

FILED
Court of Appeals
Division III
State of Washington
5/21/2019 9:46 AM
36089-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GAVIN DAVID WOLF, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. In violation of due process as guaranteed by article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the trial court erred by failing to hold a termination hearing that complied with due process.
2. In violation of due process, the court erred by denying Mr. Wolf's motion to continue the termination hearing. The court erred in terminating Mr. Wolf from mental health court.
3. In violation of due process, the court erred by refusing to let Mr. Wolf call or confront any witnesses at the termination hearing.
4. In violation of due process, Mr. Wolf did not receive written notice of the specific grounds for termination. The court erred in terminating Mr. Wolf from mental health court.
5. In violation of due process, Mr. Wolf did not receive a decision from a neutral decision-maker. The court erred in terminating Mr. Wolf from mental health court.
6. In violation of due process, the court erred by failing to enter adequate written findings of fact and conclusions of law, which should include a written statement of evidence considered.
7. In violation of article I, §§ 3 and 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the court erred by ordering that Mr. Wolf be restrained during the termination hearing.
8. In violation of due process, cumulative error deprived Mr. Wolf of a fair hearing. The court erred in terminating Mr. Wolf from mental health court.
9. The court erred by imposing a \$200 filing fee.
10. The court erred by imposing a \$100 DNA fee.
11. The court erred by ordering that Mr. Wolf pay the costs of community custody, including urinalysis or other testing.

12. The court erred in ordering that non-restitution legal financial obligations bear interest.

II. ISSUES PRESENTED

1. May Mr. Wolf challenge alleged trial court errors for the first time on appeal, when he asserts constitutional issues but did not object below and the allegations are not manifest on the record?
2. Did the trial court harmlessly err by denying Mr. Wolf an opportunity to call witnesses to testify on his behalf, when Mr. Wolf stated he sought only to call witnesses who were irrelevant to the scope of the termination hearing?
3. Did the court abuse its discretion by requiring Mr. Wolf to be restrained during the termination hearing after it heard argument from both parties and Mr. Wolf threatened to physically harm jail staff?
4. May Mr. Wolf challenge the trial court's decision to deny his requested continuance, when he does not offer any authority on the issue?
5. Does the cumulative error doctrine apply when Mr. Wolf has only demonstrated one possible error, which was harmless?
6. Should discretionary legal financial obligations only be imposed in accordance with recent changes in the law?

III. STATEMENT OF THE CASE¹

Background and procedure.

In 2015, the State of Washington charged Gavin David Wolf with three counts of third degree assault. Clerk's Papers (CP) 4. Mr. Wolf later

¹ RP refers to the proceeding setting the termination hearing and the termination hearing recorded by Joe Wittstock. 2RP refers to the initial drug court proceedings and 3RP to the eventual sentencing hearing.

wished to participate in Spokane County therapeutic mental health court and, on March 29, 2016, he opted into the program after completing an observation period to ensure he could comply with program requirements. CP 5-10.²

The terms of the two therapeutic court agreements were substantially similar; Mr. Wolf essentially agreed to abide by treatment requirements and other standard release conditions in exchange for the State dismissing all charges upon successful completion. CP 5-10. Relevant to this appeal, Mr. Wolf expressly waived his right to be present at “Mental Health Court staffing meetings.” CP 5. He also agreed to sign releases for confidential treatment information to be shared with the mental health court team, waived several other rights in regard to the underlying charges, and acknowledged that he must complete the program to the “satisfaction of the Court.” CP 6. Mr. Wolf agreed to participate in therapy to the satisfaction of the entire mental health court team; refrain from use, possession, or consumption of drugs or alcohol; to submit to testing for monitoring; and to commit no criminal law violations. CP 6.

² Mr. Wolf also brought several other pending charges to the program. RP 5; 3RP 5. These are addressed in the linked appeal under cause number 36088-1-III with otherwise identical facts and issues.

The agreement required Mr. Wolf to acknowledge that “any failure of the treatment program, including but not limited to positive urinalysis tests, missing treatment, violation of release conditions, [or] commission of a new crime” could lead to termination from the program. CP 7. As a matter of caution, the document repeatedly warned that a violation of the agreement could lead to termination, including another specific warning for “re-arrest during the treatment program.” CP 8. The agreement concluded by stating the “decision whether or not to terminate an individual from the Mental Health Court Program rests solely with the Mental Health Court Judge, guided by input from [the mental health court team].” CP 8-9. When Mr. Wolf opted in to the program, he and defense counsel signed the agreements in open court, and Mr. Wolf discussed his obligations and stipulations with the court. CP 10; 2RP 5-7.

