

NO. 35013-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MCMAINS,

Appellant.

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

The Honorable John D. Knodell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct in closing argument deprived Kevin John McMains of a fair trial.

2. The \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h) violates equal protection.

3. The \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h) is not a mandatory legal financial obligation (LFO).

Issues Pertaining to Assignments of Error

1. The prosecutor argued in closing that, had McMains not volunteered to talk to police and not voluntarily submitted his DNA and insisted on a warrant, it would have shown he was guilty. Does this argument on McMains's exercise of constitutional rights to support inferences of guilt constitute improper prosecutorial misconduct that deprived McMains of a fair trial?

2. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees, which is to fund counties, county and regional law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that court may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment, does the mandatory imposition of the \$200 criminal filing fee violate equal protection?

3. Is the \$200 criminal filing fee a discretionary LFO that requires consideration of financial circumstances and ability to pay before imposition?

B. STATEMENT OF THE CASE

The State charged McMains with second degree child rape and second degree child molestation. CP 1-3. The charges pertain to the same complainant, then 12-year-old H.M. CP 1-3.

H.M.'s family and McMains's family were longtime neighbors and family friends; H.M. and McMains described their relationship as that of simbligns. 1RP¹ 84-85, 533. On Thanksgiving night in 2015, H.M., McMains, and Hector Duenas were playing video games in H.M.'s living room. RP 92, 410-11, 540. McMains and H.M. were sitting together on the couch and fell asleep while touching or cuddling, which H.M. and McMains described as a normal occurrence. 1RP 94-95, 98, 210, 414, 542-43. H.M. testified she felt McMains put his hands up her bra and kept touching her breasts for a long period of time, while she pretended to be asleep. 1RP 99-102. However, during H.M.'s police interview, she had claimed McMains had touched only her left breast. 1RP 175-78.

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated trial transcripts of November, 9, 10, 14, and 15, 2016; 2RP—consecutively paginated sentencing transcript of December 27, 2016 and January 6, 9, and 17, 2017.

The next night (Friday night after Thanksgiving), H.M. asked McMains to come over, and H.M., McMains, and Duenas again played video games. 1RP 108-09. McMains and H.M. again fell asleep on the couch. 1RP 110-12, 423-24. H.M. testified she again felt McMains touching her breasts. 1RP 113. H.M. said she went into a fetal position and McMains left. 1RP 115. H.M. stated McMains did not touch any other part of her body. 1RP 114.

The State began to question H.M. about a statement she made during a police interview, which drew a defense objection. 1RP 116. During this interview, H.M. had claimed that on the second night, McMains had inserted his middle finger into her vagina and left it there for two to three hours. 1RP 117. The State acknowledged that the transcript of her interview could not refresh H.M.'s recollection following a discussion of this issue with H.M. during a break. 1RP 122-23. During cross examination, defense counsel elicited that H.M. had simply forgotten about having a finger in her vagina for two to three hours until being reminded by the prosecutor. 1RP 194. H.M. also acknowledged that she was wearing tight pants on the night of the supposed digital penetration, despite not remembering McMains's hands down her pants, digitally penetrating her for two to three hours. 1RP 195.

McMains testified that nothing happened beyond cuddling, which was not out of the ordinary. 1RP 540-43. Following Thanksgiving,

McMains said nothing led him to believe anything had changed about his relationship with H.M. and continued coming over to H.M.'s house with the same frequency. 1RP 544-45. McMains also described H.M.'s family as one that engages in a lot of physical contact—hugging, snuggling, falling asleep on each other's laps—and that was all that occurred. 1RP 533-34.

After H.M. made her allegations, McMains, who was at a law enforcement academy, agreed to speak with officers and agreed to submit a DNA sample for testing. 1RP 357-58, 547.

During closing argument, the State asserted,

There's no doubt that the defendant voluntarily talked with Detective Jones. He didn't have to. He didn't have to do anything. But he did go and talk to Detective Jones. And that the defendant voluntarily gave a DNA sample. The defendant could have refused that DNA sample. But the state wants to suggest to you that what kind of message would that have sent if the defendant refused a DNA sample? Would that have set off a very large alarm bell in Detective Jones' mind?

1RP 608-09. Defense counsel objected, asserting that the State was arguing an impermissible inference. 1RP 609. The court asked counsel to approach the bench, and defense counsel asserted, "you could never make an argument that refusal was an indication of guilt. All that's been done is flipped it around a little." 1RP 609-10. The court asked the State, "You're not going to argue that if he had refused, it would have made him look guilty?" Defense counsel interjected, "That's what he's saying," which the prosecutor

denied, adding, “That could be an impermissible argument if that were the facts of the case. It’s not the facts that we have.” 1RP 610-11. The trial court again asked, “You’re saying that he [waived the right to demand a DNA warrant] only because he was trying to avoid looking guilty,” and the State again denied that this was its argument. 1RP 611. The trial court overruled the objection. 1RP 611.

