically and reasonably in deciding not to request a voluntary intoxication instruction or in pursuing an all or nothing approach, believing Classen would fare better in that regard than seeking convictions on lesser included offenses.

a. Classen's attorney was not ineffective for not requesting a voluntary intoxication instruction.

In evaluating Classen's claim his attorney was ineffective for failing to request a voluntary intoxication instruction, this Court should first determine whether the defendant was entitled to the instruction as an attorney is not ineffective for failing to present a defense not warranted by the facts of the case. *State v. Kruger*, 116 Wn.App. 685, 690, 67 P.3d 1147

(2003). A criminal defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011). In evaluating whether the evidence is substantial enough to support a defendant's proposed instruction, the trial court must interpret it most strongly in the defendant's favor. *State v. Douglas*, 128 Wn.App. 555, 561-62, 116 P.3d 1012 (2005). A defendant is entitled to a voluntary intoxication instruction only if the crime charged has a particular mental state as an element, there is substantial evidence of drug use, and the defendant presents evidence that the drug use affected his ability to acquire the required mental state. *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *State v. Webb*, 162 Wn.App. 195, 209, 252 P.3d 424 (2011). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. *State v. Vasquez*, 95 Wn.App. 12, 17, 972 P.2d 109 (1998). It is not error to refuse to submit the defense of intoxication to the jury where it is supported only by a scintilla of evidence as opposed to substantial evidence. *State v. Mriglot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977). A defendant does not need to present an expert on intoxication, but there must be some positive evidence that the defendant was intoxicated that is more than speculation or conjecture. *See Kruger*, 116 Wn.App. at 692-93; *Mriglot*, 88 Wn.2d at 578.

Classen presented no evidence that he was intoxicated let alone substantial evidence. He appears to claim that the evidence presented at trial that he said things that did not make sense, was agitated and hard to understand, and appeared to be under the influence according to the police officer reflects substantial evidence of his intoxication. Classen also cites to evidence that never went before the jury, that was only used pretrial in a competency determination, as support for his claim that despite substantial evidence of his intoxication his attorney failed to present a helpful jury instruction. Br. of Appellant, p. 17 (referring to CP 31-33, a pretrial competency evaluation wherein Classen denied using methamphetamine, but the evaluator finds this claim not credible). Classen's argument that the evidence presented at trial amounts to substantial evidence is without merit.

Classen does not cite to any case that holds that a defendant who exhibits behaviors presumably consistent with intoxication is sufficient evidence to satisfy the factor of substantial evidence of drug use required to instruct the jury on voluntary intoxication. In fact, Washington Courts have not found that evidence of a defendant's behavior and opinions or observations of others is sufficient by itself to constitute substantial evidence of drug use. More is required, such as an eyewitness or the defendant testifies to actual consumption by the defendant, physical

evidence of intoxicants is found in the defendant's blood, or the defendant smelled of alcohol. *See State v. Jones*, 95 Wn.2d 616, 622-23, 628 P.2d 472 (1981) (finding evidence sufficient when defendant testified that he had 9 or 11 beers, a witness believed that the defendant had possibly been drinking, and another witness noted his bloodshot, glassy eyes and slurred speech); *State v. Hackett*, 64 Wn.App. 780, 781-83, 785 n.2, 827 P.2d 1013 (1992) (finding evidence sufficient when a doctor testified that defendant admitted he had ingested considerable amounts of cocaine and taken valium, multiple doctors testified the defendant's seizure was a likely result of cocaine ingestion, and a toxicology report showed cocaine and valium in the defendant's blood); *State v. Gabryschak*, 83 Wn.App. 249, 253, 921 P.2d 549 (1996) (finding evidence sufficient when the evidence showed defendant had the smell of alcohol on his breath, he appeared intoxicated and was considered too drunk to drive); *State v. Walters*, 162 Wn.App. 74, 78, 82-83, 255 P.3d 835 (2011) (finding evidence sufficient when testimony established the defendant consumed at least 7 beers and 2 shots of alcohol and three witnesses described the defendant as intoxicated).

