NO. 44445-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY THOMAS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Jeffrey Thomas's constitutional right to a public trial when it conducted peremptory strikes on paper.

2. The trial court abused its discretion in admitting highly prejudicial and irrelevant testimony that Mr. Thomas told an arresting police officer he was Jesus Christ, in violation of ER 403.

3. The State failed to prove Mr. Thomas's offender score.

4. The trial court sentenced Mr. Thomas with a higher offender score than the State proved.

5. The sentencing court erred in imposing discretionary costs and fees.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and Washington constitutions guarantee a criminal defendant's right to an open and public trial. Accordingly, criminal proceedings may be closed to the public only when the trial court performs a weighing test as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. These rights and requirements extend to the jury selection process. Violation of the right to a public trial is presumptively prejudicial. Where the trial court ordered that peremptory challenges would be

made in written form by the attorneys without considering the *Bone-Club* factors, was Mr. Thomas and the public's right to an open trial violated, requiring reversal?

2. Only relevant evidence is admissible at trial. Evidence should be excluded if its potential for unfair prejudice outweighs its probative value. Did the trial court abuse its discretion in admitting testimony that Mr. Thomas said he was Jesus Christ, where the comment was irrelevant to the charged crimes and highly prejudicial?

3. The State bears the burden of proving prior convictions comprising a defendant's offender score for purposes of sentencing. A prosecutor's summary is not sufficient evidence. Did the trial court impose an improper sentence and the State fail to prove the offender score where the State submitted only a prosecutor's summary for two of the convictions included in Mr. Thomas's offender score?

4. Courts may not impose discretionary costs, including the criminal filing fee and the cost of court-appointed counsel, on a defendant unless the court finds he has a present or future ability to pay. A finding of ability to pay must be supported by the evidence. Though the evidence showed Mr. Thomas was indigent, the judgment includes a generic finding that he had the present or future ability to

pay and imposed discretionary costs and fees totaling $700. Did the sentencing court err in ordering Mr. Thomas to pay discretionary fees and costs?

C. STATEMENT OF THE CASE

At trial, evidence was presented that Jeffrey Thomas walked into the Gilchrist Buick GMC car dealership in Tacoma, asked to see a Mercedes CLS 550 and then drove off the dealership lot in the vehicle after the salesman had started the engine and popped the hood. RP 186-92, 207.[1] The next morning, Mr. Thomas pulled into the full service section of a Tacoma gas station but did not have any money to pay for the fuel that an attendant pumped into the vehicle. RP 236-40. After a discussion with the attendant in which Mr. Thomas offered goods in exchange for the fuel, he drove the vehicle out of the gas station without paying. RP 231, 240-42, 248-49, 258-59.

The police located Mr. Thomas a short time later in the Mercedes. RP 198-99, 202, 216, 257-58, 266-82, 290. He was charged with theft of a motor vehicle and theft in the third degree for the $60 in gasoline. CP 25-26. A jury convicted Mr. Thomas of both counts, but

[1] The transcript is contained in consecutively-paginated volumes referred to simply as "RP," except for the transcript from voir dire, which is referred to as "Voir Dire RP."

the State ultimately dismissed the third-degree theft charge. CP 60-61, 72-83, 95.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. Mr. Thomas's right to a public trial was violated by the non-public process employed for peremptory challenges.

This Court reviews violations of the public trial right de novo. *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). "A defendant does not waive his public trial right by failing to object to a closure during trial." *Id.*

a. Jury selection in a criminal trial must be presumptively open to comply with the constitutional right to a public trial.

The Washington Constitution mandates that criminal proceedings be open to the public without exception. Article I, section 10 requires that "Justice in all cases shall be administered openly." Article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also

guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). Open public access provides a check on the judicial process that is necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily*

Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5. In particular, "a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, Washington courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that

interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

b. The public was improperly excluded from the peremptory challenge process because it was held on paper without considering the *Bone-Club* factors.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804.[2] "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505.

