

No. 35013-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN McMAINS,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The prosecutor committed prosecutorial error by commenting on the defendant's cooperation with law enforcement officers.
2. The Court erred in imposing a mandatory filing fee.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Can the prosecutor, in closing argument, respond to questions asked by defense counsel emphasizing the defendant's cooperation?
2. Is it prosecutorial error to encourage the jury to not consider the defendant's cooperation as evidence of innocence by arguing not cooperating would have made him look suspicious?
3. Assuming it is error, what is the appropriate standard of review for the quantum of prejudice required to reverse the case?
4. Assuming it is prosecutorial error, is there sufficient prejudice to require reversal?
5. Should the court use the term prosecutorial error versus prosecutorial misconduct where there is no intentional misconduct on the prosecutor's part?
6. Should the court review the imposition of the mandatory filing fee when there was no objection below?
7. Does the mandatory filing fee after conviction violate equal protection?
8. Is the filing fee mandatory?

III. STATEMENT OF THE CASE

Kevin McMains was convicted by a jury of child molestation. Sgt. Brian Jones was the lead officer on the case and interviewed Mr. McMains for the investigation. In the interview Mr. McMains agreed to voluntarily provide a DNA sample. During testimony on the case defense counsel emphasized that Mr. McMains had voluntarily provided a sample. During Sgt. Jones' testimony a recording of the interview was played. Trial Exhibit 27, RP 520. After the exhibit played the State had no further questions. *Id.* Defense counsel asked:

Q. Did Mr. McMains still voluntarily provide the DNA sample?

A. He did.

Q. Did he know in advance what you were interviewing him about?

A. I don't believe so. That's why I told him up front.

Q. How did the interview take place; what time of the evening was it?

A. If I recall, it was between ten and 11 p.m.

Q. And where did you locate him?

A. On -- well, I called him on his phone and he came to the Moses Lake Police Department.

Q. When you called him, did you tell him what it was about?

A. I believe I told him his name came up in one of my investigations and I needed to ask him some questions.

Q. And that was the extent of his knowledge before this interview took place?

A. Yes.

MS. OGLEBAY: Thank you very much.

RP 521.

Mr. McMains also testified. At the end of his testimony defense counsel asked about the interview, the questions and answers were substantially the same as they were for Sgt. Jones.

Q. Now, we've heard your interview with him.

A. Uh-huh.

Q. And it was fairly late at night.

A. Yes.

Q. How were you contacted and asked -- how did he ask for you to speak to him?

A. I got a call on my cell phone as I was in -- if I recall correctly, the Taco Bell drive through to get some food before heading home.

Q. And did you head on out?

A. I did. I went to the police station where he asked if I would meet him there.

Q. Did you know what was going on?

A. No. As far as I recall, I was told that my name came up in an investigation.

Q. Were you willing to cooperate?

A. Yes.

Q. And you provided a DNA sample?

A. Yes.

MS. OGLEBAY: I have no further questions

RP 546-47.

During closing argument the prosecutor responded to defense counsel's questions by arguing that Mr. McMains knew it would look suspicious if he refused to cooperate, and that's why he was forthcoming.

The court imposed a mandatory \$200 filing fee at sentencing.

IV. ARGUMENT

A. Prosecutorial misconduct/error

1. *There was no prosecutorial error in responding to a defense theory raised during testimony, and even if there was, it was not prejudicial.*

Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (internal citations omitted). When there is an objection to an argument, as there was in this

case, to establish prosecutorial misconduct sufficient for a reversal the defendant must establish a substantial likelihood the jury's verdict was affected. "A defendant alleging improper argument on the part of the prosecutor must establish both the impropriety and the prejudicial effect of the argument. To be entitled to relief, the defendant must demonstrate a substantial likelihood that the misconduct affected the jury's verdict. The allegedly improper arguments must be reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. *State v. Perez-Mejia*, 134 Wn. App. 907, 916-917, 143 P.3d 838 (2006).

In the context of this case it is not improper for the prosecutor to argue that Mr. McMains' waiver of his rights was not indicative of innocence. He never argued that it was indicative of guilt. Mr. McMains' argument that a comment on a waiver of rights somehow implies guilt simply does not pass the logic test. Instead defense counsel attempted to make the argument that the waiver of rights implied innocence. The prosecutor's argument was simply a rebuttal to this implied assertion.