Mr. Wolf almost immediately violated the agreement. 2RP 12-16, 25-26. The court held a termination hearing on October 17, 2016. 2RP 11. Mr. Wolf had committed new criminal law violations, continued consuming alcohol, missed group treatment sessions, missed sessions with his case manager, and missed court on several dates. 2RP 12-14, 25-26. Mr. Wolf entered a guilty plea on the new criminal charges on October 12, 2016. 2RP 12. The court spoke with Mr. Wolf, and he assured the court he could succeed in mental health court if given another opportunity. 2RP 21. The

court continued the termination hearing for six weeks to see if Mr. Wolf made progress. 2RP 26. The termination hearing was stricken in December of 2016, presumably because of compliance, and, at that point, Mr. Wolf was taken off the termination track. RP 31.

However, after December, Mr. Wolf again faced difficulties in the program. RP 31-33. In May of 2017, Mr. Wolf's treatment providers disclosed to the court information that Mr. Wolf was noncompliant due to alcohol use. RP 31. Mr. Wolf also had a brief hospitalization at that time, but the court received information that he was again noncompliant with treatment because he did not attend group treatment sessions between his release from the hospital through July. RP 32. A second termination hearing was set for August 29, 2017, but was never held, when the court instead reset the date to gather information; however, the court also indicated it would only accept 100 percent compliance going forward. RP 32. The court received more information that Mr. Wolf refused to comply with the treatment program in July. RP 32. Mr. Wolf also was disruptive in the group sessions he *did* attend, to the point that the service provider asked him to leave. RP 32. On August 8, 2017, the provider determined Mr. Wolf non-amenable to treatment. RP 32. However, the court did not set a termination hearing at that time. RP 33. Despite the compliance requirement, Mr. Wolf continued to violate the agreement

through the end of 2017. RP 34-36. He missed treatment, case management, and drug testing appointments in September, October, November, and December. RP 34-36.

New arrest and final termination hearing.

Mr. Wolf was again arrested for a new criminal law violation of second degree malicious mischief—domestic violence, and the State sought a failure to comply warrant for mental health court on January 26, 2018. RP 3-4; CP 69-70.³ The record also reflects that a photograph was taken of Mr. Wolf unlawfully in possession of a firearm, although this photograph did not become a basis for termination at any time. RP 8. He was brought before the mental health court on the failure to comply warrant on January 30, 2018. RP 3-4. The court reminded Mr. Wolf that a new arrest violated the terms of the agreement Mr. Wolf had signed. RP 4. The court explained, “[t]he purpose of today’s hearing is so that I could describe that to you, tell you that’s why you are here, what the warrants are, why you are being held.” RP 4. The court also expressly informed Mr. Wolf that it was setting a termination hearing regarding his mental health court cases. RP 5.

³ The State designated supplemental clerk’s papers concurrently with this brief: the failure to comply warrant and first appearance scheduling order for the new charge to demonstrate Mr. Wolf did indeed have notice. *See* CP 69-73.

The court expressly notified Mr. Wolf the hearing would be set for March 13, 2018. RP 5.

On March 13, 2018, the court held the termination hearing. RP 1. Mr. Wolf was in custody at the time and jail staff brought him to the hearing in restraints. RP 13. The court stated it preferred having no restraints and asked for a reason why Mr. Wolf was restrained. RP 13-14. The jail transport team explained that, while in custody, Mr. Wolf made a threat of violence to transport staff about seeing what would happen to them when they tried to handcuff him at the end of his court hearing. RP 14. Both Mr. Wolf and his attorney presented argument in opposition. RP 14-16. The trial court assessed the arguments from all parties, recalled several incidents of Mr. Wolf's periodic angry behavior, current violent charges, and made a finding in support of restraining Mr. Wolf for the hearing. RP 16-17; CP 11.

