No. 44077-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYSON MAXWELL

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 12-1-00619-2

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the procedural and substantive facts.

C. ARGUMENT.

1. The state provided sufficient evidence to support conviction of unlawful possession of a firearm either as an accomplice or a principal

Maxwell argues that the State provided insufficient evidence to convict him of unlawful possession of a firearm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence

and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) (abrogated on a different matter by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994)).

Here, the State provided sufficient evidence to support the jury's verdict of 'guilty' on the crime of unlawful possession of a firearm as either an accomplice or a principal.

a. The State provided sufficient evidence to support conviction as an accomplice.

A person can be guilty of a substantive crime as an accomplice under RCW 9A.08.020, which reads, in pertinent part, as follows:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> ....
> (c) He is an accomplice of another person in the commission of the crime.
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it.

The statute does not define "aid". It is, however, defined in WPIC 10.51, included in this record in Jury Instruction No. 14, as "all assistance whether given by words... or presence;" although "mere presence and knowledge of the criminal activity" are insufficient for liability to attach, "a person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." CP 14. Banek testified that the gun was his; he also testified that he was convicted for possession of a firearm. RP 350-353. [1]

Maxwell first argues that his complicity with Banek in unlawful possession of a controlled substance with intent to deliver was unrelated to the charge of unlawful possession of a firearm. Appellant's Opening Appeal at 14. In fact, Banek and Maxwell were mutually legally accountable for each other because an accomplice takes on legal accountability for the actions of another. RCW 9A.08.020.

The law attaches legal responsibility to an accomplice for the acts of the principal. State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984); In Davis, the defendant accomplice stood watch while the principal went into a store and demanded money of the clerk at gunpoint. Id. at 655. Davis

[1] Unless otherwise noted, all reference to the record are to the three volume trial transcript dated September 26th and 27th, 2012.

was charged and convicted of first degree robbery. Id. at 657, 659. Davis argued that, for conviction of robbery in the first degree, the State must prove that the accomplice had knowledge of the deadly weapon. Id. at 656-657. The Supreme Court upheld the conviction, concluding that "the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Id. at 658 (referring to State v. Carothers, 84 Wn.2d 256, 525 P.2d 228 (1974) (disapproved of on other grounds by State v. Harris 102 Wn.2d 148, 685 P.2d 584 (1984)).

Maxwell does not contest the sufficiency of the state's evidence supporting accomplice liability on the charge of unlawful possession with intent to deliver. Appellant's Opening Brief at 14. Maxwell's relationship to Banek as an accomplice or a principal on the drug charges places Banek's conduct within the gambit of Maxwell's legal responsibility. Just as the court found in Davis that the defendant was responsible for the principal's possession of a firearm, Maxwell was legally complicit in Banek's illegal possession of a firearm.

Second, Maxwell argues that the gun was Banek's and that he had insufficient knowledge to be convicted as an accomplice for the crime of unlawful possession of a firearm. Appellant's Opening Brief at 8, 15. In

fact, there was sufficient evidence to show that Maxwell was aware of the firearm.

A person acts with knowledge when "he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010. Whether there is sufficient evidence to support the inference of a state of mind is a situational, "case-by-case" consideration. *See generally*: State v. Hanna, 123 Wn.2d 704, 712, 871 P.2d 135 (1994). Furthermore, an accomplice need not have knowledge of every element of the crime; "the State is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime." State v. Roberts, 142 Wn.2d 471, 512-513, 14 P.3d 713 (2000); State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984) (citing Davis, 101 Wn.2d 654 (1984)).

The State provided sufficient evidence for a rational trier of fact to find that Maxwell knew of the firearm. First, the State provided circumstantial evidence tending to show that Maxwell was aware of it. Officer Miller testified about his experience as an undercover officer and his knowledge of drug distributors' practices and essential equipment. RP 48-53, 66, 99 130, 156-157. He testified that drug dealers carry large sums of money, multiple cell phones, and often times stolen property. RP 98-99, 157, 129-130. Finally, he testified that "most drug dealers carry

weapons to protect themselves." RP 66. In fact, Maxwell and Banek were found with a stolen laptop, multiple cell phones and almost $2000 in denominations that Officer Miller testified to as being the most common for drug dealers. RP 129-130, 157, 98-99. The State's evidence of Maxwell's deliberate activity—working with a dealer, handling all the paraphernalia of a dealer and working with the set of a dealers' equipment—was sufficient for a jury to conclude that "a reasonable person in the same situation" such as Maxwell would be aware that Banek possessed a piece of equipment essential to Banek's trade: to wit, a firearm.

