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Division III
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No. 36803-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 19-1-00059-04

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

THOMAS DALE CURTIS,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. Does the record support the defendant's contention that the public trial right was violated?
2. Is there a knowledge element for the crime of Unlawful Possession of a Controlled Substance?
3. Are the community custody conditions restricting the defendant's associations overbroad or vague?
4. If a court waives some discretionary fees, must the court waive all discretionary fees?

II. STATEMENT OF THE CASE

Procedural History

On May 8, 2019, Thomas Curtis was convicted of two counts of Unlawful Possession of a Controlled Substance as charged. CP 27-28. During jury selection, the defendant challenged Juror 14 for cause, stating: "Obviously, this is just so obvious that it doesn't need a lot of argument." RP 100. The State indicated that it didn't have a "strong objection" to the "for cause" challenge, but that there was no specific reason given. Id. The court clarified its own concern for the juror's mental health, and the State withdrew its objection and indicated that "we would have no objection on that ground." RP 100-101. After a brief discussion, it was determined that any other "for cause" challenges would be taken up before

peremptories. RP 101-102. After voir dire was concluded, the court conducted a sidebar. RP 115. Peremptory challenges were then exercised and the court rearranged the jurors to reflect the challenges. RP 115-120. The court then excused the unselected jurors, including all of the peremptories and Juror 14. RP 120-121. There was no court closure at any time during the trial; the courtroom remained open to the public at all times.

At sentencing the court found the defendant indigent and imposed a $500 Crime Victim Compensation fund fee and 12 months of community custody supervision including supervision fees. CP 29-33. The community custody conditions included prohibitions on contact with known felons and known users of controlled substances. CP 29-33.

III. ARGUMENT

A. There was no violation of the public trial right as the court did not excuse a juror in an off the record sidebar.

Mr. Curtis argues that the challenge of Juror 14 was heard off the record, but the record clearly indicates that it was conducted in open court. RP 100-101. The defendant raised the for cause challenge without providing an explanation, the State indicated that it really needed a specific reason, the court clarified the basis for the challenge, and the State withdrew its objection. RP 100-101. While the court never explicitly

stated on the record that Juror 14 was removed for cause, the record is nonetheless clear. The defendant made the challenge, the State raised a concern, and after a brief on the record discussion, the State withdrew its objection. While the court did not excuse Juror 14 until the conclusion of the peremptory challenges, there is absolutely no evidence that Juror 14 was discussed in the sidebar before peremptories. No other for cause challenges were made and no other jurors were excused beyond Juror 14 and the peremptories. RP 115-121.

Mr. Curtis is engaging in pure speculation when he claims that the court heard any part of jury selection in the sidebar. In fact, the court made its intentions clear on the record when it indicated that it would conduct a sidebar "making sure that that is what you intend to do" (referring to any other for cause challenges). "And then if you do, we'll take a break and ask the jury to leave." RP 102. The context of the discussion is clear. If a party had any further "for cause" challenges after voir dire, they would indicate that they did in a sidebar, and the court would excuse the jury and put them on the record.

It is clear from the record that no further challenges were made for cause after voir dire. The court moved on to peremptories and then excused the jurors that had been stricken, including Juror 14. RP 115-120. Mr. Curtis argues that because the court didn't state explicitly that Juror

14 was removed for cause, that there must have been some discussion off the record. However, this is purely speculation. He presents no evidence that any off the record discussion of Juror 14 occurred. He determines that Juror 14 was likely struck in the sidebar "after great scrutiny". But in fact, Juror 14 was struck on the record when the court clarified the reason for the strike and the State withdrew its objection. It requires no scrutiny and no speculation to conclude that the court intended to excuse Juror 14 after the State withdrew its objection.

Even if there had been discussion of the challenge of Juror 14 during the sidebar, it would not have violated the defendant's right to a public trial or his right to be present. Since the courtroom was never closed, there is no violation of the right to a public trial. Mr. Curtis's argument assumes without authority that the sidebar constituted a closure.

The court has heard a similar argument before in *State v. Love,* 183 Wn.2d 598, 354 P.3d 841 (2015):

> Love equates the for cause and peremptory challenges in his trial—which occurred in open court—to those exercised behind a closed chambers door. He argues the possibility that spectators at his trial could not hear the discussion about for cause challenges or see the struck juror sheet used for peremptory challenges rendered this portion of his trial inaccessible to the public.
>
> We find no merit in that comparison. The public trial right facilitates fair and impartial trials through public scrutiny. *Shearer*, 181 Wn.2d at 566 [334 P.3d 1078]. The public's

> presence in the courtroom reminds those involved about the importance of their roles and holds them accountable for misconduct. *Id.; Strode*, 167 Wn.2d at 226 [217 P.3d 310]. Effective public oversight of the fairness of a particular trial begins with assurance of the fairness of the particular jury.
>
> Yet the public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publicly available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury se[le]ction.

Love, 183 Wn.2d at 606-607.

As in *Love*, the courtroom was open to the public, and the record reflects both the peremptories and the "for cause" challenge. And while in *Love* the sidebar was on the record, in *State v. Effinger*, 194 Wn. App. 554, 562, 375 P.3d 701 (2016), the sidebar was not transcribed, yet the court held that such a sidebar did not constitute closure of the court. "We conclude that the for cause challenges at sidebar did not constitute a closure." *Id.*; see also *State v. Marks*, 185 Wn.2d 143, 145, 368 P.3d 485 (2016) (no open court violation where there was no closure of the courtroom to the public and where immediately following the challenges,

the superior court announced the selected members of the jury panel in open court.).