The court expressly and extensively made a record of the nature of the current proceeding and mental health court staffing in general. RP 18. The court explained that Mr. Wolf agreed at his initial opt-in that the decision to terminate resides solely with the court. RP 19. The court also defined staffing for the record:

The definition of staffing is where we meet as a group—and I'll describe who the "we" is in a moment—prior to the hearing in order for the Court to receive certain

information in a confidential fashion; “confidential” meaning certain things are disclosed that we would not normally perhaps disclose in court, personal medical information and the like.

It is my opportunity to hear from the people who might want to provide me with information and background so when I come out into court, I at least have the views of the participants and I have the view of that information. That did occur.

And I heard from folks at Pioneer as to their involvement. I heard from Mr. O’Neil. I heard from the Department of Corrections, Mr. Saad. I heard from Dr. Altshuler. And I heard from the [S]tate.

And, of course, I asked for [defense counsel]’s position as well. And Mr. Antush is in a little bit different position in some respects obviously here in this hearing as an advocate for Mr. Wolf. And we talked about that. And I respected certainly his position, and he honored that position when we were in staffing. So I do have the information; as I go through certainly I’ll disclose all of that—there is certainly no secrets at all. That process did occur. I want to make sure it is on the record that we went through that process.

RP 19-20.

Mr. Wolf asked the court for a continuance to bring witnesses to explain that he was “experiencing a psychotic state” when he was arrested; he did not contest that he was arrested. RP 21. The court reminded Mr. Wolf repeatedly that a re-arrest is grounds for termination. RP 26-27. The court reminded Mr. Wolf at length that the hearing was not to litigate the underlying arrest, but whether an arrest occurred, “a re-arrest is a ground for termination. I don’t determine the underlying charge if that is the case;

in other words, I don't go through it today and put witnesses on the stand.”

RP 23. The court also explained:

Let's go back to the termination policy one more time just so it is clear: The decision rests solely with the Mental Health Court judge. This is not a trial. This is a hearing. In all hearings you are entitled to notice and the opportunity to be heard. We gave everyone notice of this hearing. And everyone is going to have the opportunity, as they already have, to be heard as to the particular charges.

RP 27. The court declined Mr. Wolf's request to have witnesses come and testify that he should remain in mental health court because he did well in the program at times. RP 25-27. The court reiterated on the record the history of Mr. Wolf's time in mental health court. RP 30-33. The court noted that Mr. Wolf was arrested for three third degree assault charges which should have been grounds for termination, but he was permitted to bring those charges in to mental health court and stay in the program as a matter of grace. RP 33. While making these findings on the record, the court reminded Mr. Wolf that it had repeatedly allowed him to stay in the program even though his conduct repeatedly could have resulted in termination per the agreement. RP 30-36. The court emphasized that Mr. Wolf had been in the program for 36 months, had been through termination hearings, and had repeatedly been permitted to stay despite technical violations of the agreement by the grace of the court. RP 36.

Mr. Wolf's counsel agreed he had new charges in arguing that he should be permitted to remain in the program. RP 42. Mr. Wolf personally renewed his request to continue in order to have various treatment providers testify on his behalf about his progress in treatment. RP 44, 46. Mr. Wolf disagreed with the court's earlier decision to hold him to 100 percent compliance, even though the stated reason for termination was only the new arrest and not the repeated lack of compliance that had always been excused. RP 48.

The court paraphrased the arrest report for the new charge on the record. RP 50-51. Mr. Wolf's mother offered him a car ride and during the ride he became upset and broke one of her windows before eventually being arrested. RP 50-51. Mr. Wolf spent a great deal of time litigating his original underlying charges—the charges he first brought in to mental health court and now wanted to contest despite his initial stipulation to the admissibility and accuracy of the police report for the purposes of a bench trial if he were to be terminated. RP 55-56. Mr. Wolf finally agreed there was a new charge, although he asserted he should enjoy the presumption of innocence on the new charge. RP 56. He did not argue that re-arrest was not a ground for termination. *See* RP *passim*.

At the conclusion of the hearing, the court made the decision to terminate Mr. Wolf from the mental health court program. RP 61. The

court explained for the record that he considered the recommendation of the entire mental health team in staffing, before reiterating that it was solely the trial court's decision to terminate. RP 61. The court entered an order terminating Mr. Wolf from the program, and that order included a finding of fact that Mr. Wolf was "re-arrest[ed] during the treatment program" in violation of the agreement, memorializing the decision. CP 13. The underlying crimes from 2014 and the three newer third-degree assault charges proceeded to a bench trial per the initial agreement, and the court found Mr. Wolf guilty on all counts. CP 41-54. The court sentenced Mr. Wolf on April 24, 2018. CP 41. Regarding legal financial obligations, the court imposed \$800 in mandatory fees and indicated its intent to strike all discretionary fees. 3RP 11. Mr. Wolf timely appealed. CP 57.