Second, the State submitted a jail recording of a phone conversation between Maxwell and Jisu Kim containing two statements consistent with Maxwell's knowledge of the firearm. RP 187-202, 210. During the conversation, Kim made a statement to the effect that the gun was not the defendants'. RP 192. "But, like, it wasn't even yours, the gun. I mean, like they aren't even yours." Id.. Instead of affirming this statement, the quickest and most natural response, Maxwell replied "I don't know." Id.. The conversation continued:

> FEMALE VOICE: ...They're charging you with unlawful possession of synthetic narcotics while armed – wait. Where was the gun at?
>
> MALE VOICE: Under the bed.

FEMALE VOICE: Under your bed?

MALE VOICE: Hell no.

FEMALE VOICE: Well, where was (inaudible) under whose bed?

MALE VOICE: Uh?

FEMALE VOICE: Under whose bed?

MALE VOICE: Where do you think?

FEMALE VOICE: Huh?

MALE VOICE: I don't even want to talk about that.

FEMALE VOICE: Huh?

MALE VOICE: They record all these fuckin' things.

FEMALE VOICE: What?

MALE VOICE: They record these calls.

RP 196.

This conversation, made in a particular context, with a particular tone and manner, suggests a fluid familiarity with the firearm from which the jury could have concluded that Maxwell knew of the firearm that night. Officer Miller's testimony about dealers' practices and the fact that Banek and Maxwell shared those things between them was enough circumstantial evidence for the jury to conclude that Maxwell "ha[d] information which would lead a reasonable person in the same situation to believe" that Banek possessed a firearm. RCW 9A.08.010. The 'dealer'

circumstance in which Maxwell was operating and the consistency of Maxwell's response with knowledge of the gun's presence there that night provide sufficient evidence from which the jury could infer that Maxwell had knowledge of the firearm.

Maxwell contends, finally, that the State provided insufficient evidence that Maxwell aided Banek in the possession of the firearm. The law and the facts suggest otherwise.

Presence and a readiness to assist are sufficient for a jury to find that the accomplice was aiding the principal. State v. Wilson, 95 Wn.2d 828, 833, 631 P.2d 362 (1981). In order to support an allegation of accomplice liability "the State must prove that the defendant was ready to assist in the crime" alleged. State v. Luna, 71 Wn. App. 755, 759 862 P.2d 620 (1993). In State v. Williams, Williams climbed to the roof of a school with three of his friends. 28 Wn. App. 209, 210, 622 P.2d 885 (1981). Once there, one of the friends entered the school and stole a stereo; Williams was convicted of burglary in the second degree. Id. at 210. On appeal, Williams claimed instructional error. Id. at 210. Noting that "the 'ready to assist' language in the instruction which qualified the defendant's knowing presence at the scene of the crime language therein, allowed the defense to argue that once on the roof, the defendant and [the other accomplice] did not anticipate [the principal's] further criminal

activities and that although he was present, he was not ready to assist in the burglary," the court upheld the conviction because "the verdict was by a properly instructed jury based on sufficient evidence to convict." Id. at 212, 213.

The State provided sufficient evidence from which the jury could conclude that Maxwell was "ready to assist" Banek in his commission of the crime of unlawful possession of a firearm. First, Banek and Maxwell had been friends for six to nine months under circumstances that suggest illicit activity. RP at 356, 381-382. In fact, the jury found Maxwell guilty of intent to deliver drugs. RP 486-688. It is reasonable for the jury to infer that two friends engaged in crime will assist each other in the particulars of that crime. If, for example, Banek were to drop his pistol or were to ask Maxwell to look after the gun, it's unthinkable that Maxwell wouldn't pick up the pistol or watch after it for Banek. Second, in addition to being "ready to assist" Banek in specific cases, Maxwell aided Banek's possession by engaging in a form of criminality with Banek that implies carrying firearms. Officer Mills testified that "most drug dealers carry weapons to protect themselves." RP at 66. He went on to explain that "unlike regular citizens... [persons who deal in narcotics] cannot call 911 because someone just came in and stole their money or stole their drugs. They can't – they have no help. They need to protect themselves."