B. There is no knowledge element in RCW 69.50.4013.

Our Supreme Court has repeatedly held that drug possession does not have a *mens rea* element. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981). The court must decline Mr. Curtis's invitation to overturn Supreme Court precedent. "[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." *State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

C. The community custody conditions imposed are not overbroad or vague.

RCW 9.94A.703(3)(b) authorizes the court to order a defendant to refrain from direct or indirect contact with the victim of the crime or a specified class of individuals. The court has repeatedly upheld community custody restrictions prohibiting contact with other drug users. *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (condition that defendant not associate with persons using, possessing, or dealing with controlled substances is not overbroad or vague); *State v. Hearn*, 131 Wn. App. 601, 128 P.3d 139 (2006) (condition that defendant not associate with known drug offenders is not unconstitutional or manifestly

unreasonable); *In Re Pers. Restraint of Brettell*, 6 Wn. App. 2d 161, 430 P.3d 677 (2018) (condition barring defendant from associating with known users or sellers of illegal drugs is not impermissibly vague); *State v. Houck*, 9 Wn. App. 2d 636, 446 P.3d 646 (2019) (condition barring defendant from associating with known drug users and sellers is not unconstitutionally vague and "known" effectively notifies a person of ordinary intelligence who needs to be avoided).

"If a person of ordinary intelligence can understand what behavior a condition forbids, given the context in which its terms are used, the community custody condition is valid." *Brettell,* 6 Wn. App. 2d at 168, citing *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678-79, 425 P.3d 847 (2018). The language in Mr. Curtis's community custody condition relating to persons known to use controlled substances is consistent with the language repeatedly approved by the courts and is understandable to a person of ordinary intelligence in context.

Similarly, the court held that restrictions on associating with known felons and gang members was specifically authorized by the same statute. *State v. Coombes*, 191 Wn. App. 241, 253-254, 361 P.3d 270 (2015). Persons known to have a "felony criminal background" is a specified class of individuals and an ordinary person would understand in context that it includes only those individuals known to the defendant to

have a prior felony conviction. It is not vague or overbroad. See also *State v. Swearingen*, No. 32299-8-III, 2014 LEXIS 2388 (Unpublished)[1] (restriction on associating with known felons is not vague and was properly imposed); *State v. Knott,* No. 35546-2-III, 2019 LEXIS 765 (Unpublished) (restrictions on contact with convicted felons remanded to include language about the defendant's knowledge of the conviction); *State v. Weatherwax*, 113 Wn. App. 667, 681, 376 P.3d 1150 (2016) (limits on association with felons and gang members are authorized by statute and are not impermissibly vague) (overruled on other grounds).

D. The court's discretion to impose supervision fees is not restricted by its exercise of discretion to waive other fees.

As of June 7, 2018, RCW 10.01.160 prohibits a court from imposing discretionary costs of prosecution on indigent defendants when they meet the test in RCW 10.01.160(3). Mr. Curtis was determined by the court to meet this test and the court did not impose any discretionary costs of prosecution under RCW 10.01.160. CP 30. It is clear from this record that the court conducted an inquiry into the defendant's ability to pay and did find him indigent. The court also ordered the defendant to

[1] Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1.

pay "supervision fees as determined by DOC." Such supervision fees are clearly not costs of prosecution and are not covered by RCW 10.01.160.

Mr. Curtis contends that the court intended to waive discretionary costs and that this must be interpreted to include the supervision fees imposed under RCW 9.94A.703(2)(d). However, the court made no such declaration. The statute in question reads: "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department." By the plain language of the statute, the court is required to impose the fees unless it explicitly waives them. The court did not explicitly waive the fees.

The court also properly followed the statute when it imposed the requirement to pay for substance abuse testing at the defendant's expense.

> In sentencing an offender convicted of an alcohol or drug-related traffic offense the court shall require the offender to complete a diagnostic evaluation by a substance use disorder treatment program approved by the department of social and health services or a qualified probation department . . . The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

RCW 9.94A.703(4). This is not a discretionary cost. It is plainly mandated by the statute in convictions for alcohol or drug related offenses.

The court considered the defendant's ability to pay and imposed only mandatory LFOs and did not to waive the community custody supervision fees.

E. The State agrees that the legal financial obligations are not subject to interest and that the Judgment and Sentence should be so amended.

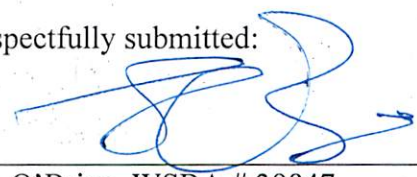
As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations. RCW 10.82.090(1). The State concedes that it was error for the court to impose interest in the present case and agrees with Mr. Curtis that the appropriate remedy is a remand for the limited purpose of striking this language from the Judgment and Sentence.

IV. CONCLUSION

Based on the foregoing reasons, the court should affirm Mr. Curtis's conviction and only remand for the limited purpose of striking the interest from the legal financial obligations.

DATED this 20 day of February, 2020.

Respectfully submitted:



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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. THOMAS DALE CURTIS, Defendant/Appellant.	No. 36803-3-III Chelan Co. Superior Court No. 19-1-00059-04 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 20th day of February, 2020, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

Richard Lechich Washington Appellate Project 1511 Third Avenue, Suite 610 Seattle, WA 98101 richard@washapp.org	( ) U.S. Mail ( ) Hand Delivery (X) E-Service Via Appellate Courts' Portal

Signed at Wenatchee, Washington, this 20th day of February, 2020.

Cindy Dietz

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