No witness in Classen's trial testified to seeing Classen ingest any drug, and only one witness testified about his intoxication, and that was an opinion based on Classen's appearance. No evidence from any witness

who saw him consume a drug was presented, there was no toxicology report, no medical evaluation, and no other physical sign, such as smell or drug paraphernalia found on or near him, that Classen had ingested a drug. Any evidence that Classen was intoxicated was speculative. Speculative evidence of drug use is not substantial evidence and thus Classen did not satisfy the second factor required to obtain a voluntary intoxication instruction. *See Mriglot*, 88 Wn.2d at 578.

But even if there was substantial evidence of drug use, there was insufficient evidence presented at trial that the drug use affected Classen's ability to acquire the required mental states of the charged crimes. *See Everybodytalksabout*, 145 Wn.2d at 479. There must be substantial evidence presented of the effects of drugs on the defendant's mind or body. *Gabryschak*, 83 Wn.App. at 253. Essentially, Classen needed to have established that his intoxication affected his ability to form the intent to assault the victim or to kidnap her. Classen did not present substantial evidence to meet this factor.

In *Kruger*, the Court found this third factor was satisfied based on evidence that the defendant had a blackout, he vomited at the police station, had slurred speech, and was impervious to pepper spray. *Kruger*, 116 Wn.App. at 692. By contrast, there was no evidence in the record that Classen blacked out, vomited, or had slurred speech. The majority of the

testimony that could even remotely be linked to an indication of intoxication was based on observations that Classen was saying things that did not make a lot of sense, and that he was agitated. *See* RP 81-82, 135, 234. These observations could have been caused by many things other than intoxication, as could the officer's observation that Classen was nonresponsive, smacking his lips as if he were thirsty and had twitchy muscles. The evidence of his behavior does not rise to the level of physical or mental manifestations of intoxication like what was seen in *Kruger, supra*. In fact, the evidence at trial showed Classen was acting in a deliberate and goal-oriented manner. Classen chased the victim into traffic, he hit her, grabbed her by the side of the head and slammed it into the side of a truck. RP 123, 213-14, 221-23. Classen then retreated as people tried to keep him away from the victim. RP 214. Classen also hit another woman when she refused to do as he wanted, and attempted to flee as good Samaritans intervened to help. RP 115, 132-34, 235-38. This evidence suggests Classen was acting intentionally and had the ability to control his actions.

Classen could not have satisfied the three factors necessary to obtain the voluntary intoxication instruction based on the evidence presented at trial. It is not ineffective assistance of counsel not to pursue an unavailable defense. *See, e.g. In re Pers. Restraint of Woods*, 154

Wn.2d 400, 421, 114 P.3d 607 (2005), *overruled in part on other grounds* by *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). From the evidence presented at trial, it is clear there was no substantive evidence that Classen ingested drugs or other evidence that could have shown this factor without waiving his Fifth Amendment right not to testify. An attorney's choice not to make a frivolous objection or not to ask for instructions that are not supported by the evidence or the law does not render that attorney ineffective.

Even if it was not reasonable for counsel to not pursue a voluntary intoxication instruction, Classen has not shown that this action prejudiced him. To prevail on his claim of ineffective assistance of counsel, Classen would have to show that but for his attorney's deficient performance, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. As discussed at length above, Classen was not entitled to a voluntary intoxication instruction and it is likely the trial court would have denied giving the instruction. Thus, Classen cannot show he was prejudiced by his attorney's action. Classen's claim his attorney was ineffective for failing to ask for a voluntary intoxication instruction fails.

b. Classen's attorney was not ineffective for not requesting lesser included instructions.

