SUPREME COURT NO. 90360-3
COA NO. 44077-6-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYSON MAXWELL,

Petitioner.

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

The Honorable Carol Murphy, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Tyson Maxwell asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Maxwell requests review of the decision in State v. Tyson Maxwell, Court of Appeals No. 44077-6-II (slip op. filed May 6, 2014), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court violated Maxwell's constitutional right to a public trial where the peremptory challenge stage of jury selection was conducted in private?

2. Whether imposition of a legal financial obligation for which there is no statutory authority may be challenged for the first time on appeal?

3. Whether imposition of legal financial obligations in the absence of consideration of an ability to pay them is a statutory sentencing error that may be raised for the first time on appeal?

D. STATEMENT OF THE CASE

The State charged Tyson Maxwell with (1) first degree unlawful possession of a firearm (count I); (2) possession of a controlled substance (methamphetamine) with intent to deliver (count II); (3) possession of a

controlled substance (oxycodone) with intent to deliver (count III); (4) possession of a controlled substance (marijuana) with intent to deliver (count IV); (5) making a false or misleading statement to a law enforcement officer (count V); (6) unlawful use of drug paraphernalia (count VI); and (7) possession of a controlled substance (MDMA) with intent to deliver (count VII). CP 10-11; 1RP[1] 485-86.

The case proceeded to trial. After prospective jurors were questioned as part of the voir dire process, the court announced how the remaining portion of jury selection would take place:

> The next step in this process, ladies and gentlemen, is the part where we actually choose the jurors in this case. During that process, the lawyers will be having a discussion with the clerk to my left, and some of those discussions are going to involve maybe looking out at your numbers and indicating their preferences and some discussions that *the whole idea is that you don't hear what's going on.* So I'm going to ask you please to not try to hear what's going on up here at the clerk's station. And to aid in that process, you may have discussions amongst yourselves about anything unrelated to this case . . . I would ask that you generally remaining your places, although you may stand if that's more comfortable for you. After we've had these discussions up here, I will get your attention, and then we will seat our jury.

1RP 131-32 (emphasis added).

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[1] The verbatim report of proceedings is referenced as follows: 1RP - three consecutively paginated volumes consisting of 9/26/12, 9/27/12 and 9/28/12; 2RP - 10/2/12.

Peremptory challenges were then exercised off the record. 1RP 132. After the challenges took place, the court went back on the record and announced those who would serve as jurors for the trial. 1RP 132-34. A jury was subsequently sworn in. 1RP 135.

The jury ultimately convicted on all counts. CP 50-56. The court sentenced Maxwell to 100 months total confinement and imposed legal financial obligations. CP 60-61.

Maxwell raised several arguments on appeal, including violation of his right to a public trial and right to be present during jury selection, insufficient evidence to support the firearm possession conviction, and improper imposition of legal financial obligations as part of the judgment and sentence. Brief of Appellant at 1; Supplemental Brief of Appellant at 1. The Court of Appeals reversed the firearm conviction but otherwise affirmed. Slip op. at 1. Maxwell seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER THE COURT VIOLATED MAXWELL'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The federal and state constitutions guarantee the right to a public trial to every criminal defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to

open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

The Court of Appeals held the right to a public trial does not attach to the peremptory challenge stage of the jury selection process. Slip op. at 7-8. That is a significant question of constitutional law calling for review under RAP 13.4(b)(3).

The question of which aspects of the trial process the public trial right attaches has roiled appellate courts during the past few years. The jury selection process has received special scrutiny in this regard.

It is established that the right to a public trial encompasses jury selection when it comes to questioning prospective jurors to determine fitness to serve on a particular case. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012).

But whether other aspects of the jury selection process are subject to the public trial mandate has resulted in considerable litigation that has yet to be resolved. See State v. Njonge, 161 Wn. App. 568, 570-72, 255 P.3d 753 (2011) (public trial right violated where hardship phase of voir dire closed to public), review granted, 176 Wn.2d 1031, 299 P.3d 19 (2013); State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013) (public trial right not implicated when bailiff excused two jurors

solely for illness-related reasons before voir dire began), review pending (No. 88818-3); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (public trial right violated where trial court clerk drew four names to determine which jurors would serve as alternates during a court recess off the record), review pending (No. 89321-7); State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) (public trial right violated where discussion on whether some prospective jurors should be dismissed took place in chambers), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013).