RP 176. Dealers need to protect themselves because people continue to deal drugs with them or buy drugs from them. Maxwell was one such person. Similar to Williams, where the defendant's failure to present convincing evidence of his protest allowed the jury to find him complicit in the burglary as an accomplice because of how far he'd already supported the principal's behavior, so too, by partnering with Banek in an illegal trade that requires arms for protection, Maxwell bolstered and contributed to Banek's substantive crime of possession of a firearm. The jury could infer from this contribution a readiness to assist and find Maxwell guilty of aiding Banek in the crime of unlawful possession. The State provided enough evidence for the jury to conclude that Maxwell was guilty as an accomplice to Banek's crime of illegal possession of a firearm.

b. The State provided sufficient evidence to support conviction as principal.

A person is "guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty... of any serious offense." RCW 9.41.040. Maxwell stipulated at trial that he committed a serious offense prior to the events of this case. RP 296.

Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has physical custody of the object. Id. at 29. A person has constructive possession when he or she has dominion and control over the object. Id. at 29. This dominion and control need not be exclusive. State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Courts determine whether a person has dominion and control over an item by considering the totality of the circumstances. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977) (disapproved of on different ground by State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012)).

Maxwell argues, first, that he had no knowledge of the firearm. RP 12. This argument has been addressed above; the State provided sufficient evidence to support the jury's conclusion that Maxwell knew of the firearm.

Second, Maxwell contends he could not have been found guilty of possession of a firearm as principal because the State failed to show that he had dominion and control over the firearm. Appellant's Opening Brief at 10-11. In fact, the circumstances were highly suggestive that Maxwell did, in fact, have constructive possession of the firearm.

In State v. Porter, the police executed a warrant on a house in which Porter was in. 58 Wash. App. 57, 58-59, 61, 791 P.2d 905 (1990).

When the police entered the room, they found Porter sitting next to an amount of cocaine. Id. at 58-59. Porter pointed a pistol at an officer and then attempted to flee. Id.. He was charged with unlawful possession of controlled substance with intent to deliver. Id. at 59. Porter challenged the sufficiency of the State's evidence to convict him of possession of the substance: "Since other people were discovered inside the residence and mere proximity to the drugs alone is insufficient to show that he had dominion and control over the drugs, Porter argues that the sate failed to prove the possession element of the crime charged." Id. at 60. The court, however, found that "Porter's close proximity to the illegal drugs, together with the other corroborative evidence tending to show guilt," including a large sum of money found on Porter's person, his attempt to obstruct the officer and his attempt to flee the scene, "[were] sufficient to establish the dominion and control over the drugs necessary to constitute constructive possession." Id. at 62.

In this case, the State provided circumstantial evidence similar to the type that was provided in Porter to support Maxwell's possession conviction. As discussed above, Officer Miller testified about dealers' practices and basic equipment. RP 48-53. A gun was part of this equipment, as were large sums of money, stolen property, drug paraphernalia and multiple cell phones. RP 66, 99 130, 156-157.

Maxwell was found with the latter four and the jury convicted him with possession with intent to deliver. RP 128-133, 100. Similar to the defendant's behavior in Porter, Maxwell tried to obstruct the work of a police officer by lying about his name. RP 65-66. Additionally similar to Porter, Maxwell was found with nearly $2000 after apparently trying to remove that sum of money from his person while the police kept an eye on him. RP 93. Officer Miller's testimony regarding drug dealers' practices and equipment, considered with the paraphernalia and equipment that was found around Maxwell and the fact that Maxwell attempted to obstruct justice, are circumstances from which the jury could associate, like it did in Porter, Maxwell with the firearm and attribute possession to him. The physical placement of the firearm under a bed other than Maxwell's is not as significant as appellant emphasizes. Appellant's Opening Brief 10-11. At trial Banek affirmed: "there was a lot of activity going on in [the] hotel room that night[.] People were moving around, changing positions[.]"[2] RP 380-381. In light of Maxwell's complicity with Banek in a drug deal, furtive reaction to police, association with the trappings and equipment of a dealer and conviction of unlawful possession with intent to deliver controlled substance, the jury was permitted to conclude that Maxwell had