The jury acquitted McMains of second degree rape of a child but convicted him of second degree child molestation. CP 48-49; 1RP 640-45.

The trial court imposed a low-end standard-range sentence of 15 months for the second degree child molestation.² CP 129; 2RP 76-77. The court also imposed 36 months of community custody. CP 131. As for LFOs, the court imposed a \$500 victim penalty assessment, \$100 DNA collection fee, and a \$200 criminal filing fee, referring to all these LFOs as mandatory. CP 132-33; 2RP 77.

McMains filed a timely notice of appeal. CP 149-50.

² The sentencing in this case was continued several times as the trial court disputed the parties’ and the Department of Corrections’ agreement that McMains was eligible for a special sex offender treatment alternative. 2RP 7-8, 27, 56, 63-65, 70, 76-77.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT THAT IMPLIED McMAINS WAS GUILTY FOR EXERCISING OR WAIVING CONSTITUTIONAL RIGHTS DEPRIVED McMAINS OF A FAIR TRIAL

The State argued that McMains spoke to police and volunteered to give a DNA sample because, if he hadn't, it would make him appear guilty. Defense counsel objected to this argument, preserving the issue for appellate review. The State's repugnant invitation to infer guilt based on McMains's exercise of constitutional rights requires reversal.

A DNA cheek swab constitutes a search under the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Gauthier, 174 Wn. App. 257, 263, 298 P.3d 126 (2013). The State is not permitted to ask the jury to infer guilt from the refusal to consent to a warrantless DNA search. Id. at 266-67. Likewise, "use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). The issue in this case involves a corollary to these rules: although the State did not directly argue McMains was guilty because he refused to speak to police and refused to voluntarily submit his DNA, it argued that McMains did not exercise these rights because doing so would have showed he was guilty. The problem created by the improper argument is the same. In essence, the

State's arguments amount to castigating McMains for the fact that had constitutional rights to exercise.

Part of the exercise of constitutional rights is making a choice about whether and to what extent to exercise them. In a case involving New Jersey's requirement that a police officer testify about traffic citation fixing investigation on penalty of losing his employment, the High Court stated that the option to lose one's livelihood or to pay the penalty of self-incrimination is "the antithesis of free choice to speak out or to remain silent." Garrity v. New Jersey, 385 U.S. 493, 497-98, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to "waive" one or the other." Id. at 498 (quoting Union Pac. R.R. Co. v. Public Serv. Comm., 248 U.S. 67, 70, 39 S. Ct. 24, 63 L. Ed. 131 (1918)).

The State's closing argument—McMains was guilty because he knew well enough to waive constitutional rights because not waiving them would have implied guilt—placed McMains between the rock and the whirlpool. The State's contention was McMains would have proved himself guilty if he had insisted on a warrant and silence before giving his DNA and speaking with police, so, to rebut this proof, he instead proved himself guilty by opting to speak with police and volunteer a DNA sample. By attributing guilt to the very existence of McMains's choice—regardless of what that

choice was—the prosecutor’s argument constituted egregious misconduct. The State should never be permitted to argue inferences of guilt for a defendant’s choices in exercising or waiving constitutional rights.

The State’s closing argument is also little different than the police officer stating the defendant was a “smart drunk” for remaining silent at the accident scene in State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).³ The State contended that the officer’s testimony was merely a lay opinion that Easter was intoxicated. Id. at 235. Our supreme court disagreed, holding that the “smart drunk” comment characterized “Easter’s silence as evasive and evidence of his guilt.” Id. The same is true here, albeit twisted around. The prosecutor’s argument similarly lauded McMains’s intelligence in waiving his right to silence and right to demand a search warrant before collecting his DNA. The prosecutor first acknowledged McMains’s rights not to talk to Detective Jones and not to give a DNA sample. 1RP 608. Then the prosecutor argued that it was smart not to exercise these rights because “what kind of message would that have sent if the defendant refused a DNA sample,” noting also it would be an “alarm bell” to law enforcement. 1RP 608-09. As in Easter, McMains’s was a “smart waiver of rights”

³ McMains acknowledges that this court recently indicated Easter has been overruled by Salinas v. Texas, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), and thus relies on Easter for persuasive support in the prosecutorial misconduct context. See State v. Magana, 197 Wn. App. 189, 194, 389 P.3d 654 (2016).

because insisting on silence or a search warrant would have betrayed his guilt.

