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Court of Appeals
Division I
State of Washington

NO. 73532-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAVONDA BECK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL HISTORY	3
2. SUBSTANTIVE FACTS	4
C. <u>ARGUMENT</u>	10
1. THE TRIAL COURT'S "FACIAL COMMENTS," IF ANY, WERE HARMLESS	10
a. Relevant Facts	11
b. Judge Middaugh's Facial Expression Was Not A Comment On The Evidence	12
c. Any Error Was Harmless	14
2. WHERE THERE WAS NO EVIDENCE THAT DEFENDANT SUFFERED A MENTAL HEALTH CONDITION PREVENTING HER FROM PARTICIPATING IN GAINFUL EMPLOYMENT, THE TRIAL COURT PROPERLY IMPOSED THE MANDATORY DNA FEE	16
3. BECK'S CHALLENGES TO MANDATORY LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED	21
a. The Court Should Not Reach The Merits Of The Claim Because It Is Not Ripe For Review	22
b. The Alleged Errors Are Not Manifest Constitutional Errors And Should Not Be Reviewed Under RAP 2.5	23

c.	The Victim Penalty Assessment And The DNA Fee Statute Do Not Violate Due Process	25
d.	RCW 10.01.160 Does Not Apply To Mandatory LFOs	31
D.	<u>CONCLUSION</u>	34

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Amunrud v. Bd. of Appeals, 158 Wn.2d 208,
143 P.3d 571 (2006)..... 26, 31

Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127,
606 P.2d 1214 (1980)..... 14

State ex rel. Peninsula Neighborhood Ass'n
v. Dep't of Transp., 142 Wn.2d 328,
12 P.3d 134 (2000)..... 25

State v. Beaver, 184 Wn. App. 235,
336 P.3d 654 (2014), aff'd,
184 Wn.2d 321, 358 P.3d 385 (2015)..... 26

State v. Blank, 131 Wn.2d 230,
930 P.2d 1213 (1997)..... 22, 29

State v. Blazina, 182 Wn.2d 827,
344 P.3d 680 (2015)..... 24, 28, 29, 32

State v. Brush, 183 Wn.2d 550,
353 P.2d 213 (2015)..... 13

State v. Cates, 183 Wn.2d 531,
354 P.3d 832 (2015)..... 22

State v. Clark, ___ Wn. App. ___,
362 P.3d 309 (2015)..... 25, 33

State v. Curry, 118 Wn.2d 911,
829 P.2d 166 (1992)..... 22, 33

State v. Eisner, 95 Wn.2d 458,
626 P.2d 10 (1981)..... 14

State v. Elmore, 139 Wn.2d 250,
985 P.2d 289 (1999)..... 15

<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	15
<u>State v. Farmer</u> , 116 Wn.2d 414, 805 P.2d 200 (1991).....	25
<u>State v. Hansen</u> , 46 Wn. App. 292, 730 P.2d 706 (1986).....	13
<u>State v. Hartzell</u> , 156 Wn. App. 918, 237 P.3d 928 (2010).....	13
<u>State v. Humphrey</u> , 139 Wn.2d 53, 983 P.2d 1118 (1999).....	27
<u>State v. Jacobsen</u> , 78 Wn.2d 491, 477 P.2d 1 (1970).....	13
<u>State v. Johnson</u> , 179 Wn.2d 534, 315 P.3d 1090 (2014).....	22
<u>State v. Kuster</u> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	33
<u>State v. Lampshire</u> , 74 Wn.2d 888, 447 P.2d 727 (1968).....	15
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	22, 23, 33
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	24
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	24

Constitutional Provisions

Washington State:

CONST. art. IV, § 16 12

Statutes

Washington State:

Former RCW 43.43.7541 (2002)..... 17

LAWS OF 1973, 1st Ex. Sess., ch. 122, § 1 27

LAWS OF 1977, 1st Ex. Sess., ch. 302, § 10 27

RCW 7.68.035..... 2, 21, 25, 27, 32

RCW 9.94A.030 32

RCW 9.94A.777 18, 20

RCW 10.01.160..... 3, 21, 28, 31, 32, 33

RCW 10.73.160..... 29

RCW 10.82.090..... 30

RCW 43.43.753..... 17, 26

RCW 43.43.7532..... 27

RCW 43.43.7541..... 2, 17, 21, 25, 26, 28

RCW 72.11.020..... 29

RCW 72.11.030..... 29

Rules and Regulations

Washington State:

RAP 2.5..... 2, 23, 24, 32

A. ISSUES PRESENTED

1. A trial judge may not comment on the evidence such that her attitude toward the merits of the cause is reasonably inferable. Where such a comment is made, it may be harmless and may be cured by an appropriate instruction. Here, after instructing the jury that it must disregard any perceived comments on the evidence, and before giving the same instruction at the close of trial, the trial judge allegedly made a "facial comment" in response to the defendant's confusing testimony. Was any error harmless?