[2] Mr. Jackson asked Banek: "there was a lot of activity going on in [the] hotel room that night? People were moving around, changing positions?" Banek replied in the affirmative.

dominion and control over the firearm that lay just a few feet away when the police came in. The State provided sufficient evidence to support a conviction of illegal possession of a firearm as a principal.

2. The court did not violate Maxwell's right to a public trial when it conducted a portion of the jury selection process at the clerk's desk.

Near the end of jury selection, the judge announced that peremptory challenges would take place at the clerk's station, outside the hearing of the jury pool. Voir Dire RP 131-132. Peremptory challenges were exercised off the record and the jury was seated. RP Voir Dire 132. Now, Maxwell claims that this procedure violated his right to a public trial.[3] Appellant's Opening Brief at 25-29.

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is subject to de novo review on direct appeal. State v. Easterling, 157 Wn.2d 167,173-74, 137 P.3d 825 (2006). The right to a public trial is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 10 of the Washington Constitution. Id. at 174. The remedy for a violation of the right to a public trial is reversal and remand for a new trial. State v. Wise, 148 Wn. App. 425, 433, 200 P.3d 266 (2009) *affirmed,* 176 Wn.2d 1, 288 P.3d 1113 (2012). The right to a public trial is not absolute, but the courtroom may

[3] This issue is pending review in the Supreme Court in State v. William Smith, case no. 85809-8, set for oral argument in the fall term, 2013.

be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an undercover police officer was testifying and he feared public testimony would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Bone-Club, 128 Wn.2d. at 258-59.

The right to a public trial is violated when jury selection is conducted in chambers rather than in an open courtroom without consideration of the Bone-Club factors. *See, e.g.,* Strode, 167 Wn.2d at 227 (Alexander, C.J. plurality opinion); 167 Wn.2d at 235-36 (Fairhurst, J., concurring). That analysis is not required, however, unless the public is "fully excluded from the proceedings within a courtroom," State v. Lormor, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) citing to Bone-Club, 128 Wn.2d at 257, or when jurors are questioned in chambers. Lormor, 172

Wn.2d at 92, citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009). The court went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

Maxwell tries to equate the sidebar with a full closure of the courtroom. Appellant's Opening Brief at 21. But, just as in Lormor, where the defendant's family was not excluded, the doors were not closed, the defendant was not prohibited from observing, nor was the communication done in chambers, the preemptory challenge here was done in open court where anyone could come in and observe. Id. at 92-93; Voir Dire RP 131-132. A sidebar is not a "closure" for purposes of the right to a fair trial.

Nor should it be. The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). The court's decision to perform peremptory challenges at the clerk's desk did not impair the public's ability to reinforce fairness, the family's ability to contribute or venirepersons' ability to see interested individuals. Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To decide whether a particular process must be open to the general public, the Sublett court adopted the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). Applying the test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

Here, Maxwell objects to the peremptory challenges done out of earshot and off the record done in open court, but he has not addressed the "experience and logic" test to show that those peremptory challenges must be open to the public. He fails to show that this was a closure that infringed on his right to a fair trial.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. Maxwell does not suggest any reason under the experience and logic test for considering side bars to be a courtroom closure. The court did not violate Maxwell's right to a public trial when it conducted a portion of the jury selection process at the clerk's desk.

3. Maxwell waived his right to appeal the court's imposition of legal financial obligations and, if this court elects to consider them, the court properly considered Maxwell's ability to pay those obligations.