Peremptory and for-cause challenges are an integral part of voir dire. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *Wilson*, 174 Wn. App. at 342 (noting peremptory

[2] Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *State v. Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied).

and for cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). Indeed, "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury." *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

There are important limits on both parties' exercise of peremptory challenges that must be enforced in open court, subject to public scrutiny. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenge, and critical role of public scrutiny). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court); *cf. State v. Saintcalle*, No. 86257–

5, __ Wn.2d __, 2013 WL 3946038, *4 (Aug. 1, 2013) (discussing important public interest in proper exercise of juror challenges: "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."); *id.*, at *7 ("peremptory challenges have become a cloak for race discrimination").

In *Wilson*, this Court recently distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and peremptory challenges, which are part and parcel of voir dire. 174 Wn. App. at 343-34. This Court observed that unlike hardship strikes made by clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court and parties' rights to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

This approach is consistent with other jurisdictions. California has long held that peremptory challenges must be exercised in open court. *People v. Harris*, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In *Harris*, the right to a public trial was violated where peremptory challenges were exercised in chambers based on the trial court's unilateral determination. *Id.* at 677. The violation required reversal even though the court tracked the challenges on paper, announced in open court the names of the stricken prospective jurors, and the proceedings were reported. *Id.* at 684-85, 688-89.

The trial court's use of a secret ballot was no more open than the proceedings in *Harris*. Here, for-cause challenges were conducted in open court but the trial court unilaterally directed that peremptory strikes would be exercised silently on paper. *Compare* RP 8-9 *with* Voir Dire RP 8. Thus, at the conclusion of the parties' rounds of interviewing the venire, the courtroom was silent while the attorneys shuffled paper between them. *See* RP 108-09. After the shuffling ceased, the court merely read out the numbers of the jurors that would be seated on the jury. RP 109-11. Although allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. State v. Leyerle*,

158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis upon which to discern which jurors had been struck and which were simply excused because the panel had been selected. There was no public check on the non-discriminatory use of peremptories. This Court cannot ascertain whether the same jurors would have been stricken if the parties had to face the public scrutiny of open proceedings. Like in *Harris*, the subsequently-filed record does not absolve the constitutional violation. *See* CP __ (peremptory challenge and panel section lists);[3] *Harris*, 10 Cal. App. 4th at 684-85, 688-89.

c. Violation of the public trial right constitutes structural error, requiring reversal and remand for a new trial.

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181 ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless

[3] A supplemental designation of clerk's papers has been filed, requesting the trial court to forward copies of the peremptory challenge and panel section lists to this Court.

error analysis."). "If the trial court failed to [conduct a *Bone-Club* inquiry] then a 'per se prejudicial' public trial violation has occurred "even where the defendant failed to object at trial." *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Id.* (quoting *Wise*, 176 Wn.2d at 18). Because here the trial court conducted peremptory challenges in private without considering the *Bone-Club* factors, Mr. Thomas's conviction should be reversed and the matter remanded for a new, public trial.

2. The trial court improperly admitted highly prejudicial and irrelevant testimony that Mr. Thomas claimed to be Jesus Christ.

The admission of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A decision rests on untenable grounds if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.*

a. The trial court erred in admitting Mr. Thomas's statement because it was irrelevant and highly prejudicial.

Only relevant evidence is admissible. ER 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if evidence is relevant, it may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403.

Evidence is relevant only if there is "a logical nexus between the evidence and the fact to be established." *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000).

Here, the State sought to prove theft of a motor vehicle and theft in the third degree for $60 in gasoline. Mr. Thomas's statement to Officer Roberts that "I am Jesus Christ" bears no relevance to any of the elements of these offenses. The State argued it was relevant to show why Officer Roberts stopped questioning Mr. Thomas. RP 87-88. But there is no logical nexus between the extent of Officer Roberts's questioning and a fact of consequence to the determination of the action.