2. Where a defendant suffers from a mental health condition that prevents her from participating in gainful employment, the trial court must determine whether the defendant has the means to pay legal financial obligations before imposing the otherwise mandatory DNA fee. Where the record establishes that the defendant's mental health condition did not prevent her from being employed most of her life, did the trial court properly impose the DNA fee? Has defendant failed to establish that her counsel was constitutionally ineffective for failing to challenge the DNA fee on this basis?

3. The constitutionality of a mandatory legal financial obligation imposed at sentencing is not ripe for review until the

State attempts to collect payment or impose punishment for failure to pay. The State has not attempted to collect the mandatory DNA fee and Victim Penalty Assessment from the defendant. Is her claim unripe, thus precluding review?

4. Under RAP 2.5, this Court may refuse to review any claim raised for the first time on appeal, including whether imposing mandatory legal financial obligations without consideration of the defendant's ability to pay is unconstitutional. The defendant raised no objection to the DNA fee or Victim Penalty Assessment in the trial court and does not argue that any "manifest constitutional error" exists to justify review under RAP 2.5. Should this Court decline to review the issue?

5. Substantive due process requires that laws that affect an individual's non-fundamental right be rationally related to a legitimate state interest. The defendant acknowledges the State's legitimate interest in creating and maintaining a DNA database and in funding programs to facilitate victim participation in criminal prosecution. RCW 43.43.7541 establishes a mechanism to fund the DNA database and RCW 7.68.035 creates a system to fund the programs for victims. Has the defendant failed to prove beyond a reasonable doubt that the DNA fee and Victim Penalty Assessment

statutes violate substantive due process as applied to indigent defendants?

6. RCW 10.01.160 permits the trial court to impose "costs" upon a convicted defendant only if he or she has the current or likely future ability to pay them. For purposes of this statute, "costs" are "limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision." Neither the DNA fee nor the Victim Penalty Assessment is a "cost" by this definition, and courts have held that RCW 10.01.160 does not apply to such mandatory fees and fines. Has the defendant failed to show that the statute precludes imposition of the DNA fee and Victim Penalty Assessment?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

By amended information, the State charged Lavonda Beck with three counts of Trafficking in Stolen Property in the First Degree. CP 11-12. The State alleged that Beck had stolen and pawned or sold several pieces of jewelry and four state quarter collections from Barbara and Paul Hanson, Beck's elderly godparents who employed her as a live-in caretaker. CP 4-8. After

a jury trial before the Honorable Laura Middaugh, the jury convicted Beck as charged. CP 53-55; RP 498.¹ The trial court granted Beck a first time offender waiver, imposing 45 days in jail and 45 days in the Community Center for Alternative Programs (CCAP). CP 105; RP 531. The trial court also imposed the mandatory DNA fee and Victim Penalty Assessment without objection. CP 104; RP 532. The court waived all nonmandatory fees and costs. CP 104; RP 553. Beck appeals.

2. SUBSTANTIVE FACTS

Barbara and Paul Hanson had known 58-year-old Lavonda Beck since Beck was born; Barbara is her godmother.² RP 236-37, 292, 363. The Hansons employed Beck to clean their house twice each month for several years. RP 238, 366. In May 2013, Paul was recovering from a serious illness and required live-in care that Barbara could not provide. RP 239. At about the same time, Beck found herself with nowhere to live. RP 239, 369. Since Beck had been employed as a caretaker for the elderly before, the Hansons offered to hire her to care for Paul, shop for groceries, prepare

¹ The verbatim report of proceedings consists of four volumes. Because they are consecutively paginated, the State refers to the record by page number alone.

² This brief refers to the Hansons by first name for clarity. No disrespect is intended.

meals, wash Paul's laundry, and pick up medications. RP 240-42, 296-97, 366-67. Barbara estimated that this work amounted to no more than four hours per day. RP 242.

Beck moved in with the Hansons in May of 2013. RP 239, 295-96, 326. They paid her \$500 per month, plus room and board. RP 240, 296, 367. They also provided her with a credit card on Paul's account for buying groceries and medications for Paul, and they helped her buy a car. RP 241, 286, 297-98.