Classen further claims his attorney was ineffective for not requesting a lesser included offense instruction of Assault in the Fourth Degree as to Count 4. Classen cannot show his attorney's action was not the result of a legitimate trial strategy, nor can he show prejudice. This claim fails.

A defendant is entitled to lesser included offense instructions if she meets the *Workman* test and the defendant requests the lesser included offense instructions be given. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (discussing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The question here is not so much whether Classen could have requested the lesser included offense instructions, but whether his attorney was ineffective for failing to do so. Classen's attorney's actions are presumed to be reasonable and Classen must show there is absolutely no conceivable legitimate tactic to explain the attorney's choice. *See Reichenbach*, 153 Wn.2d at 130.

An "all or nothing" approach is a conceivably legitimate trial tactic. *Grier*, 171 Wn.2d at 42. Though this approach may be risky, it is sometimes the best approach to achieving an outright acquittal. *Id.* Classen has not shown that the all or nothing approach was not a conceivably legitimate tactic for his attorney to take in his case.

Furthermore, Classen cannot show prejudice. The jury was instructed to only find Classen guilty on any of the counts, including count 4, if it was convinced, beyond a reasonable doubt, that every element of the crime had been proved. CP 58. The jury would not have convicted him of Assault in the Second Degree unless the State had met its burden of proof in establishing every element of Assault in the Second Degree. *See Grier*, 171 Wn.2d at 44. “[T]he availability of a compromise verdict would not have changed the outcome of [the defendant’s] trial.” *Id.* As the jury found Classen guilty of the greater offense, the availability of a lesser included offense would not have changed the result of his convictions and thus Classen cannot show prejudice from his attorney’s decision not to seek a lesser included for count 4. *See id.* Classen’s claim of ineffective assistance of counsel fails.

III. The imposition of the filing fee does not violate equal protection.

Classen argues that the imposition of the \$200 filing fee in his case violates equal protection because indigent civil litigants can have their costs and fees waived. This Court has previously addressed this argument and found that imposition of mandatory costs and fees does not violate equal protection. As such, Classen’s claim should be denied.

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington State constitution require that similarly situated persons are treated similarly under the law. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). All persons need not be treated identically, but any distinctions that are made must have some relevance to the purpose for which the classification was made. *In re Det. Of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966)). Here, in analyzing an equal protection claim, this Court should use the rational basis test, as no fundamental right is at issue and the challenged classification (between criminal defendants and civil litigants) is not a suspect classification. *State v. Mathers*, 193 Wn.App. 913, 925, 376 P.3d 1163 (2016) (citing *State v. Scherner*, 153 Wn.App. 621, 648, 225 P.3d 248 (2009)). Rational basis review looks to whether there is a legitimate governmental objective being served and whether the means of achieving it are rational. *In re Det. Of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). There is a strong presumption of constitutionality, and here, as the party challenging the constitutionality of the mandatory criminal filing fee, Classen must show the classification is purely arbitrary. *In re Det. of Ross*, 114 Wn.App. 113, 118, 56 P.3d 602 (2002).

In *Mathers*, this Court addressed a challenge nearly identical to Classen's current challenge. There, this Court found that GR 34, which allows some waiver of fees and costs for civil litigants, is akin to RCW 10.01.160, a statute which allows courts to recoup some of the costs associated with criminal prosecution. *Mathers*, 193 Wn.App. at 925-26. This Court found that GR 34 served a different purpose from fees imposed pursuant to RCW 10.01.160, like DNA fees and victim fees, because those fees are imposed only after a conviction, whereas the civil filing fee is required prior to a civil litigant being able to access the court. *Id.* at 926. The *Mathers* Court found the defendant did not establish that criminal defendants and civil litigants are similarly situated individuals receiving disparate treatment, and thus his equal protection claim failed. *Id.*