Division Three recently held the public trial right does not attach to the peremptory challenge stage of jury selection. State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), review pending (No. 89619-4). A panel in Division Two adhered to Love without independent analysis. State v. Dunn, __Wn. App.__, 321 P.3d 1283, 1285 (2014), review pending (No. 90238-1).

But in other cases, Division Two treated the peremptory challenge stage as part of the voir dire process that should be conducted in open court. See Wilson, 174 Wn. App. at 342-43 (in holding public trial right not implicated when bailiff excused jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges); Jones, 175 Wn. App. at 97-101 (in holding private drawing of alternates violated right to public trial,

comparing it to voir dire process involving for cause and peremptory challenges); see also People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends."), review denied, (Feb 02, 1993).

Application of the "experience and logic" test set forth in State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012) shows the peremptory challenge process implicates the core values of the public trial right and therefore must be subject to contemporaneous public scrutiny. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342-44.

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34,

74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, a prosecutor is forbidden from using peremptory challenges to remove a juror based on race, ethnicity, or gender. McCollum, 505 U.S. at 48-50; Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992). Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's supervision contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Wise, 176 Wn.2d at 5-6. An open peremptory process of jury selection acts as a safeguard against discriminatory

removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge. This Court should grant review to determine whether this integral aspect of the jury selection process is subject to the public trial right.

2. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT ON THE ISSUE OF WHETHER THE IMPOSITION OF A LEGAL FINANCIAL OBLIGATION WITHOUT STATUTORY AUTHORITY CAN BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

The court imposed a $100 "Thurston County Drug Court Fee" as part of the judgment and sentence. CP 60. There is no statutory authority to impose that fee because Maxwell did not participate in drug court.

RCW 10.01.160(2) provides "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." A court may impose only a sentence that is authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). It has long been held "costs are the creature of statute" and that "there is no inherent power in the courts to award costs, and that they can be granted in any case or proceeding solely by virtue of express

statutory authority." Pierce County v. Magnuson, 70 Wn. 639, 641, 127 P. 302 (1912).

Maxwell did not participate in drug court. The cost of drug court is therefore not a cost "limited to expenses specially incurred by the state in prosecuting" Maxwell. RCW 10.01.160(2). There is no statutory basis to impose a drug court cost on a defendant who did not participate in drug court.

"A trial court's sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is *void*." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800, review denied, 99 Wn.2d 1015 (1983)). Sentencing provisions outside the authority of the trial court are illegal. State v. Pringle, 83 Wn.2d 188, 193-94, 517 P.2d 192 (1973).

The Court of Appeals did not dispute that the trial court lacked statutory authority to impose the drug court fee. Rather, it held Maxwell waived his challenge to that fee by failing to object below. Slip op. at 8-9. Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals decision conflicts with precedent from the Supreme Court and Court of Appeals allowing challenges to erroneous sentences imposed without statutory authority to be raised for the first time on appeal.

"[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999), accord State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)). Erroneous imposition of legal financial obligations without statutory authority falls within this established rule. Moen, 129 Wn.2d at 543-48 (challenge to untimely restitution order may be raised for first time on direct appeal);[2] see also State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000) (challenge to the sentencing court's authority to impose drug fund contribution, which constitutes a legal financial obligation, reviewable for first time on appeal), review denied, 142 Wn.2d 1026, 21 P.3d 1150 (2001); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal"). The Court of Appeals decision conflicts with this precedent.

[2]Restitution is a legal financial obligation. RCW 9.94A.030(30).

3. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT ON WHETHER THE TRIAL COURT'S FAILURE TO CONSIDER ABILITY TO PAY IN IMPOSING LEGAL FINANCIAL OBLIGATIONS CAN BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

The trial court ordered Maxwell to pay a number of discretionary costs as part of the judgment and sentence totaling over $3000. CP 60. The court may order a defendant to pay costs pursuant to RCW 10.01.160. However, the statute also provides "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The record does not reflect any such consideration here. 2RP 19-20. The pre-printed, generic language in the judgment and sentence ability regarding ability to pay lacks support in the record. CP 59. The court in Maxwell's case failed to follow statutory mandate in imposing the legal financial obligations.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. State v. Bertrand, 165 Wn. App. 393, 404, 267

P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). Boilerplate findings not supported by the record are inadequate. Bertrand, 165 Wn. App. at 404-05.

The Court of Appeals did not dispute that the trial court failed to consider Maxwell's ability to pay, in derogation of RCW 10.01.160(3). Instead, the Court of Appeals held the issue could not be raised on appeal in the absence of an objection below. Slip op. at 8-9 (citing State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013)).

Precedent establishes the broad proposition that erroneous sentences may be challenged for the first time on appeal. Ford, 137 Wn.2d at 477, 973 P.2d 452 (1999); Fleming, 129 Wn.2d at 532; Moen, 129 Wn.2d at 543. Justification for the rule is that it tends to bring "sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Ford, 137 Wn.2d at 478.

The issue of whether the imposition of legal financial obligations without considering ability to pay may be challenged for the first time on appeal is already before this Court in State v. Blazina (No. 89028-5) and State v. Paige-Coulter (89109-5). Maxwell raises the same issue. Review

is appropriate because this case presents a significant question of substantial public interest under RAP 13.4(b)(4) and the Court of Appeals decision conflicts with precedent from the Supreme Court and Court of Appeals under RAP 13.4(b)(1) and (2).

F. CONCLUSION

For the reasons stated above, Maxwell requests that this Court grant review.

DATED this 5th day of June 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYSON TAKUMI MAXWELL, Appellant.	No. 44077-6-II UNPUBLISHED OPINION

MELNICK, J. — Tyson Maxwell appeals his convictions for first degree unlawful possession of a firearm, unlawful possession of a controlled substance (methamphetamine, oxycodone, marijuana, and MDMA[1]) with intent to distribute, making false or misleading statements to a law enforcement officer, and unlawful use of drug paraphernalia. He also appeals the legal financial obligation (LFO) portion of his sentences. Specifically, he argues (1) insufficient evidence supports his unlawful possession of a firearm conviction, (2) the trial court violated his right to a public trial and his right to be present, and (3) the trial court erred by imposing LFOs. He also argues in his statement of additional grounds (SAG) that he received ineffective assistance of counsel and that there is insufficient evidence to uphold his unlawful possession of a controlled substance with intent to distribute convictions. Because there is insufficient evidence to support Maxwell's unlawful possession of a firearm charge as either a principal or an accomplice, we reverse that conviction and remand for the trial court to dismiss the charge with prejudice and resentence Maxwell. We affirm Maxwell's remaining convictions and sentences, including imposition of LFOs.

FACTS

[1] MDMA is 3-, 4-methylenedioxymethamphetamine, or more commonly known as Ecstasy.

I. BACKGROUND

On the morning of May 9, 2012, Officers Dave Miller and Alfred Stanford responded to a call regarding unwanted people in a hotel room at the Comfort Inn in Lacey, Washington. When nobody responded to their pounding on the door, the officers used the manager's key and found two men sleeping in their respective beds. After waking the men, the officers identified themselves as police and asked if the men were okay.

Miller observed "two smoking devices, a bag of marijuana, and then [sic] tinfoil with a long black burnt line on it." 1 Report of Proceedings (RP) at 62. He placed the men in handcuffs, sat them on the beds in which they were found sleeping, and read them their *Miranda*[2] rights. The men had no identification, and when questioned, both men provided false names. Maxwell subsequently confirmed his true and correct name. The police identified the other man as Anthony Banek. Maxwell told Miller that he came to the hotel room with a girl he met the previous night and that nothing in the room belonged to him. The room had actually been rented by Jisu Barbie Kim and Kim's boyfriend, who the hotel manager testified was not Maxwell but another gentleman with Kim.