This court's decision in State v. Wallin, 166 Wn. App. 364, 269 P.3d 1072 (2012), is also instructive. There, the prosecutor implied Wallin had tailored his trial testimony based on observing the evidence presented in the courtroom throughout the trial. Id. at 366-67, 374. "[T]here [wa]s no showing that Mr. Wallin had any opportunity to 'tailor' his testimony other than showing up for trial." Id. at 377. Thus, the State's implication of tailoring punished Wallin for his exercise of his constitutional right to "confront witnesses and participate in his own defense." Id. Such an implication "is permissible only if there is specific evidence of tailoring." Id. at 374. Because there was none in Wallin's case, this court reversed and remanded for a new trial. Id. at 377.

The same reasoning applies here. Had McMains implied at trial or argued during closing that voluntarily speaking with officers and offering a DNA sample proved his innocence, perhaps it would have invited the State's argument. But McMains did not do so. In Wallin, this court asked, "Why then should [Wallin] be subject to the State's suggestion—unfounded on this record—that he tailored his testimony?" 166 Wn. App. at 377. There was no good answer there, and there is no good answer here. McMains should never have been subject to the State's unfounded suggestion that his decision

to speak with and provide a DNA sample to law enforcement showed he was guilty.

More fundamentally, the State's argument told the jury that those who choose to exercise their constitutional rights are guilty. McMains was sitting at counsel table during a trial before a jury of 12, thereby exercising several of his constitutional rights. The prosecutor's argument that insisting on the exercise of constitutional rights is evidence of guilt invited the jury to infer that McMains was guilty for taking the case to trial, for having a lawyer represent him, for demanding a jury of his peers, and for remaining present in the courtroom. Based on the impropriety of the State's argument—the inference the prosecution asked jurors to draw based on the mere existence of the accused's constitutional rights—McMains asks this court to hold categorically that, unless invited by a defense theory or argument, the State may not argue guilt stemming from the exercise, waiver, or existence of any constitutional right.

Where prosecutorial misconduct directly violates constitutional rights, the misconduct is presumed prejudicial and the State bears the heavy burden of establishing harmlessness beyond a reasonable doubt. State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). Prosecutorial comments on the exercise of constitutional rights fall within the constitutional error category. State v. Emery, 174 Wn.2d 742, 757, 278 P.3d

653 (2012) (citing Easter, 130 Wn.2d 228; State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1970)); see also State v. Espey, 184 Wn. App. 360, 369-70, 336 P.3d 1178 (2014) (prosecution must satisfy constitutional harmless error standard where prosecutor improperly comments on defendant's right to counsel during closing argument).

The State cannot carry its burden. This case boiled down to credibility—whether the jury believed H.M.'s account that McMains raped and molested her or whether it believed McMains's account that he merely cuddled with and slept beside her. There was no conclusive DNA evidence. 1RP 236, 240 (no meaningful DNA comparisons could be made H.M.'s bra or underwear). Because credibility was key in McMains's trial, the State's choice to impugn the existence, exercise, and waiver of his constitutional rights could not have been harmless. Cf. Burke, 163 Wn.2d at 222-23 (holding references to Burke's silence as evidence he was hiding something undermined his credibility as a witness and therefore were not harmless beyond a reasonable doubt); Gauthier, 174 Wn. App. at 270-71 (where credibility at issue, comment on refusal to consent to DNA test no harmless beyond a reasonable doubt).

H.M.'s credibility was weak. H.M. testified that McMains had touched her breasts on both nights but did not touch any other part of her

body.⁴ 1RP 113-14, 193. The prosecutor attempted to remind H.M. about her other pretrial allegations, but this wasn't permitted, given the State's concession that no document could refresh her recollection. 1RP 116-17, 122-23. Defense counsel elicited that H.M. did not remember McMains placing his finger into her vagina for two to three hours on the second night, which she had claimed during her police interview. 1RP 142, 194-95. As defense counsel successfully argued in closing, "I submit contrary to the state that one does not forget something of that nature. One may be half asleep. I can't speak for anyone else, but I would certainly think it would wake me up if that occurred for two to three hours." 1RP 616. The jury seemed to agree, acquitting McMains of the child rape charge. CP 48; 1RP 640. The jury did not find H.M. a particularly credible witness because she clearly was not.

As such, the prosecutor's implication in closing, indicating McMains was guilty because he knew better than to insist on a DNA search warrant or his silence, could easily have swayed the jury to convict McMains of child molestation. The prosecutor's argument made McMains appear as a schemer who was attempting to evade the detection of his guilt. By engaging in a lengthy sidebar following the defense's objection and then

⁴ H.M.'s report to police was also inconsistent with respect to the alleged touching of her breasts. She had told police that on the first night, McMains had touched only her left breast but testified at trial that he had touched both breasts for a long time. 1RP 99-102, 175-78.

overruling the objection, the trial also “lent an aura of legitimacy to what was otherwise an improper argument.” State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). The State’s aspersions on McMains in a credibility case where the complaining witness’s credibility had been significantly undermined cannot be shown to be harmless beyond a reasonable doubt. McMains asks that this court reverse and remand for a new a fair trial.