In addition, if Mr. Thomas's invocation of Jesus Christ was at all relevant, its minimal relevance was outweighed by the possibility of unfair prejudice. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational decision by the jury. *Hedlund*, 165 Wn.2d at 654. Alternatively, unfair prejudice occurs when the jury makes erroneous inferences from the evidence that undermine the goal of the rules to promote accurate fact finding and fairness. *Id.* at 654-55.

Here, admission of Mr. Thomas's statement that "I am Jesus Christ" produced two types of prejudice. First, as Officer Roberts indicated at the Criminal Rule 3.5 hearing, the statement hearkens back to Maurice Clemmons and the murder of the four Lakewood police officers. In the aftermath of the Lakewood shooting, news reports frequently discussed that just months before the shooting Maurice Clemmons repeatedly referred to himself as Jesus Christ, particularly while ordering his young female relatives to fondle him.[4] Maurice

[4] *E.g.*, Nick Perry, Maureen O'Hagan, Jonathan Martin & Ken Armstrong, *Four Days in May Set Stage for Sunday's Tragedy*, Seattle Times, Mod. Dec. 1,2009, *available at* http://seattletimes.com/html/localnews/2010392869_shootingjustice01m.html; Scott Gutierrez, Levi Pulkkinen & Casey McNerthney, *Wounded Suspect in Officers' Slaying on the Run*, Seattle PI (updated Nov. 29, 2009), http://www.seattlepi.com/local/article/Wounded-suspect-in-officers-slaying-on-the-run-888527.php#page-3; *Police: Suspect in Deaths of Officers Not in House*," USA Today, Nov. 30, 2009, *available at*

Clemmons's comments were rebroadcast in the News Tribune, the major news publication in Pierce County, when his cousin testified in 2011.[5] The comment is immortalized in Maurice Clemmons's Wikipedia entry.[6] Admission of the comment at Mr. Thomas's trial was unfairly prejudicial because it likely caused his Pierce County jury to associate him with the notorious murderer that recently terrorized Pierce County and the State. *See State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (defining "unfair prejudice" as that which is more likely to arouse an emotional response by the jury, rather than a rational decision).

Second, the comment was highly prejudicial because the jury likely associated it with a mental infirmity. *See, e.g., State v. Jeppesen*, 55 Wn. App. 231, 236-37, 776 P.2d 1372 (1989) (noting prejudice

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http://usatoday30.usatoday.com/news/nation/2009-11-29-police-officers-shot-washington_N.htm; "Man Who Killed 4 Washington Police Officers Shot Dead, Fox News, Dec. 2, 2009, *available at* http://www.foxnews.com/story/2009/12/02/man-who-killed-4-washington-police-officers-shot-dead/.

[5] Adam Lynn, *Clemmons Cousin Testifies in Court*, The News Tribune (Tacoma), Apr. 26, 2011, *available at* http://www.thenewstribune.com/2011/04/26/1640162/clemmons-cousin-testifies.html.

[6] *Maurice Clemmons*, Wikipedia, http://en.wikipedia.org/wiki/Maurice_Clemmons (last visited Aug. 1, 2013) ("On May 11, around 1 a.m., Clemmons appeared naked in his living room and ordered two female relatives, ages 11 and 12, to fondle him. The two reportedly complied out of fear, and the 11-year-old fled the house afterward. Clemmons took the 12-year-old into his bedroom along with Clemmons' wife. Clemmons repeatedly referred to himself as Jesus, and said his wife was Eve.").

stemming from testimony of mental illness as relevant to bifurcation of insanity defense); *In re B.B.*, 826 N.W.2d 425 (Iowa 2013) (acknowledging "social stigma attaching to those with mental illnesses is unfairly prejudicial" in discussing collateral consequences of involuntary commitment).

"When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Moreover, in doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). At most, Mr. Thomas's comment was minimally relevant. But it was certainly highly prejudicial. The trial court abused its discretion by admitting it contrary to ER 403.

b. Admission of the statement was not harmless.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983); *accord State v. Grier*, 168 Wn. App. 635, 650 n.33, 278 P.3d 225 (2012). The irrelevant and inflammatory

evidence admitted in this case made the jury view Mr. Thomas as a mentally infirm and aligned him with a mass police killer. It is within reasonable probabilities that the jury could not separate this image from the State's evidence as to the elements of theft of a motor vehicle. Therefore, admission of the evidence was not harmless and the conviction must be reversed.