When Miller exited the room to apply for a telephonic search warrant, another officer noticed Maxwell moving and fidgeting toward the head of the bed. The officer investigated and found a roll of rubber-banded money on the bed and some loose $20 bills sticking out of Maxwell's pocket. The money in the rubber band totaled $1,921 and the loose bills in Maxwell's pocket totaled $80.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After obtaining the search warrant, the officers searched the room with Maxwell present. They found numerous pieces of evidence, including: a hollow pen[3] and a piece of tinfoil[4] near the money; a small baggie of marijuana, a marijuana pipe, and a methamphetamine pipe at the end of Maxwell's bed; a long piece of tinfoil with a burnt line down the middle, another hollow pen, and two tablets inside a small container on a table; and another piece of tinfoil and pay/owe sheets on or in the nightstand. The officers also seized a small baggie of methamphetamine, a methamphetamine pipe, and a roll of tinfoil. In Banek's pillowcase was a bottle containing 14 pills. Under Banek's mattress the officers found a loaded .357 magnum revolver and in a backpack on the floor of the closet were three bullets. The officers also seized four knives, including one found on Maxwell's person, and four cell phones.

II. PROCEDURAL HISTORY

Maxwell proceeded to a jury trial. The court conducted voir dire in open court with Maxwell present. After questioning the prospective jurors, the attorneys exercised their challenges for cause. The trial court then stated:

> The next step in this process, ladies and gentlemen, is the part where we actually choose the jurors in this case. During that process, the lawyers will be having a discussion with the clerk to my left, and some of those discussions are going to involve maybe looking out at your numbers and indicating their preferences and some discussions that the whole idea is that you don't hear what's going on.

RP (Jury Voir Dire) at 131.

At trial, Miller testified as an expert witness. He told the jury that, based on his training and experience, the $2,001 in cash Maxwell possessed was a large sum of money for a street level dealer and that Maxwell likely had the cash because he was getting ready to buy more

[3] Miller testified that hollow pens are often used as a pipe or straw to consume narcotics.

[4] Miller testified that tinfoil is used to smoke prescription drugs.

product. He also apprised the jury that people often work together or in groups to sell drugs and that it is common for drug dealers to carry weapons and have multiple cell phones. Miller further stated that the pay/owe sheets found in the nightstand contained various written words and numbers that are associated with drug dealing and that the writing included Banek's and Maxwell's nicknames.

A forensic scientist testified that the small baggie contained methamphetamine, the two tablets were MDMA, and the fourteen pills tested positive for oxycodone. An evidence technician confirmed the green leafy substance was marijuana.

Banek, who had accepted a plea bargain for his involvement, testified that the controlled substances were his. Banek further testified that the firearm and bullets were his, that he hid the firearm from everyone, and that Maxwell did not know about the firearm.

The jury found Maxwell guilty on all counts. The trial court sentenced Maxwell to 100 months in prison and imposed LFOs. Maxwell did not object to the trial court's imposition of the LFOs. Maxwell timely appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE—UNLAWFUL POSSESSION OF A FIREARM

Maxwell argues insufficient evidence exists to support the jury's verdict on his unlawful possession of a firearm charge. When viewing the evidence in the light most favorable to the State, there is insufficient evidence to prove that Maxwell had dominion and control over the firearm, or that he knew of the firearm's presence. We reverse Maxwell's conviction for unlawful possession of a firearm and remand to the trial court to dismiss with prejudice.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt 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." *Salinas*, 119 W.2d at 201. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person commits first degree unlawful possession of a firearm when "the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter."[5] RCW 9.41.040(1)(a). To establish that Maxwell unlawfully possessed a firearm, the State had to prove that he knowingly possessed it. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000).

Knowing possession may be actual or constructive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Constructive possession is "'established by showing the defendant had dominion and control over the firearm.'" *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999) (quoting *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). "Dominion and control" means that the item "may be reduced to actual possession immediately." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). In establishing dominion and control,

[5] At trial, Maxwell stipulated that he had committed a serious offense prior to the events in this case and, thus, that element is not at issue on appeal.

the totality of the circumstances must be considered and no single factor is dispositive. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). The defendant's control over the firearm does not have to be exclusive. *Raleigh*, 157 Wn. App. at 737. But mere proximity to the firearm is insufficient to show control. *Raleigh*, 157 Wn. App. at 737.