The same is true for Classen. Classen's claim involves GR 34 and civil litigants, and RCW 36.18.020(2)(h), the criminal filing fee statute, as opposed to DNA and victim program fees, however, the reasoning in *Mathers, supra* is equally applicable. The *Mathers* Court found that GR 34 serves a different purpose than RCW 10.01.160, the statute which may require a defendant to pay costs, mainly focusing its finding on the fact that the civil filing fee is a pre-requisite to obtaining access to court for civil litigants, whereas the criminal costs are imposed only post-conviction, after the criminal defendant has had full access to justice. The

same is true for the criminal filing fee pursuant to RCW 36.18.020(2)(h) — it is assessed only after a defendant has been convicted of a crime. Its purpose is different than that of GR 34, and the defendant is not prevented from accessing justice due to its imposition after his case is finished in superior court.

There is a rational basis for treating civil litigants differently than indigent criminal defendants. The waiver of the mandatory civil filing fee is allowed to provide equal access to justice. *Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.2d 1042 (2013). Without this waiver, some civil litigants would not be able to access the courts. However, criminal defendants do not pay any fees prior to accessing the courts for trials, hearings or sentencing. Thus, there is a rational basis for treating civil litigants differently than criminal defendants and the mandatory criminal filing fee pursuant to RCW 36.18.020(2)(h) does not violate equal protection.

Classen cannot sustain his burden to show that he is similarly situated with civil litigants. Classen's claim that the trial court violated equal protection by imposing the \$200 filing fee is without merit.

IV. The \$200 filing fee is mandatory.

Classen argues that the \$200 criminal filing fee is not mandatory and therefore the trial court erred in imposing the fee without first inquiring into Classen's ability to pay. Our Courts have repeatedly found

the \$200 criminal filing fee is not a discretionary fee and therefore the trial court must impose it pursuant to statute. The trial court did not err in imposing the \$200 filing fee in Classen's case.

The criminal filing fee provision is codified in RCW

36.18.020(2)(h). That statute states in part:

(2) Clerks of super courts shall collect the following fees for their official services:

...

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h). Whether this statute creates a mandatory legal financial obligation is a question of statutory interpretation. *State v. Gonzales*, 198 Wn.App. 151, 153, 392 P.3d 1158 (2017). This Court reviews issues of statutory interpretation de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2008). The first step in a statutory interpretation analysis is to look at the plain language of the statute. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the plain language of the statute is unambiguous, the Court need not inquire further. *Armendariz*, 160 Wn.2d at 110.

Classen makes the identical argument that the defendant in *Gonzales, supra* made to this Court earlier this year. Classen, like *Gonzales*, argues that the use of the word “liable” is ambiguous because the term can mean a situation from which legal liability might arise. Br. of Appellant, pp. 10-21; *Gonzales*, 198 Wn.App. at 154-55. In *Gonzales*, this Court found that the use of the word “shall” immediately preceding the term “liable” clarifies that “there is not merely a risk of liability because “[t]he word ‘shall’ in a statute ... imposes a mandatory requirement unless a contrary legislative intent is apparent.”” *Id.* at 155 (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993))). The Legislature has not made any contrary intent apparent, nor has the Legislature taken action to change the treatment of criminal filing fees as mandatory obligations in the four years since the opinion in *State v. Lundy*, 176 Wn.App. 96, 308 P.3d 755 (2013), thus this Court presumes the Legislature approves of its interpretation of this statute. *See State v. Mathers*, 193 Wn.App. 913, 918, 376 P.3d 1163, *rev. denied*, 186 Wn.2d 1015, 380 P.3d 482 (2016) (stating “[w]here the legislature has had time to correct a court’s interpretation of a statute and has not done so, we presume the legislature approves of our interpretation.”).

This Court has heard and rejected the same argument Classen makes in this case. This Court should abide its prior holdings and reject Classen's arguments. He has not made any showing of why our Courts' prior decisions are incorrect and harmful. Classen's claim should be rejected.

CONCLUSION

Classen has failed to show any error and the trial court should be affirmed in all respects.

DATED this 27 day of September, 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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