In September 2013, Barbara had a medical emergency. RP 251, 329. As she was taken to the ambulance, Barbara told Beck where she had hidden her wedding and anniversary rings so that somebody would know where they were in case she died. RP 251. The wedding ring featured a large canary (yellow) diamond and several smaller white diamonds; it had been appraised at \$6,800. RP 248-49, 251. The anniversary ring featured seven marquise diamonds and had been appraised at \$1,600. RP 250-51.

While Barbara was in the hospital, Beck began going through the house, ostensibly to clear it of "junk." RP 265. Barbara recalled that Paul had authorized this, but that she wanted this work to wait until she was out of the hospital. RP 265, 273-74. Paul

recalled that he gave Beck permission to donate two items but did not give her broader permission to remove other things from the house. RP 308-09.

When Barbara returned from the hospital, she noticed that some of her jewelry was missing. RP 332. Barbara decided to pack up what she had left and give it to her son Joe to secure in a safe in his house. RP 333. When Barbara could not find her wedding and anniversary rings to send with Joe, Beck claimed that they had not been where Barbara said they would be when she went to the hospital. RP 253.

Barbara also noticed that a large metal milk jug had been emptied of the rolled coins that she had collected there for 15 years. RP 243, 301. Paul estimated that the jug had contained at least \$1,000 in coins and weighed more than 40 pounds. RP 301. Paul asked Beck what had happened to the money. RP 302. Beck claimed that the firemen who had responded to Barbara's medical emergency had taken it. RP 302. Paul did not believe this and immediately asked Beck to move out. RP 303. After Beck moved out, Barbara discovered that the four books of state quarters she had collected for her grandchildren were also missing. RP 260-62. Paul called the police. RP 303.

During his investigation, Auburn Police Detective Stephen Bourdage discovered Beck's extensive history of pawning jewelry and other items. RP 221-23. Auburn Cash America employee Sharon Pankalla provided pawn tickets showing that Beck had pawned two diamond rings on August 22, 2013, a diamond and gemstone tennis bracelet on October 20, 2013, and four books of collectible coins on April 18, 2014.³ RP 223-25, 352-55. Beck received \$300 for the anniversary ring, \$115 for the wedding ring, \$75 for the bracelet, and \$50 for the four sets of quarters. RP 352-55. Barbara identified these items as some of her missing property. RP 227, 249-51, 254-55.

At trial, Beck gave a very different version of the facts. She described a terrible work environment in which Barbara twice threatened her with a gun, but also regularly gave Beck gifts and

³ At trial, photographs of the stolen jewelry and coin books and the pawn tickets for each of the items were admitted as separate exhibits. The testimony about these exhibits can be unclear when this evidence is referred to only by exhibit number. The following chart may help:

Exhibit No.	Item	Exhibit No.	Item
1	Photo of gemstone bracelet	23	Pawn ticket for gemstone bracelet
6	Photo of anniversary ring	24	Pawn ticket for anniversary ring
12	Photo of wedding ring	25	Pawn ticket for wedding ring
13-15	Photos of quarter books	26	Pawn ticket for quarter books

jewelry. RP 370-72, 385, 403. She testified that she never took anything from the Hansons without permission, and that she waited until Barbara was out of the hospital and could personally decide what items she no longer wanted. RP 363, 380. With respect to the jewelry, Beck said that she showed Barbara "52 rings, about 20 bracelets and about 20 necklaces," which Barbara divided into a pile to keep and a pile to give away. RP 397-98. Beck said she believed she could do whatever she wanted with the give-away pile. RP 398. Beck also claimed that Barbara herself had given the coins from the milk jug to Joe and his children. RP 374, 401-02.

Beck's testimony about how and when she acquired and sold Barbara's jewelry was confusing and internally inconsistent. She first stated that Barbara had given her the wedding ring (which she referred to as a topaz ring) between March and May of 2013 for her birthday, which is in November. RP 383. Then she testified that Barbara gave her the ring in November 2012, and that she pawned the ring in Puyallup between March and May of 2013. RP 384-85. Then she testified that she received the ring for her birthday in 2013. RP 386. Later in her testimony, she said Barbara had given her an imitation of the wedding ring on her birthday in

November, without indicating the year. RP 403-04. She then testified again that it was in 2012. RP 404-05.