Maxwell contends that the court did not properly consider whether he was in fact able to meet the financial obligations imposed by the court. Appellant's Opening Brief at 29; CP 60. In fact, Maxwell waived his right to appeal these fees before collection of them by not objecting to them at sentencing. In the event that the court were to consider Maxwell's challenge, it would find that the fees were correctly assessed.

a. Maxwell waived his right to challenge the court's imposition of financial obligations on appeal.

An improper award of costs following conviction does not, by itself, rise to the level of constitutional error such that it might be considered if raised for the first time on appeal. State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (holding that a court's award of costs

without considering defendant's ability to pay, while unauthorized, could not be challenged on constitutional grounds until an attempt at enforced collection is made); *see* State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990); RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686 757 P.2d 492 (1988). For this reason, an appellant who does not object to a sentencing court's award of costs at trial is held to have waived his objection until the government attempts to enforce collection of the judgment. Id. at 244; State v. Snapp, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004) (refusing to consider an appellant's challenge to costs imposed at judgment when the issue was not raised at sentencing).

Maxwell brings this issue and challenges the imposed costs for the first time on appeal. Maxwell did not object to the court's imposition of costs during sentencing. This was in spite of the fact that the judge solicited Maxwell's counsel's input on the State's recommended fees on two separate occasions. Sentencing Hearing RP 15, 20. On both occasions counsel failed to object or otherwise contest these fees. Id. For this reason, Maxwell waived his right to appeal the fees that the court assessed to him and the court is not required to consider his challenge.

b. If the court chooses to consider Maxwell's challenge, it will find that the trial court properly considered his

> ability to meet the financial obligations that the court had the discretion to impose.

Costs are authorized by statute. "[S]tatutes authorizing costs are in derogation of common law and should be strictly construed." State v. Moon, 124 Wn. App. 190, 195, 100 P.3d 357 (2004). The following financial obligations were imposed on Maxwell: (i) a $500 crime victim assessment, (ii) $465.10 court costs including (iii) a $200 criminal filing fee, (iv) a $100 DNA collection fee, (v) a $2000 Thurston County drug enforcement fund fee and (vi) a $100 crime lab fee. CP 72.

i. Crime victim assessment.

A crime victim assessment is required by RCW 7.68.035.

> When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). Subsequent sections of this statute direct the collection and disbursement of this money to assist victims of crime.

The victim assessment of $500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810

P.2d 55 (1991) (victim assessment is not a "cost"); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992). As such, it follows that the defendant's financial circumstances are irrelevant.

ii. Court costs.

Court costs are allowed by RCW 10.01.160 and 9.94A.760(1). "The court *may* require a defendant to pay costs." RCW 10.01.160(1), emphasis added. Costs are limited to the expenses the State specifically incurred in prosecuting the defendant's case. RCW 10.01.160(2). Because the term "costs" refers to expenses incurred by the State, restitution and victim assessments would not be included as "costs." RCW 10.46.190 provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee "as provided for in civil actions." RCW 36.18.016(3)(b) allows a jury demand fee of $250 for a jury of twelve in criminal cases, the same amount as allowed in RCW 36.18.016(3)(a) for civil cases. The court is directed to take into account the financial resources of the defendant and not order costs if the defendant cannot pay them. RCW 10.01.160(3); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). Bertrand did not address which, if any, of the legal financial obligations the court may impose are mandatory.

As noted above, the judge considered Maxwell's counsel's input on sentencing, including imposed financial obligations, on two separate occasions. Sentencing Hearing RP 15, 20. Maxwell's counsel opted not to address these obligtaions on both occasions. Sentencing Hearing RP 15, 20-21. In addition to acting as a waiver, counsel's silence provided a rebuttable presumption to the judge that Maxwell was able to meet his financial obligations because Maxwell's counsel, presumably, is the officer of the court most aware of Maxwell's financial situation. The court took into account Maxwell's ability to pay the court costs.

iii. Criminal filing fee.

Although the criminal filing fee is listed with court costs on the judgment and sentence, the $200 filing fee is mandatory and cannot be waived.

RCW 36.18.020(2)(a) directs the clerk of the superior court to collect a $200 filing fee for the initiation of most litigation. RCW 36.18.020(2)(h) provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, a defendant is a criminal case shall be liable for a fee of two hundred dollars.