In the present case, there is no contention that Maxwell had actual possession of the firearm. There is also insufficient evidence to prove Maxwell had dominion and control of the firearm, or that he even knew of its presence. In *State v. Chouinard*, 169 Wn. App. 895, 902-03, 282 P.3d 117 (2012), *review denied*, 176 Wn.2d 1003 (2013), we found the State presented insufficient evidence of constructive possession where the State demonstrated only the defendant's proximity to the firearm in the vehicle in which he was a passenger and that the defendant had knowledge of the weapon's presence in the vehicle. We held that evidence of mere proximity and knowledge, alone, is insufficient to show the defendant had dominion and control of the firearm, and, thus, could not sustain a conviction for constructive possession of a firearm. *Chouinard*, 169 Wn. App. at 902-03. Just as the defendant in *Chouinard* was in close proximity to the firearm in the vehicle, Maxwell was in close proximity to where the firearm was hidden in the hotel room—between Banek's mattress and box spring.

The State argues that Maxwell had knowledge of the firearm because after his arrest he had a phone conversation where he did not deny knowing about it. However, these statements must be considered in light of the fact Maxwell was present when the officers located and seized the firearm. There is no evidence Maxwell knew about the firearm before the officers found it hidden between Banek's mattress and box spring. Because the State proved only Maxwell's mere proximity to the firearm, there is insufficient evidence to prove that Maxwell had constructive possession of the firearm. *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929

(2010) ("[A] defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if [the defendant] has not exercised dominion or control over the weapon or premises where the weapon is found.").

Further, because there is a lack of proof that Maxwell knew of the firearm's presence, he cannot be found guilty as an accomplice. RCW 9A.08.020(3)(a). An accomplice does not have to have knowledge of every element of the crime, but must have general knowledge of the specific substantive crime committed. *State v. Roberts*, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000); *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999). "[F]or one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (emphasis in original).

Accordingly, there is insufficient evidence to prove Maxwell possessed the firearm or knew of its presence underneath Banek's mattress. We reverse Maxwell's conviction of first degree unlawful possession of a firearm and remand this case to the trial court with instructions to dismiss the unlawful possession of a firearm conviction with prejudice and resentence Maxwell.

II. RIGHT TO A PUBLIC TRIAL

Maxwell argues the trial court violated his right to a public trial by allowing the attorneys to exercise peremptory challenges during a sidebar. In *State v. Dunn*, No. 43855-1-II, 2014 WL 1379172 (Wash. Ct. App. Apr. 8, 2014), we recently decided the issue Maxwell raises here. In *Dunn*, we held that the trial court did not violate a defendant's right to a public trial when the attorneys exercised peremptory challenges during a sidebar. 2014 WL 1379172, at *3. In deciding this issue, we adopted the reasoning of Division Three in *State v. Love*, 176 Wn. App.

911, 309 P.3d 1209 (2013) (peremptory challenges done at sidebar). *Dunn* controls here. Therefore, the trial court did not violate Maxwell's public trial right and his challenge fails.

III. RIGHT TO BE PRESENT

Maxwell also argues the trial court violated his right to be present by allowing the attorneys to exercise peremptory challenges during a sidebar. Here, the record is unclear whether Maxwell was present when the attorneys exercised their peremptory challenges. The record shows that Maxwell was present during jury voir dire, and Maxwell argues there is no indication in the record that he joined counsel at the clerk's station when they exercised their peremptory challenges. At best, this allegation is supported by the trial court's statement, "The next step in this process, ladies and gentlemen, is the part where we actually choose the jurors in this case. During that process, the lawyers will be having a discussion with the clerk to my left." RP (Jury Voir Dire) at 131.