Mr. McMains acknowledges "[h]ad McMains implied at trial or argued during closing that voluntarily speaking with officers and offering a DNA sample proved his innocence, perhaps he would have invited the State's argument." Brief of Appellant at 9. This is precisely what he did.

Trial defense counsel emphasized during her questioning that Mr. McMains voluntarily provided a DNA sample and spoke with Sgt. Jones. She placed those questions at the end of both Sgt. Jones' and Mr. McMains' testimony, leaving the fact that Mr. McMains cooperated as the last thing jurors heard from both of those witnesses. There is no reason to do that other than an implication of innocence. This is a perfectly reasonable thing for defense counsel to do, but the State does not have to let that inference go unanswered. The defense cannot have it both ways; they try to create an inference of innocence by a waiver of rights, then complain when the State comments on them.

There is also no inference about other rights. Mr. McMains attempts to argue that because there was a waiver of his rights regarding the DNA sample, there must be a negative inference for his exercise of other rights. This is logically questionable, as anyone would expect a defendant to be present at his own trial, whether guilty or not. The State could find no authority for the proposition that a comment on one right creates some inference of a comment on another, and Mr. McMains cites to none. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000).

The proper standard of review is the prosecutorial misconduct standard, not the constitutional harmless error standard. Given the heavy constitutionalization of criminal law, just about any comment by the prosecutor could be twisted into affecting a constitutional right. The court in *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), outlined when the constitutional harmless error standard would apply to prosecutorial misconduct claims. The constitutional harmless error claim only applies when a prosecutor flagrantly or intentionally violates the defendant's rights.

Assuming this was error, it was not flagrant or intentional. In order to reach his conclusion Mr. McMains has to rely on inference and analogy, not clear case law on point. Defense counsel in this case clearly raised the issue with her questions emphasizing Mr. McMains' waiver of his rights. The prosecutor's actions were not flagrant and ill intentioned, but a clear response to defense counsel.

Assuming there was prosecutorial error, it did not affect the verdict. The argument was not central to the State's case. The prosecutor made one mention of it, there was an objection heard outside the hearing of the jury, and then the prosecutor never talked about it again. In the scheme of this case the issue was deminimus. The defendant has not

established with a reasonable probability the result would have been different.

2. *Assuming the prosecutor did something improper this should be classified as prosecutorial error, not misconduct.*

"'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Oct. 5, 2017). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009

Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). The State urges this Court to use the phrase prosecutorial error in its opinions.

In this case the defense challenges the prosecutor's comments on the defendant's waiver of rights. He does this by trying to analogize to a prosecutor's comments on invocation of rights. Whether this is a valid analogy is something for the appellate court to determine, but is not something the prosecutor should be expected to know how the court will rule upon pain of having been said to commit "misconduct." To classify such arguments as misconduct unfairly stigmatizes the prosecutor and suppresses legitimate advocacy. If the Appellate Court disagrees with the judge, the judge would have "erred." If a defense counsel does something an Appellate Court disagrees with, they are "ineffective." Only a prosecutor risks being labeled as committing misconduct by making an argument that an appellate court may disagree with. This is unfair and harmful. The court should reject the phrase prosecutorial misconduct unless it truly means to say the prosecutor committed intentional misconduct, and not that it is simply rejecting the prosecutor's argument as inappropriate.

B. Legal Financial Obligations

1. *The alleged filing fee error is not manifest and should not be reviewed.*

The \$200 criminal filing fee is a mandatory legal financial obligation pursuant to RCW 36.18.020(2)(h). *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Trial courts must impose such fees regardless of a defendant's indigency. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

As in *Stoddard*, the constitutional issue (here equal protection) was not raised, preserved, or developed in the trial court with supporting facts that would enable this Court to properly review the claim. In *Stoddard*, this Court stated:

We consider whether the record on appeal is sufficient to review Gary Stoddard's constitutional arguments. Stoddard's contentions assume his poverty. Nevertheless, the record contains no information, other than *Stoddard's* statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a \$100 fee. The cost of a criminal charge's defense exponentially exceeds \$100. Therefore, one may be able to afford payment of \$100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.

Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the \$100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

192 Wn. App. at 228-29.

This Court should not accept review of the equal protection claim based upon an undeveloped record. It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

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§ 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted); *Strine*, 176 Wn.2d
at 749-50.

Therefore, policy and RAP 2.5 do not favor consideration of the belatedly raised \$200 filing fee issue.