Beck testified that Barbara gave her the marquise-diamond anniversary ring along with five other rings, and that she pawned all six in Puyallup for less than \$10. RP 386. Then she claimed that Barbara had given her the anniversary ring for her birthday in November 2013, and that it was actually just an imitation replica of Barbara's anniversary ring. RP 386. Then she testified that she had actually sold the imitation and three or four other rings to an antiques/collectibles shop, not a pawn shop, and received \$18 or \$19. RP 387. When confronted with the pawn ticket showing that she had pawned the two diamond rings at the Auburn Cash America in August 2013, Beck retreated to her testimony that Barbara had given her the imitation anniversary ring at some other time, along with eight others. RP 387-88. She later testified that Barbara gave her the anniversary ring during the summer of 2013, that it was just an imitation worth \$19.95, and that a pawn shop gave her \$351 for it. RP 406.

Beck also testified that Barbara had given her the gemstone tennis bracelet to give to Beck's daughter-in-law and that the bracelet was only worth \$49.99. RP 394. She claimed that she

was able to pawn it for \$300. RP 395. She could not explain why the pawn ticket for that transaction indicated that she received \$75 for the bracelet. RP 395. Beck also testified that she had collected seven books of state quarters, had given two away, and had pawned the rest. RP 389. Of those five, she said that she had pawned two of them in Puyallup, two of them in Eatonville, and one near the Muckleshoot casino. RP 389. She could not explain the pawn ticket indicating that she had pawned four books of quarters in Auburn. RP 389-90.

C. ARGUMENT

1. THE TRIAL COURT'S "FACIAL COMMENTS," IF ANY, WERE HARMLESS.

Beck contends that the trial court improperly commented on her credibility and thereby denied her a fair trial by visibly reacting to her convoluted testimony. This claim should be rejected. Given the context in which it occurred, the jury would not have interpreted the trial court's conduct as an expression of personal opinion regarding the credibility of Beck's testimony. In any event, there is no evidence that the jury saw the judge's expression, and the jury was twice properly instructed to disregard any perceived judicial comment. Accordingly, any error was harmless.

a. Relevant Facts.

In an effort to clarify Beck's testimony about when she received and pawned the diamond rings, Judge Middaugh interrupted the cross examination to ask, "Is there a year for some of these things?" RP 404. Beck unresponsively stated, "2014 was the last time I saw the people until today except for when they were at court. And 2013 is when I went to work for Paul. 2012 is when I worked for Barbara." RP 404. The court replied, "Okay." RP 404. At that point, defense counsel objected to "the court's facial comments and comments in court." RP 404. The court noted the objection and told the prosecutor to go on. RP 404. Defense counsel "object[ed] again to any facial comments the court is making." RP 404. The court directed the prosecutor to go ahead. RP 405.

Following Beck's testimony and outside the jury's presence, defense counsel made a more detailed record of his objection:

MR. ARALICA: Your honor, with due respect I don't think it was appropriate to make facial comments when the court was clarifying a question of Ms. Beck. The court raised its hand and Your Honor shook your head back and forth. And I'm concerned it sends a message to the jury that you as a judge may not believe or have questions about her credibility. I'm not saying that's what happened, but I am concerned about those perceptions and that's why I objected. And I don't mean to insult the court. I am just –

THE COURT: No, that's okay. You need to make that objection if you feel it's appropriate. And I don't recall waving my hand. But you're an officer of the court and you say that, then I'm sure that that's what you saw. And – and I will instruct the jury again that if they perceive that I have made a comment that they are not to consider any comment that I have made. Anything else?

RP 407-08. Defense counsel did not propose any particular instruction or suggest any other remedy. The court did not seek input from the State. The court later explained, “just for your information, I am making faces because my shoulder’s killing me.”

RP 409.

Defense counsel filed a declaration to supplement the record the following day. CP 51-52. Counsel stated that he “observed Judge Middaugh shake her head and put her hand up. She had an inquisitive and confused look on her face.” CP 51. Counsel opined that the conduct amounted to a comment on the evidence but did not request any remedy. CP 52. Counsel did not raise the issue again in court.

b. Judge Middaugh's Facial Expression Was Not A Comment On The Evidence.

Under article IV, section 16 of the Washington Constitution, a judge is prohibited from conveying to the jury her personal opinion about the merits of the case and from instructing the jury

that a fact at issue has been established. State v. Hartzell, 156 Wn. App. 918, 938, 237 P.3d 928 (2010). A comment on the evidence occurs only if the court's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706 (1986). In evaluating whether a trial court's words or actions amount to a comment on the evidence, appellate courts look to the facts and circumstances of the particular case. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Judicial comments are presumed to be prejudicial unless the record affirmatively shows that no prejudice could have resulted. State v. Brush, 183 Wn.2d 550, 559, 353 P.2d 213 (2015).