Because the court has no discretion regarding court costs, no consideration of Maxwell's ability to pay these costs was necessary.

iv. DNA collection fee.

A fee for DNA collection is required by RCW 43.43.7541: "Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars." (Emphasis added.) All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a "court-ordered legal financial obligation as defined in RCW 9.94A.030." RCW 43.43.754. RCW 9.94A.030(29) provides, in part, that a "legal financial obligation" is an amount of money ordered by the court and may include, restitution, crime victims' compensation fees, court costs, drug funds, attorney fees, costs of defense, fines, and "any other financial obligation that is assessed to the offender as a result of a felony conviction."

The imposition of a $100 DNA collection fee is mandatory, and has been since June 12, 2008. RCW 43.43.7541, State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009). Therefore, [defendant's] ability to pay was irrelevant to the imposition of that amount.

v. Thurston County drug enforcement fund.

The Thurston County Drug enforcement fund assessment is authorized by RCW 9.94A.030(29), which includes fees paid to a county

or interlocal drug fund as a legal financial obligation. The court may impose legal financial obligations under 9.94A.760(1).

A defendant may challenge, for the first time on appeal, this assessment as an erroneous sentence. State v. Hunter, 102 Wn. App. 630, 634, 9 P.3d 872 (2000). If the defendant does challenge it, the drug fund assessment is to be based upon the costs of the investigation in the defendant's case and the State must substantiate the amount. Id.

Maxwell did not challenge the State's assessment of the drug fund fee itself, or of its application to him; rather, Maxwell challenges whether the court considered his financial ability able to pay those fees. Appellant's Opening Brief at 31. As discussed above, the court adequately considered whether or not Maxwell could meet the court's imposed burden.

vi. Crime lab fee.

The crime lab fee is required by RCW 43.43.690(1):

> (1) When a person has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

The language here is mandatory. If the defendant is acquitted of the charge associated with the crime lab fee, it cannot be imposed. Moon, 124 Wn. App. 193-94.

By not objecting to the court's imposition of financial obligations at sentencing, Maxwell waived his right to challenge the obligations on appeal. In the alternative, if the court opts to consider Maxwell's challenge, the court will find that the $200 criminal filing fee, $100 crime lab fee, $100 DNA collection fee and $500 victim penalty assessment were mandatory and that the court adequately considered whether Maxwell could pay the $2000 drug enforcement fund fees and $250 jury demand fees by submitting them to Maxwell's counsel for comment. Counsel's option not to contest the imposition served as indication that Maxwell could, in fact, meet those financial obligations. The judge adequately considered Maxwell's financial ability when it found Maxwell had the ability to pay the imposed legal financial obligations.

D. CONCLUSION.

The State provided sufficient evidence for the jury to find that Maxwell illegally possessed a firearm either as an accomplice or a principal. The court's conduct of preemptory challenges as a sidebar at the clerk's desk and off the record did not violate Maxwell's right to a public trial because the sidebar was not a closure of the court.

Finally, Maxwell waived his right to appeal the court's assessment of court fees because he did not object to the assessment at trial. If the court opts to consider his challenge it will find that the court did, in fact, consider Maxwell's ability to meet his obligations.

The State respectfully requests this court to affirm Maxwell's convictions and fees on all counts.

Respectfully submitted this 3rd day of July, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

Electronically filed at Division II

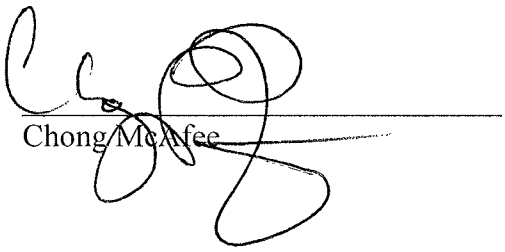
TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND--

CASEY GRANNIS, ATTORNEY FOR APPELLANT
GRANNISC@NWATTORNEY.NET

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

Dated this 3d day of July, 2013, at Olympia, Washington.



Chong McAfee

THURSTON COUNTY PROSECUTOR

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