IV. ARGUMENT

A. MR. WOLF'S DUE PROCESS CHALLENGES ARE EITHER UNPRESERVED, NOT MANIFEST, OR HARMLESS ERROR.

Mr. Wolf briefly makes several claims that the trial court violated his due process rights. Most of these claims are not preserved because he did not make an objection at the hearing and they are not manifest constitutional error. Mr. Wolf did ask to have an opportunity to call witnesses, but because he misunderstood the nature and scope of the

termination hearing his proposed witnesses were not material to the hearing and, thus, the error was harmless. This court should affirm.

1. RAP 2.5 and preservation of alleged due process violations.

The only alleged error Mr. Wolf brought to the trial court's attention concerned his ability to secure witnesses to testify on his behalf in the termination hearing. The other alleged errors are unpreserved, including errors related to: (1) written notice of the violation, (2) the State's disclosure of evidence of the violation, (3) confrontation of the State's witnesses, (4) a hearing before a neutral decision-maker, and (5) the court did not state the burden of proof on the record.⁴

RAP 2.5(a)(3) permits an appellate court to review an unpreserved claim of error if it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the asserted error must be manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Due process is obviously an issue of constitutional magnitude.

⁴ Mr. Wolf's claim the court did not enter findings of fact is incorrect because an order with that finding is in the record. CP 12-13. Mr. Wolf's confrontation claim is discussed with his preserved witness issue.

Analysis of whether an issue is manifest must strike “a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused.” *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077 (2018), *review denied*, 190 Wn.2d 1027 (2018) (citing *Kalebaugh*, 183 Wn.2d at 583). To establish manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. “To demonstrate actual prejudice, there must be a plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756). The “consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.” *Dunleavy*, 2 Wn. App. 2d at 427 (internal citations omitted) (emphasis added).

Most of the alleged due process violations stem from unpreserved errors that are not manifest. No actual prejudice accrued, and the alleged errors did not have practical, identifiable consequences at the hearing. The scope of the hearing on the record is critical to the analysis of whether these issues are manifest. The State sought a failure to comply warrant because Mr. Wolf was arrested for an allegation of a new criminal law violation. Mr. Wolf was brought before the trial court on the warrant and the court

explained to him that it would hold a termination hearing two months later to determine whether his *re-arrest* violated his agreement to participate in the therapeutic court. The hearing did not concern any allegations of non-compliance with treatment, or whether Mr. Wolf would benefit from continued mental health treatment if permitted to remain.

At the hearing, the court spoke at length in order to create a record for appellate review. This is because the nature of therapeutic courts means that much information is not made part of the public record. *See State v. Cassill-Skilton*, 122 Wn. App. 652, 94 P.3d 407 (2004) (Van Deren, J., concurring) (explaining federal and state law require drug and alcohol treatment records and mental health treatment records be kept confidential which stymies or even prevents the creation of a public trial record). The therapeutic court model is difficult to reconcile with the requirements of due process, but the trial court here did an excellent job of enabling appellate review of this decision.

Mr. Wolf first claims he did not receive: (1) written notice of the hearing, or (2) notice of the evidence upon which the State intended to rely. But, he was clearly on notice of his new arrest when he was arrested and, again, when he was brought before the court on the failure to comply warrant. He received notice again at that time. The court mentioned during the March termination hearing that all parties received notice, presumably

written. Mr. Wolf never complained that he did not know the court was deciding whether or not to terminate him or the nature of his violation. Mr. Wolf's defense counsel did not express any confusion about the nature of the violation and was present at staffing when the issue was discussed. On this record, there is no indication that Mr. Wolf suffered any consequence for the alleged failure of written notice of his new arrest.