Here, the trial court's "inquisitive and confused look" was a natural human reaction to Beck's confusing and inconsistent testimony about how and when she obtained Barbara's rings and where and when she pawned or sold them. Even if the jurors observed the judge's facial expression, which Beck has not established, it is more likely that they perceived the look as genuine confusion about the timeline Beck was trying to establish than as a personal opinion on Beck's credibility.

c. Any Error Was Harmless.

Further, an isolated instance of conduct suggesting a comment may be deemed harmless “particularly ... if the response appears invited and represents a natural, limited reaction to an immediate stimulus. In such instances, potential error may be cured by an instruction, if requested.” State v. Eisner, 95 Wn.2d 458, 463, 626 P.2d 10 (1981) (quoting Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980)). Here, the trial court twice instructed the jury – at both the beginning and the end of trial – to disregard any statement or conduct by the court appearing to indicate a personal opinion on the evidence. During its opening instructions, the court stated:

One last thing to consider, is that our state constitution prohibits a trial judge from making a comment on the evidence. Because it's your role to evaluate the evidence. It would be improper for me to express by words or conduct my personal opinion about the value of particular witnesses, a testimony or an exhibit. And I will not intentionally do this. If it appears to you that I have commented in any way on the evidence in this case or expressed my personal opinion, you must disregard that.

RP 204. At the end of trial, less than a day after the court's alleged “facial comments,” the court instructed the jury again:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express by words or conduct my personal opinion

about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

RP 444.

This instruction has been deemed sufficient to avoid and/or cure any prejudice arising from an alleged nonverbal comment on the evidence. See State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). Juries are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012).

Beck appears to concede that a prompt curative instruction would have averted any error, but nevertheless argues that the instructions given here were insufficient because "[t]he damage was done when the remark was made, it should have been corrected immediately." Brief of Appellant (BOA) at 11. She relies on State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1968). There, the trial court explicitly opined, in front of the jury, that the defendant's testimony was not material. Id. at 891. Although the trial court evidently gave some instruction to the jury to "disregard comments of court and counsel," our supreme court held that the instruction was insufficient to cure the error. Id. at 892. Lampshire is readily distinguishable. Unlike in that case, the trial court here

made no statement at all, let alone one that explicitly conveyed the court's negative opinion of the evidentiary worth of the defendant's testimony.

Further, while Beck now argues that the error should have been promptly cured with an instruction, she failed to seek such relief at trial. The record suggests that the trial court would have been amenable to such a request – Judge Middaugh acknowledged that she may have made a face and stated that she would instruct the jury to disregard any perceived comments. RP 407-08. Counsel requested neither this nor any other remedy. Under the circumstances, this Court should hold that any error arising out of Judge Middaugh's "facial comments" was harmless beyond a reasonable doubt.

2. WHERE THERE WAS NO EVIDENCE THAT DEFENDANT SUFFERED A MENTAL HEALTH CONDITION PREVENTING HER FROM PARTICIPATING IN GAINFUL EMPLOYMENT, THE TRIAL COURT PROPERLY IMPOSED THE MANDATORY DNA FEE.

Beck next contends that the trial court erred by imposing the \$100 DNA fee, and that her counsel was ineffective for failing to object. She relies on a statute that requires the court to consider ability to pay before imposing the fee on one who suffers from a

mental condition that renders her unable to work. Because the record establishes no such condition, that statute does not apply and the DNA fee was mandatory.

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” Id. To fund the DNA database, the legislature enacted RCW 43.43.7541. This statute originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: “Every sentence ... must include a fee of one hundred dollars.” RCW 43.43.7541.

Notwithstanding that mandate, the legislature made an exception for some defendants who suffer from mental health conditions. Before imposing any legal financial obligation other than restitution and the victim penalty assessment on such a

defendant, the trial court "must first determine that the defendant, under the terms of this section, has the means to pay such additional sums." RCW 9.94A.777(1).

Beck argues that the trial court erred by imposing the DNA fee without first considering her ability to pay because there was evidence in the record that she suffers from various mental health conditions. But the statute does not apply to every defendant with a mental health condition:

For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(2). Thus, the DNA fee is mandatory unless the defendant's mental health condition prevents her from working.