2. *There is no equal protection problem.*

First, Defendant takes aim at the wrong target. He claims that RCW 36.18.020(2)(h) violates equal protection. However, *his argument* is that GR 34, authorizing civil litigants a waiver of fees authorized under the statute, does not do the same for criminal defendants. It is the court rule, not the statute that authorizes the waiver. The statute makes the fees mandatory to all within its application. Defendant fails to make a claim that GR 34 violates equal protection.

Secondly, Defendant’s equal protection argument is perfunctory. He cites no cases dealing with the application of GR 34. Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)). Therefore, this Court should not consider this new argument.

Furthermore, there is no equal protection violation present in either the challenged statute, RCW 36.18.020(2)(h), or the court rule, GR 34. The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington State Constitution guarantee equal protection under the law. “Equal protection requires that similarly situated individuals receive similar treatment under the law.” *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). This court reviews constitutional challenges de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010); *State v. Price*, 169 Wn. App. 652, 655-56, 281 P.3d 331 (2012).

The appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Appellate courts apply a strict scrutiny standard when state action involves suspect classifications like race, alienage, national origin and/or fundamental rights. *Id.* Intermediate scrutiny is applied for semi-suspect classifications and/or important rights. *Id.* Otherwise, courts apply rational basis review. *Id.* Defendant concedes he is not a member of a suspect or semi-suspect class and agrees that rational basis review applies here. Appellant’s Supp. Br. at 2.

Rational basis review is a highly deferential standard, and courts will uphold a statute under this standard unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *In re Det. of Stout*, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Ward*, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994).

There is a rational basis for treating civil litigants *entering* the justice system differently than indigent criminal defendants *already in* the system and convicted of a criminal offense. The former group seeks access to justice; the later has received access to justice. Indeed, the State graciously provided this defendant access to justice *free of charge* when it filed the information. There was no *advance* requirement that he pay a filing fee to get into court, as there is in civil cases. It is only upon a criminal defendant’s conviction that he or she is required to pay a filing fee. GR 34 allows the waiver of mandatory filing fees for indigent civil litigants *to provide equal access to justice*. *Jafar v. Webb*, 177 Wn.2d 520,

526-32, 303 P.3d 1042 (2013). Without such a waiver, indigent parties would not be able to seek relief in the courts. *Id.* at 529-31.

The system does treat civil and criminal litigants the same in regards to filing fees. While a civil litigant may have the filing fee waived at the beginning of a case, a losing civil litigant is required to pay the filing fee at the conclusion of the case, just like a losing criminal defendant. RCW 4.84.010(1). GR 34 does not provide relief from RCW 4.84.010(1). Thus criminal and civil litigants are not differently situated.

Lastly, the criminal defendants are authorized to seek remission of these mandatory costs under RCW 10.01.160(4), under the same criteria as that providing waiver of fees to indigent civil litigants under GR 34. “[C]ourts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs.” *City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). There is no real difference in the procedure. The defendant has failed to establish, as is his burden, an equal protection violation.

3. *As Courts have previously held, the filing fee is mandatory.*

As Mr. McMains notes, this is an issue of statutory interpretation. As such it is clearly not a manifest constitutional issue under RAP 2.5. Thus the court should decline to review it. In addition Mr. McMains does not demonstrate any error that is applicable to him. By his own

declaration he is capable of working and earning an income. He was taking courses to be a reserve police officer. On this record Mr. McMains makes no showing he would be entitled to relief even if the court had considered his ability to pay.

Mr. McMains argues that the plain language of the statute that says “shall be liable” is somehow discretionary. Division II recently rejected this argument in *State v. Gonzales*, 198 Wn. App. 151, 392 P.3d 1158 (2017) (*petition for review denied* 188 Wn.2d 1022, 398 P.3d 1140 (2017)). Mr. McMains makes no showing that *Gonzales* is incorrect or harmful. See *In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017). Therefore this argument should be rejected.

V. CONCLUSION

There was no prosecutorial error, as the complained about argument was a fair response to counsel’s questions and did not inappropriately comment on defendant’s rights. Even if there was there is no reasonable probability it affected the outcome of the case. The

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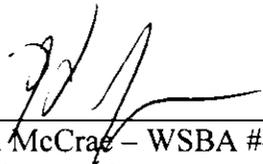
criminal case filing fee is mandatory and does not violate equal protection.

The trial court should be affirmed in all respects.

Dated this 23 day of October, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
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Dated: October 24, 2017.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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