Likewise, Mr. Wolf never expressed any concern or objection about allegations the trial court was: (4) not a neutral decision-maker. Staffing meetings always included Mr. Wolf's counsel, so he had representation present at the meetings. The decision was not prejudged; Mr. Wolf was only terminated after a lengthy termination hearing and only after the court heard argument from Mr. Wolf and his counsel. The trial court repeatedly reminded Mr. Wolf that he had expressly agreed his ability to remain in the therapeutic court per the terms of the agreement was solely at the discretion of the trial court judge. Mr. Wolf also expressly asked the court to follow the staffing *recommendation* that he be permitted to utilize the DOSA program as part of his sentence. That sentencing decision was similarly a judicial decision only to be made by the trial court. Mr. Wolf should not be permitted to complain on appeal about a procedure that he later asked the court to follow below to his benefit at his sentencing hearing.

At the end of the termination hearing, the court found that Mr. Wolf had been re-arrested. The court concluded this violated the therapeutic court agreement and terminated Mr. Wolf from the program. Any conversation from the therapeutic court staffing would not bear any consequence to the decision that ultimately resulted in his termination. This issue is not manifest.

Mr. Wolf's claim that: (5) the trial court did not hold the State to its burden of proof is also unpreserved. The State must prove noncompliance with a diversion or therapeutic court agreement by a preponderance of the evidence. *State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984). Mr. Wolf did not lodge an objection concerning the burden of proof. Mr. Wolf did not cite any authority stating due process requires the trial court to state the burden of proof on the record. The court read the arrest report, read the relevant facts into the record, and found Mr. Wolf had been re-arrested in violation of the agreement. Mr. Wolf's arraignment and eventual plea on the re-arrest charge were discussed throughout the record. The State clearly demonstrated by a preponderance of the evidence that Mr. Wolf was re-arrested. Mr. Wolf does not show or explain how the failure to state the burden of proof is manifest.

2. Preserved due process claim—opportunity to call witnesses.

The Fourteenth Amendment guarantees due process of law. U.S. CONST. amend. XIV. In the context of revocation decisions, due process affords a few minimal guarantees: written notice, disclosure of evidence, opportunity to be heard, right to confront witnesses, a neutral decision-maker, and a written statement of evidence considered. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *State v. Nelson*, 103 Wn.2d 760, 763, 697 P.2d 579 (1985); *In re Boone*, 103 Wn.2d 224, 231, 691 P.2d 964 (1984). These guarantees extend to a therapeutic court termination hearing. *Cassill-Skilton*, 122 Wn. App. at 653.

Even when constitutional error occurs, reversal is not automatic. *State v. Mancilla*, 197 Wn. App. 631, 641, 391 P.3d 507 (2017), *review denied*, 188 Wn.2d 1021 (2017). When faced with a constitutional error, appellate courts apply a harmless error test. *State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.2d 95 (2016). Under this test, reversal is not required if the State can prove the error harmless beyond a reasonable doubt. *Id.* at 487-88.

Mr. Wolf complains that he erroneously did not receive an opportunity to call witnesses or present evidence at the termination hearing. This error is harmless. Mr. Wolf and his counsel were permitted to make

argument at the hearing, and Mr. Wolf's counsel sought a short continuance to possibly bring lay witnesses who might argue that Mr. Wolf was experiencing a "psychotic break" at the time of arrest; not that he was not arrested. This was all conjecture. However, the court referenced a 10.77 order from one of his charges that determined him competent to proceed. No argument was made that Mr. Wolf had not been re-arrested for a new criminal law violation. Mr. Wolf personally sought to introduce several witnesses entirely unrelated to the subject of the termination hearing. Mr. Wolf never asked to confront the arresting officers or complaining witness.⁵ Instead, Mr. Wolf sought to call a variety of treatment providers and other acquaintances who would testify that Mr. Wolf was getting some benefit from the program. He did not address in any way the fact that his termination hearing was proceeding only on the fact that he was re-arrested in violation of the terms of the agreement or that the trial court was the sole decisionmaker on that fact.

The termination hearing was solely to determine whether Mr. Wolf was re-arrested. Witnesses who would testify that Mr. Wolf might benefit

⁵ The Washington Supreme Court recently resolved a division split on confrontation analysis under U.S. CONST. amend. VI. and WASH. CONST. art. 1, § 22. Although Mr. Wolf's challenge concerns due process, a confrontation challenge is waived if not asserted at the trial court. *State v. Burns*, ___ Wn.2d ___, 438 P.3d 1183, 1191 (2019).

from treatment or sometimes showed compliance with treatment would have no relevance or bearing on whether he was re-arrested. The agreement unequivocally stated a new arrest was a violation of the therapeutic mental health court program. Here, the error was harmless beyond a reasonable doubt.