3. The State failed to prove the offender score under which Mr. Thomas was sentenced.

This Court reviews the trial court's calculation of the offender score de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

The State bears the constitutional burden of proving prior convictions by a preponderance of the evidence. *E.g.*, *State v. Graciano*, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013) (contrasting burden on prior offenses, which State bears by preponderance, with finding of same criminal conduct); *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. The burden is on the State "because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers.*

Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must support the criminal history determination. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing 'some minimal indicium of reliability beyond mere allegation.'" *Id.* (quoting *Ford*, 137 Wn.2d at 481) (emphasis in original).

Here, the prosecutor presented a summary of Mr. Thomas's offender score as well as copies of documents pertaining to some of the listed prior offenses. CP84-85; Sentencing Exhibit 1. The prosecutor's summary, presented in a proposed stipulation that was rejected by Mr. Thomas, alleged the following prior offenses:

PRIOR CONVICTIONS (if any)

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
THEFT 1 (NOT FA)	02/06/92	PIERCE	01/17/92	A	NV	C	1	FELONY
PSP 2	10/22/92	PIERCE	10/05/92	A	NV	C	1	FELONY
THEFT 2 (NOT FA)		PIERCE	11/12/92	A	NV	C	1	FELONY
ROBBERY 2	04/27/93	PIERCE	03/13/93	A	V	B	1	FELONY
C-UDCS	03/24/94	PIERCE	01/31/94	A	NV	C	1	FELONY
UPCS (X2)	04/14/99	PIERCE	06/12/98	A	NV	C	2	FELONY
UDMILCS	05/14/01	PIERCE	12/20/00	A	NV	C	1	FELONY
UPC	12/19/06	KING	03/21/06	A	NV	C	1	FELONY
ROBBERY 2	12/22/09	PIERCE	08/10/09	A	V	B	1	FELONY

Although the State provided copies of judgments from the offenses from 2001 and prior that the State sought to prove, the State's exhibit

does not include any documents pertaining to the alleged 2006 King County offense or the 2009 Pierce County offense. *Compare* Sentencing Exhibit 1 *with* CP 84 (prosecutor's summary). At the sentencing hearing, the State handed the court the documents at Sentencing Exhibit 1 in support of an offender score of nine without presenting additional argument or proof. RP 426. Mr. Thomas objected to and refused to stipulate to the evidence and argument presented by the State. CP 84-85; RP 428. As stated, the documents at Sentencing Exhibit 1 do not pertain at all to the 2006 and 2009 convictions. Yet, without conducting any analysis, the court apparently presumed the State has satisfied its burden and considered an offender score of nine. RP 430; CP 75.

A prosecutor's summary of criminal history is not sufficient to satisfy the State's burden. *Hunley*, 175 Wn.2d at 915. The best evidence of a prior conviction is a certified copy of the judgment and sentence. *Id.* at 910. However, the State may also establish criminal history by presenting comparable certified documents of record or transcripts of prior proceedings. *Id.* at 910-11.

Because the State only presented its own summary in support of the 2006 and 2009 offenses alleged, the evidence was insufficient to

include those offenses in Mr. Thomas's offender score. Moreover, absent sufficient proof of those later offenses, the remaining prior offenses wash out because the State has not proved that Mr. Thomas committed an offense within five years of release from confinement on the remaining class C felonies or within 10 years on the 1993 class B felony. *Compare* RCW 9.94A.525(2)(b) and (c) *with* CP 84.[7]

Because Mr. Thomas objected to the offender score at the sentencing hearing, the proper remedy is to remand for resentencing based on the evidence presented at the initial hearing. *Hunley*, 175 Wn.2d at 906 n.1 (citing *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007) (quoting S*tate v. Lopez*, 147 Wn.2d 515, 520, 55 P.3d 609 (2002))).[8] The State is not permitted a second opportunity to satisfy its burden where Mr. Thomas objected in the first instance. Accordingly, the Court should remand for correction of Mr. Thomas's offender score and resentencing consistent with the corrected score.