Although the trial court did not specifically call Maxwell to the clerk's station with his attorney, there is no indication whether Maxwell did or did not accompany counsel when counsel exercised the peremptory challenges. Because the record is unclear whether Maxwell was present at the clerk's station during the exercise of peremptory challenges, the claim relies, at least in part, on facts outside the record on appeal. We do not address issues on direct appeal that rely on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

IV. LEGAL FINANCIAL OBLIGATIONS (LFOS)

Maxwell argues the trial court lacked authority to impose a drug court fee and erred when it determined he had the present or future ability to pay. But Maxwell did not object to the trial court's imposition of the fines or fees. Therefore, he has waived his ability to challenge the trial

court's imposition of LFOs on appeal. RAP 2.5(a); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013).

V. SAG ISSUES

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Maxwell asserts his trial counsel provided ineffective assistance. Because counsel's performance was not deficient, we hold Maxwell received effective assistance of counsel.

To prove ineffective assistance of counsel, Maxwell must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Performance is not deficient if counsel's conduct can be characterized as a legitimate trial strategy. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). To establish prejudice, the defendant must show a reasonable probability that the deficient performance affected the outcome of the trial. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Maxwell first contends that counsel provided ineffective assistance for not requesting a fingerprint analysis of the firearm found in the hotel room and for not requesting that a handwriting analysis be performed on the pay/owe sheets found in the hotel room. Counsel's decisions were legitimate trial strategies. By not requesting fingerprint or handwriting analyses, trial counsel avoided any possible negative findings from the analyses and was also able to argue at trial that the investigating officers had not done fingerprint or handwriting analyses nor did they have such proof that the items in the room were Maxwell's or that the pay/owe sheets were

authored by him. Trial counsel asked Miller, "[Y]ou didn't have any fingerprints taken off of any of the items, tinfoil or otherwise?" to which Miller responded that he did not "believe so." 2 RP at 233. Thus, counsel's performance in not requesting fingerprint and handwriting analyses was a legitimate trial strategy.

Maxwell next asserts counsel provided ineffective assistance for objecting to a photograph of him only for its depiction of his tattoo and not because it showed him in handcuffs. The challenged photograph is not in the record, and other than Maxwell's argument that the photograph shows him in handcuffs, there is no other evidence or support in the record that the challenged photograph shows him in handcuffs. Thus, we cannot properly review Maxwell's argument.

Lastly, Maxwell contends counsel provided ineffective assistance for failing to object to the jail phone conversations and allowing the State to play portions of the recording, which, in turn, Maxwell argues allowed the jury to take his statements out of context. The State, however, played the entirety of the call and not portions as Maxwell alleges. Thus, this argument fails. We hold Maxwell's trial counsel provided effective assistance of counsel.

B. SUFFICIENCY OF THE EVIDENCE—POSSESSION WITH INTENT TO DELIVER

Maxwell asserts there is insufficient evidence to uphold his unlawful possession of a controlled substance with intent to deliver convictions.[6] We hold there was sufficient evidence to allow a rational trier of fact to find, beyond a reasonable doubt, that Maxwell is guilty of unlawful possession of a controlled substance (methamphetamine, oxycodone, MDMA, and marijuana) with intent to deliver. *See Salinas*, 119 Wn.2d at 201. The officers found a small

[6] Maxwell does not specifically identify which unlawful possession with intent to deliver convictions he is challenging and, instead, argues generally that there is insufficient evidence to support the convictions.

baggie of marijuana, two MDMA tablets, 0.1 grams of methamphetamine, fourteen oxycodone pills, a marijuana pipe, a methamphetamine pipe, hollowed pens that are commonly used for consumption of drugs, a piece of burnt foil with a black line down the middle, approximately $2,000 in cash, four cell phones, a roll of tinfoil, and pay/owe sheets in the hotel room in which Maxwell was found sleeping. Additionally, Maxwell provided a false name to officers when asked for his identification in the hotel room. Accordingly, there is sufficient evidence to support Maxwell's unlawful possession of a controlled substance with intent to deliver convictions.

We reverse Maxwell's unlawful possession of a firearm conviction and remand for the trial court to dismiss the conviction with prejudice and resentence Maxwell. We affirm Maxwell's remaining convictions and sentences, including imposition of LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.

We concur:

Hunt, J.

Worswick, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. TYSON MAXWELL, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 440747-6-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYSON MAXWELL
DOC NO. 821115
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JUNE 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 05, 2014 - 1:45 PM

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