Beck testified that she had experienced four brain aneurysms at some point, which necessitated surgery and entitled her to social security disability benefits. RP 363. But she also testified, "I can work with a disability." RP 367. Indeed, she described a lifetime of gainful employment:

Bartender for 22 years and slash grocery store worker. ... [A]nd then I worked in the Wonder Bread and I worked for

Safeway and Winco Foods. Then I went to work for home care and I have done that for the last eight years. And I've worked for three agencies: Catholic Community Services, American and Addus.

RP 364. She also explained the hard work she performed for the Hansons:

I helped [Paul] stand. I helped him get into bed. I helped him take a shower. I cooked three meals a day. I bought all the groceries. I cleaned all the house, mopped and waxed all the floors. Did all the laundry. And shampooed the rugs. I also had to clean up after Barbara.

RP 366-67. In addition, she testified that she "had to clean every corner from top to bottom, even the garage and the yard." RP 367.

In addition to the aneurysms, defense counsel represented in his presentence report that Beck "developed bipolar disorder when she was twenty four. Her symptoms included anxiety attacks, depressive episodes, and mania. Her mental health symptoms have been fairly stabilized over the years with medication." CP 80. Counsel further represented that Beck was diagnosed with "major depressive disorder" and panic attacks, and that she had been hospitalized on seven occasions for "various mental health problems." CP 84. Counsel provided no documentation of Beck's mental health diagnoses or hospitalizations. He acknowledged that Beck "actively sought treatment including medication and therapy"

and that “[m]edication was successful in managing the longstanding mental health symptoms.” CP 84. As a result, Beck has not been prevented from gainful employment; rather, she “has been employed for most of her life.” CP 81.

Beck’s claim on appeal that her mental health condition prevents her from working is also inconsistent with her request for an alternative sentence imposing “Work Ethic Camp.” CP 87-88. That program requires the offender to be “actively involved in intensive programming up to 16 hours a day, 7 days a week.” CP 95. The Department of Corrections Work Ethic Program policy explicitly states that offenders will not be placed in that program if they suffer “[p]hysical or mental impairments that would prevent participation in and/or completion of the Work Ethic Program.” CP 95. Beck’s request to be sentenced to work ethic camp further undermines her position on appeal that her mental health condition prevents her from participating in gainful employment.

Because Beck does not meet the criteria for operation of RCW 9.94A.777, the DNA fee was mandatory. The trial court had no discretion under the circumstances to avoid imposing the fee, and thus, Beck cannot show that defense counsel was deficient in

failing to object to its imposition. This Court should affirm imposition of the DNA fee.

3. BECK'S CHALLENGES TO MANDATORY LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED.

When any defendant is convicted of a felony, the trial court is required by law to impose a \$100 DNA fee and a \$500 Victim Penalty Assessment (VPA). RCW 43.43.7541; RCW 7.68.035. The trial court complied with these statutory requirements by imposing these mandatory legal financial obligations (LFOs) in Beck's judgment and sentence, and Beck did not object. For the first time on appeal, Beck contends that the statutes mandating imposition of the VPA and the DNA fee are unconstitutional as applied to indigent defendants, and that the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOs without consideration of her ability to pay. Because Beck's claims are both unpreserved and unripe for review, this Court should decline to consider them. If this Court does reach the merits, it should reject Beck's claims because she fails to establish that the statutes are unconstitutional beyond a reasonable doubt.

a. The Court Should Not Reach The Merits Of
The Claim Because It Is Not Ripe For Review.

Assuming that Beck has standing to bring this constitutional challenge,⁴ this Court should refuse to reach the merits because the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), when it held that an inquiry into defendant’s ability to pay is not constitutionally required before

⁴ Generally, a person may challenge the constitutionality of a statute only if she is harmed by the provisions claimed to be unconstitutional. State v. Cates, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). In the context of due process challenges based on legal financial obligations assessed against indigent individuals, a person must demonstrate “constitutional indigence” based on “the totality of the defendant’s financial circumstances” to establish standing. State v. Johnson, 179 Wn.2d 534, 553, 555, 315 P.3d 1090 (2014). Here, Beck does not even argue that she is indigent. Although the record establishes that Beck receives disability and food stamps and had at one time filed for bankruptcy, nothing in the record indicates whether she owns real or personal property that would preclude a finding of constitutional indigence. See Johnson, 179 Wn.2d at 553-54 (“Ownership of, or equity in, property indicates that a defendant is not constitutionally indigent”). Failure of the record to disclose such information demonstrates the wisdom of refusing to entertain her claim for the first time on appeal.

imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Id. at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" Id. at 242. "If at that time defendant is unable to pay through no fault of his own, ... constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the VPA or the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

- b. The Alleged Errors Are Not Manifest Constitutional Errors And Should Not Be Reviewed Under RAP 2.5.