B. THE COURT DID NOT ERR WHEN DETERMINING MR. WOLF SHOULD REMAIN RESTRAINED DURING THE TERMINATION HEARING.

Mr. Wolf appeared before the court in restraints because of threats he made to jail staff. After conducting a hearing on the issue of restraints and hearing from both parties, the court, in its discretion, concluded restraints were necessary for safety. This court should affirm because there is no error.

Criminal defendants are entitled to be brought into the presence of the court free from restraints. *State v. Lundstrom*, 6 Wn. App. 2d 388, 393, 429 P.3d 1116 (2018). “[R]egardless of the nature of the court proceeding or whether a jury is present, it is particularly within the province of the trial court to determine whether and in what manner shackles or other restraints should be used.” *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227 (2015). Restraints are disfavored because they may interfere with important constitutional rights, “including the presumption of innocence, privilege of

testifying [on] one's own behalf, and right to consult with counsel during trial." *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

A defendant's right to be in court free from restraints is not limitless. *Walker*, 185 Wn. App. at 800. The right may yield to courtroom safety, security, and decorum. *Id.* A defendant may be restrained if necessary to prevent injury, disorderly conduct, or escape. *Id.*

The trial court is vested with the discretion to provide for courtroom security in order to ensure the safety of court officers, parties, and the public. *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001). The trial court must exercise discretion in determining the extent to which courtroom security measures are necessary and its decision must be founded upon a factual basis set forth in the record. *State v. Finch*, 137 Wn.2d 792, 846, 975 P.2d 967 (1999). The trial court should allow restraints only after conducting a hearing and entering findings on the record justifying their use on a particular defendant. *Walker*, 185 Wn. App. at 800. The court's decision is reviewed for abuse of discretion. *State v. Breedlove*, 79 Wn. App. 101, 113, 900 P.2d 586 (1995). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Turner*, 143 Wn.2d at 724. This broad standard means that courts can reasonably reach different conclusions. *L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113,

436 P.3d 803, 814 (2019). Therefore, this Court should not reverse the decision of the trial court, even if it would decide the case differently, unless this Court finds that no other court could reasonably adopt the view of the trial court. *Id.*

Jail staff transported Mr. Wolf to his termination hearing while he was restrained. The court indicated it preferred that Mr. Wolf be free from restraint, and jail staff informed the court that Mr. Wolf had threatened physical injury on the staff if and when they attempted to place him back into restraints at the end of the hearing. The court heard argument from Mr. Wolf's counsel and Mr. Wolf himself, reviewed Mr. Wolf's history with the court, nature of the threats, and nature of other pending charges, and determined that restraint was a necessary security measure in this instance. The court made this finding on the record.

This decision is reviewed for abuse of discretion, and the court here followed proper procedure. The court sua sponte inquired about Mr. Wolf's restraints, recognized his right to be free from restraint, and reasoned through the circumstances before concluding that Mr. Wolf should remain restrained. Nothing in the record indicates the court's decision was manifestly unreasonable. The court certainly did not defer to a decision made by jail staff; to the contrary, the court noted its disagreement before listening to the factual basis and argument from both parties. Mr. Wolf

made a threat of physical violence and the court determined restraint was necessary at the termination hearing for the safety of staff. There is no abuse of discretion and no error.

If the court did err, an erroneous shackling is not structural error; it is subject to constitutional harmless error analysis. *Lundstrom*, 6 Wn. App. 2d at 393 n.2 (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157 (1999)). The likelihood of prejudice is significantly reduced in a proceeding without a jury. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002). There is a presumption that the trial court properly discharged its official duties without bias or prejudice. *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

On this record, any alleged error is harmless beyond a reasonable doubt. Despite the length of the record—which the trial court created specifically to enable appellate review because much of any therapeutic court is not recorded as discussed above—the scope of the termination hearing was very narrow. The court held the hearing solely to determine whether Mr. Wolf had been re-arrested during the program. There was no jury to influence. The court began the hearing by indicating it preferred Mr. Wolf proceed without restraints. Nothing in the record suggests the

court was influenced in any way by the presence of restraints. If error existed, on this record, it was clearly harmless beyond a reasonable doubt.