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[7] The State did not assert a release date on the May 14, 2001 offense. *See* Sentencing Exhibit 1. Although the judgment reflects a sentence of 50 months, with credit for time served and good time, it is far from certain that Mr. Thomas remained confined within 10 years of the current offense, which was June 27, 2012. CP 25.

[8] While *Hunley* acknowledged the appropriate remedy in cases like this where the defendant objected, the Court permitted the State to present new evidence at resentencing in that case because Mr. Hunley did not object at the initial sentencing hearing. 175 Wn.2d at 912, 915-16.

4. The generic finding that Mr. Thomas has the present or likely future ability to pay is clearly erroneous and the discretionary costs imposed should be stricken.

This Court should strike the erroneous imposition of discretionary fees. The sentencing court imposed the following discretionary fees: $200 for a "criminal filing fee" and $500 for court-appointed attorney recoupment. CP 76; RP 429-30; RCW 9.94A.760.[9]

The court did not make an oral finding that Mr. Thomas had the ability to pay these costs. In fact, the State presented no evidence at sentencing that Mr. Thomas had or would have the ability to pay these costs. In contrast, the court signed an order of indigency and noted Mr. Thomas's indigency in reducing the attorney recoupment costs. RP 429-30.

The judgment and sentence contains only boilerplate language stating that:

> The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the

[9] The remaining fees were mandatory and are not disputed here. *See State v. Curry,* 118 Wn.2d 911, 829 P.2d 166 (1992) (victim assessment mandatory); *State v. Thompson,* 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

> ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 75.[10] Although mandatory fees were properly imposed, it was improper for the court to impose an additional $700 in costs and fees, because Mr. Thomas lacks the present and future ability to pay.

Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *Curry*, 118 Wn.2d at 915-16; RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Id.* This requirement is both constitutional and statutory. *Id.*; *see* RCW 9.94A.760(2) (requiring court to consider defendant's ability to pay prior to assessing incarceration costs). Additionally, a trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Thomas without specifically finding he had the ability to

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[10] The court's boilerplate finding as to Mr. Thomas's resources and ability to pay is factual and should be reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991).

pay. Substantial evidence did not support the court's boilerplate finding. Mr. Thomas was found indigent for purposes of trial and appeal. He lacked sufficient funds to pay for the $60 in gasoline that was the subject of count two. Nonetheless, the court imposed the discretionary costs and fees without any reference to Mr. Thomas's present or future ability to pay. RP 429-30.

This case is contrary to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." *Baldwin*, 63 Wn. App. at 311.

But unlike the defendant in *Richardson*, Mr. Thomas is not employed and is serving a 57-month sentence. Unlike in *Baldwin*, the State did not submit evidence establishing a factual basis for Mr. Thomas's future ability to pay. To the contrary, the totality of the evidence showed Mr. Thomas was indigent at the time of sentencing and likely to remain so. Thus, the court's boilerplate finding that Mr.

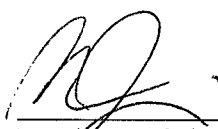
Thomas had the ability to pay was clearly erroneous and this Court should strike the discretionary costs imposed.

E. CONCLUSION

Mr. Thomas's conviction should be reversed and remanded for a new trial because the public was excluded from the exercise of peremptory strikes and the *Bone-Club* inquiry was not conducted on the record prior to the closure. Alternatively, Mr. Thomas should have a new trial because the court admitted highly prejudicial evidence that had little probative value. If the conviction is not reversed, however, this Court should remand to correct the offender score and sentence, based on the evidence initially presented, and strike the discretionary costs imposed.

DATED this 2nd day of October, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44445-3-II
v.	)	
	)	
JEFFREY THOMAS,	)	
	)	
APPELLANT.	)	

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