Beck did not object to the imposition of the VPA or the DNA fee at sentencing. Accordingly, RAP 2.5(a) bars consideration of her claims.

A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant’s rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Beck’s constitutional claims depend on her present and future inability to pay the mandatory VPA and the DNA fee. But her failure to object to imposition of these LFOs deprived the trial court of the opportunity to make a record as to her financial resources and likely future ability to pay. Since there are insufficient facts in the record to adjudicate whether Beck is constitutionally indigent, any error cannot be manifest within the meaning of RAP 2.5(a).

In State v. Blazina, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where

defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. See also State v. Clark, ___ Wn. App. ___, 362 P.3d 309 (2015) (recognizing that “the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity,” and exercising discretion not to consider challenge to a fine for the first time on appeal). Because Beck failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

c. The Victim Penalty Assessment And The DNA Fee Statute Do Not Violate Due Process.

Even if this Court exercises its discretion to review the unpreserved claim, it should reject Beck’s constitutional challenges to RCW 43.43.7541 and RCW 7.68.035. A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). If at all possible, courts should construe statutes to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991). Beck cannot meet this heavy burden; her claim should be rejected.

Substantive due process bars arbitrary and capricious government action regardless of the fairness of the procedures used. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), aff'd, 184 Wn.2d 321, 358 P.3d 385 (2015). The level of review applied depends on the nature of the interest involved. Id. (citing Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006)). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Under this standard, the challenged statute need only be “rationally related to a legitimate state interest.” Id. In determining whether this relationship exists, the reviewing court may “assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” Id.

As explained above, the legislature created the DNA database to serve as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” RCW 43.43.753. The legislature ultimately decided to fund the DNA database with a \$100 fee applied to every felony sentence. RCW 43.43.7541.

Eighty percent of the fee goes into the “state DNA database account.” Id. Expenditures from that account “may be used only for creation, operation, and maintenance of the DNA database[.]” RCW 43.43.7532.

In 1973, the legislature created a crime victims’ compensation account to aid innocent victims of criminal acts. State v. Humphrey, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999) (citing LAWS OF 1973, 1st Ex. Sess., ch. 122, § 1). To help fund the account, the legislature added a provision in 1977 directing trial courts to impose a penalty assessment upon those found guilty of certain classes of crimes. Id. (citing LAWS OF 1977, 1st Ex. Sess., ch. 302, § 10). The Victim Penalty Assessment is thus designed to fund “comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035. In addition to encouraging participation at trial, these programs work to assist victims of crime in learning about and applying for benefits, assist such victims in navigating the restitution and adjudication process, and assist victims of violent crimes in the preparation and presentation of their claims to the Department of Labor and Industries. RCW 7.68.035(4).

Beck recognizes that requiring those convicted of felonies to pay the DNA fee serves a legitimate state interest in operating the DNA database. BOA at 19. She also acknowledges that the VPA serves a legitimate state interest in providing services to victims. BOA at 19. Relying on Blazina, however, she argues that imposing these mandatory LFOs upon those who cannot pay does not rationally serve those interests.

Blazina involved a claimed violation of RCW 10.01.160(3), which requires the trial court to make an individualized determination of a defendant's ability to pay before imposing *discretionary* LFOs as part of a sentence. 182 Wn.2d at 837-38. Because Blazina had not objected to imposition of the LFOs at sentencing, the court concluded that he was not automatically entitled to review. Id. at 832. In deciding to reach the merits anyway, the court noted the "national conversation" about problems associated with imposing LFOs on indigent defendants. Id. at 835-37. Beck cites this discussion as support for her position that the fee imposed under RCW 43.43.7541 bears no rational relationship to the statute's legitimate purpose, but the passage offers no such support. Rather, Blazina concerned a claimed violation of a statute – not a due process violation – and its holding

was based on statutory construction. Accordingly, Blazina's application to a constitutional challenge to a mandatory fee is doubtful.

Further, even if Beck had no ability to make even minimal payments at the time of sentencing, that circumstance may not continue indefinitely. Beck received a very short sentence of only 45 days in jail and 45 days in CCAP. As explained above, Beck has been employed her entire adult life in various capacities. Although she may have trouble finding another caretaking position as a result of her criminal conduct in this case, there is no reason to expect that she would not be able to return to work in a grocery store or engage in similar employment. Additionally, Beck might also receive funds through an inheritance or gift, in which case the legislature has also provided that a portion of those funds can be applied toward LFOs. RCW 72.11.020, .030.