C. THE COURT DID NOT ERR WHEN DENYING MR. WOLF'S REQUEST FOR A CONTINUANCE.

Mr. Wolf assigned error to the court's decision to deny his request for a continuance. He offered no authority in support of this argument on appeal. This Court should affirm.

"The failure of an appellant to provide argument and citation of authority in support of an assignment of error precludes appellate consideration of an alleged error." *Prostov v. State, Dep't of Licensing*, 186 Wn. App. 795, 823, 349 P.3d 874 (2015). Mr. Wolf assigned error to this issue and mentioned the court's denial in the context of his claim the court violated his due process by refusing to let him call witnesses. However, Mr. Wolf provided no authority on the decision to deny a continuance itself. This court should decline review of this issue.

Should the court consider this allegation, no error occurred. "[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Review is for abuse of discretion. *Id.* Here, Mr. Wolf sought a continuance to possibly secure witnesses who might argue that Mr. Wolf would benefit from treatment. The court denied his request. This

was not an abuse of discretion because, as discussed earlier, Mr. Wolf's potential witnesses were not material to the scope of the hearing, which was solely to determine whether he had been re-arrested in violation of the agreement.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

Mr. Wolf argues cumulative error deprived him of a fair proceeding. The cumulative error doctrine is inapplicable because Mr. Wolf has only established one harmless error.

“The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant a fair trial.” *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). “The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964 (1994)).

Mr. Wolf has not met his burden to establish cumulative error or that a new hearing is necessary. Most of the alleged due process violations stem from unpreserved errors that are not manifest. As discussed above, even if the alleged errors existed, a careful review of the record demonstrates they had no consequence on the court's decision to terminate Mr. Wolf from

therapeutic court. The bottom-line is the trial court terminated Mr. Wolf from therapeutic court after a new arrest that violated his acceptance agreement, and Mr. Wolf did not express any confusion stemming from lack of notice or other formal requirements of due process. Instead, Mr. Wolf argued against termination on the theory that some of his treatment providers might have thought he was getting some benefit from the program. He also repeatedly attempted to raise various other claims irrelevant to the termination hearing; he alleged that jail staff were violating his constitutional rights and physically abusing him in general, but these claims were not relevant to the scope of the hearing. The cumulative error doctrine does not apply.

E. LEGAL FINANCIAL OBLIGATIONS SHOULD ONLY BE IMPOSED IN ACCORDANCE WITH STATUTE.

Because the law has changed since Mr. Wolf's adjudications, the court should only impose legal financial obligations in accordance with the holding of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary legal financial obligations (LFOs) on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3); *Ramirez*, 191 Wn.2d at 738. This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). These changes

to the criminal filing fee statute apply prospectively to cases pending direct appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747. Accordingly, the change in law applies to Mr. Wolf's case. Because Mr. Wolf is indigent, the criminal filing fee must be stricken pursuant to *Ramirez*.

The change in law also prohibits imposition of the DNA collection fee when the State has previously collected the offender's DNA because of a prior conviction. Laws of 2018, ch. 269, § 18. The uncontested record establishes that Mr. Wolf has five Washington State felonies since 1990. Since that time, Washington law has required defendants with a felony conviction to provide a DNA sample. Laws of 1989, ch. 350, § 4; RCW 43.43.754. It is a reasonable conclusion that Mr. Wolf's criminal history means the State has previously collected a DNA sample from him.

The trial court intended to waive all discretionary obligations. *Ramirez* mandates the 2018 LFO amendments apply to cases pending on appeal; the State therefore concurs that the challenged discretionary obligations be stricken.

V. CONCLUSION

Therapeutic court models and the formal requirements of due process are clearly in tension. In this case, the trial court expressly made an excellent record to enable appellate review. The record demonstrates that

the alleged errors had no effect on the outcome of the hearing. For these reasons, the State respectfully requests this Court affirm.

Dated this 21 day of May 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

GAVIN WOLF,

Appellant.

NO. 36089-0-III

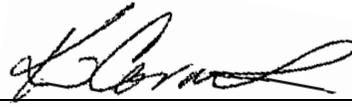
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 21, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Richard Lechich
wapofficemail@washapp.org

5/21/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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Superior Court Case Number: 15-1-03037-1

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