2. THE “MANDATORY” IMPOSITION OF THE \$200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

“Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (alteration in original) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). When a fundamental right or constitutionally cognizable suspect class is not at issue, “a law will receive rational basis review.” Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be

related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW 36.18.020(1) (“Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070 . . .”). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to “be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund.” RCW 27.24.070 requires that \$17 or \$7, depending on the type of fee involved, be deposited “for the support of the law library in that county or the regional law library to which the county belongs.” Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute’s purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b)

.....

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), civil litigants may obtain waivers of their filing fees and criminal litigants may not. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. McMains asks this court to strike the RCW 36.18.020(2)(h) \$200 criminal filing fee under the state and federal equal protection clauses.

3. THE \$200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO McMAINS'S ABILITY TO PAY BEFORE IMPOSING IT

RCW 36.18.020(2)(h) provides that a criminal defendant "shall be liable" for a \$200 filing fee and that the clerk "shall collect" it. The Court of Appeals has held this statute imposes a mandatory obligation. Gonzales, 198 Wn. App. at 154-55; Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App. at 102. However, none of these cases provides any statutory analysis whatsoever; they didn't even attempt to do so. The Court of Appeals is incorrect for several reasons.

a. The plain meaning of the word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Black's Law Dictionary confirms that "liable" might make a person obligated in law for something but also defines liability as a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER'S THIRD NEW INT'L DICTIONARY 1302 (1993) (defining liable as "exposed or subject to some usu. adverse contingency or action : LIKELY"). Based on the meaning of the word liable—giving rise to a

contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

Opinions addressing this challenge have overlooked the plain meaning of the word “liable.” But there is no difference in meaning between “shall be liable” and “may be liable.” From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature’s use of the word “liable” in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by overlooking the meaning of the word “liable” has the Court of Appeals reached its contrary result.

- b. The difference in language in other provisions of RCW 36.18.020(2) supports McMains’s interpretation that “shall be liable” does not impose a mandatory obligation

The Court of Appeals has simplistically reasoned that because RCW 36.18.020(2) contains the word “shall,” the legislature intended the criminal filing fee to be mandatory. This overlooks or misapprehends that the “‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of

the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). McMains’s nonmandatory interpretation of RCW 36.18.020(2)(h) is supported by the language of other provisions in the same statute.

The beginning of the statutory subsection reads, “Clerks of superior courts shall collect the following fees for their official services,” and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word “liable” or “liability.” E.g., RCW 36.18.020(2)(a) (“In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . .” (emphasis added)); RCW 36.18.020(2)(b) (“Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(c) (“For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(d) (“For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three

dollars.” (emphasis added)); RCW 36.18.020(2)(e) (“For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(f) (“In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(g) (“For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars.” (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), give a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”).

Because RCW 36.18.020(2)(h) contains the only provision in the statute where “liable” appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

- c. A related statute, RCW 10.46.190, provides that every person convicted of a crime “shall be liable to all the costs of the proceedings against him or her,” yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime “shall be liable” for all the costs of the proceedings.

Even though RCW 10.46.190 employs the same “shall be liable” language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs “unless the defendant is or will be able to pay them.” The supreme court confirmed this in Blazina, 182 Wn.2d at 838-

39. Even though a defendant “shall be liable” for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature’s use of the phrase “shall be liable” does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)’s criminal filing fee should likewise be interpreted as discretionary.

- d. The legislature knows how to make LFOs mandatory and chose not to do so with respect to the criminal filing fee

The victim penalty assessment is recognized as a mandatory assessment, given that RCW 7.68.035 states, “When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” (Emphasis added.). This statute is unambiguous in its command that the penalty assessment shall be imposed.

The DNA collection fee is likewise unambiguous. It states, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added). Like the victim penalty assessment, there is little question that the legislature has mandated that a \$100 DNA fee be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence “must include” the fee or that the fee “shall be

imposed,” but that the defendant is merely liable for the fee. Despite the fact that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

The Washington Supreme Court recently suggested RCW 36.18.020(2)(h)’s fee had merely “been treated as mandatory by the Court of Appeals” rather as actually legislatively mandated fee. State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been treated as mandatory on the other hand strongly indicates there is a distinction.

Given the contingent meaning of the word “liable,” the Duncan court seemed to indicate that the meaning of the phrase “shall be liable” is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in McMains’s favor. Jacobs, 154 Wn.2d at 601.

McMains asks this court to engage in reasoned statutory analysis on these several points instead of concluding that “shall” means mandatory without any attempt at analysis.

D. CONCLUSION

Prosecutorial misconduct denied McMains a fair trial, requiring reversal and retrial. Alternatively, because the criminal filing fee violates equal protection and is otherwise discretionary, McMains asks that it be stricken from his judgment and sentence.

DATED this 31st day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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