In the context of RCW 10.73.160, pertaining to appellate costs, our supreme court observed that it is not necessary to inquire into a defendant's finances or ability to pay before entering a recoupment order against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same is true with respect to

the VPA and the DNA fee. Because it is unknown whether the defendant will gain employment or otherwise obtain funds, indigence at sentencing does not weaken the rational basis for these LFOs.

Beck emphasizes that Washington's current LFO collection scheme can impose significant hardships upon the indigent. She argues that the current scheme provides for "immediate enforced collection." BOA at 25. She points to RCW 10.82.090, imposing interest on legal financial obligations accruing from the date of judgment, and various statutes relating to collection through payroll deduction and garnishment.

But the statutes on which Beck relies do not result in enforced collection from indigent defendants. While interest may accrue on the VPA and the DNA fee in some cases, it will not accrue here because the trial court waived interest on LFOs. CP 104. Even when interest is not waived at sentencing, it is not necessarily collected. The interest may be reduced or waived in certain circumstances; it must be waived if it accrued during the time the defendant was in total confinement or if the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2). The payroll deduction and wage garnishment

statutes necessarily apply only if the offender has gainful employment, a condition that makes it likely that she has the ability to pay something toward the LFOs.

Moreover, in Amunrud, our supreme court rejected the claim that rational basis review requires the court to consider whether the challenged laws are unduly oppressive on individuals. 158 Wn.2d at 226. Instead, the only requirement is that the law bear a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database and in providing services to crime victims. Providing a funding mechanism for these programs is reasonably related to that interest.

d. RCW 10.01.160 Does Not Apply To Mandatory LFOs.

In addition to her constitutional challenges to the VPA and the DNA fee, Beck contends for the first time on appeal that her LFOs should be stricken because the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOs without considering her ability to pay. Beck failed to preserve this non-constitutional issue for review by failing to object to the VPA or the DNA fee at sentencing; this Court should therefore decline to review this

argument. RAP 2.5(a)(3); Blazina, 182 Wn.2d at 834 (court of appeals properly exercises its discretion to decline review of unpreserved LFO claims). Her argument fails in any event, because RCW 10.01.160 does not apply to mandatory LFOs.

RCW 10.01.160 gives the trial court discretion to order a defendant to pay “costs,” which it defines as “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision” if the defendant has the ability to pay them. RCW 10.01.160(2), (3). Costs are a subset of the definition of “legal financial obligations,” which distinguishes among different types of costs and obligations. RCW 9.94A.030(3) (listing “court costs” separately from “statutorily imposed crime victims’ compensation fees assessed pursuant to RCW 7.68.035” and “any other financial obligation that is assessed to the offender as a result of a felony conviction”). RCW 10.01.160 lists a series of costs that may be imposed under its authority, such as warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. RCW 10.01.160(2). The definition omits any reference to mandatory fines or fees.

In Curry, our supreme court observed that mandatory LFOs like the VPA are not governed by RCW 10.01.160's ability-to-pay requirement: "In contrast to RCW 10.01.160, no provision is made in the [VPA] statute for indigent defendants." 118 Wn.2d at 917. Although Beck argues that remark was dicta, Divisions Two and Three of this Court have repeatedly held that RCW 10.01.160 does not apply to mandatory LFOs. See, e.g., Clark, 362 P.3d at 312 (RCW 10.01.160's ability-to-pay inquiry required only for discretionary LFOs, not for VPA or DNA fees); Lundy, 176 Wn. App. at 102-03 ("For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account."); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (VPA and DNA fee "are not discretionary costs governed by RCW 10.01.160"). Although none of this Division's published cases have so clearly held that RCW 10.01.160 does not apply to mandatory LFOs, this Court should adhere to that well-established conclusion.

D. CONCLUSION

For the reasons expressed herein, the State respectfully asks this Court to affirm Beck's conviction and sentence.

DATED this 7th day of March, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Dobson (dobsonlaw@comcast.net) and Dana Nelson (nelsond@nwattorney.net), the attorneys for the appellant, Lavonda Beck, containing a copy of the Brief of Respondent in State v. Beck, Cause No. 73532-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

CC Brame
Name
Done in Seattle, Washington

3/7/16
Date