33141-5-III

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

IAN JONATHAN ANDERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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2. The trial court violated Mr. Anderson's constitutional right to be present.

3. The trial court erred when it admitted evidence of Mr. Anderson's attempt to flee from police.

4. The trial court erred when it admitted evidence of force used by officers to apprehend Mr. Anderson.

5. The imposition of legal financial obligations is improper because Mr. Anderson lacks the ability to pay.

II. ISSUES PRESENTED

1. Did the trial court violate Mr. Anderson's right to a public trial when, prior to the start of voir dire, a felon, statutorily incompetent to serve as a juror, was administratively released from jury service by the trial court only after the defendant stated he had no objection to the pre voir dire dismissal of the unqualified juror?

2. Did the defendant's agreement to the administrative pretrial dismissal of an unqualified juror, and the subsequent release of that juror, violate Mr. Anderson's right to be present?

3. Did the trial court abuse its discretion by admitting evidence of the defendant's immediate flight from and resistance to his arrest?

4. Are the mandatory legal financial obligations (LFOs) imposed in his case exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3)?

III. STATEMENT OF FACTS

Mr. Dugdale reported the theft of his Nissan Maxima on June 23, 2014. RP 156. The car had Montana plates and Mr. Dugdale had the only key. RP 152. The next day, the stolen Maxima was stopped by police officers on North Washington Street in Spokane. RP 171. Spokane Police Sergeant Vigessa testified that the defendant/driver was initially compliant with the Sergeant's requests until he was asked to place his hands behind his back. RP 195-96. At that time, the defendant took off running until he was physically apprehended by another officer, Officer Yen, who managed to hold the escaping defendant long enough for Sgt. Vigessa to aid in controlling him. RP 197-98. The defendant continued to attempt escape and resist the arrest, even after being advised he was under arrest and to stop resisting. RP 198. This resistance continued until a taser was deployed. RP 200.

The defendant was convicted of possession of a stolen motor vehicle. CP 34, 37. Having an offender score of "19," defendant was given a standard mid-range sentence of 50 months. CP 56. The mandatory legal financial obligations were imposed: a $100 DNA fee, a $500 victim assessment fee, and a $200 criminal filing fee. CP 37, 44.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE MR. ANDERSON'S RIGHT TO A PUBLIC TRIAL WHEN, PRIOR TO THE START OF VOIR DIRE, A FELON, STATUTORILY INCOMPETENT TO SERVE AS A JUROR, WAS ADMINISTRATIVELY RELEASED FROM JURY SERVICE BY THE TRIAL COURT ONLY AFTER THE DEFENDANT STATED HE HAD NO OBJECTION TO THE PRE VOIR DIRE DISMISSAL OF THE UNQUALIFIED JUROR.

The defendant now claims his right to a public trial was violated when the trial court, with defendant's agreement, dismissed a statutorily unqualified juror prior to the start of any voir dire. This process of pre voir dire disqualification of a juror for statutory competency reasons did not implicate a violation of the defendant's right to a public trial, and, moreover, was a process agreed to by the defendant.

1. Failure to Object and Invited Error.

First, absent some manifest constitutional error, an appellant must object to or challenge a ruling in the trial court to preserve any error for appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009). There was no objection to the dismissal of the statutorily

disqualified juror,[1] and in fact, the defendant stated he had no objection to the process suggested by the court of sending his bailiff back to determine if the felony disqualified juror had affirmatively gained the restoration of his civil rights. Not only did Defendant fail to preserve this issue, he agreed with the process of sending the bailiff back to dismiss the statutorily incompetent juror. When directly asked by the court whether he had "any objection" to the process, the defendant stated he did not. RP 7. A defendant who invites error – even constitutional error – may not later claim that the error requires a new trial. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); *State v. Studd*, 137 Wn.2d 533, 546-547, 973 P.2d 1049 (1999) (even though error was of constitutional magnitude and presumed prejudicial, Court held that defendants had invited the error and could not, therefore, complain on appeal). "To hold otherwise would put a premium on defendants misleading trial courts." *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). In this case, if there *were* error, the defendant invited it by agreeing to the process of sending the bailiff back to dismiss the felony-disqualified juror.

[1] Under RCW 2.36.070(5) a juror that has been convicted of a felony is not qualified or competent to serve as a juror unless they have had their civil rights restored. Defendant conflates the right to vote and the right to serve on a jury when he improvidently infers the unwitting restoration of his right to vote, pursuant to RCW 29A.08.520(2)(a), somehow affects his disqualification for juror service. Appellant's Br. 15. Voting restoration under that statute does not restore juror competency.

2. There was no public trial right implicated by the pre voir dire dismissal of a statutorily unqualified juror.

The defendant attempts to cast the pre voir dire dismissal of a statutorily unqualified juror as implicating the public trial right because it involves a "juror." As a general proposition, jury selection, especially voir dire, implicates the right to a public trial. *State v. Brightman,* 155 Wn.2d 506, 515, 122 P.3d 150 (2005). "However, 'jury selection' encompasses significantly more than attorney voir dire, and the mere label of 'jury selection' does not mean the public trial right is automatically implicated." *State v. Russell,* 183 Wn.2d 720, 730, 357 P.3d 38 (2015), quoting *State v. Wilson,* 174 Wn. App. 328, 338, 298 P.3d 148 (2013).

Russell and *Wilson*, *supra*, control in this case.[2] The public trial right is not implicated by preliminary excusals for statutory reasons. *Russell*, 183 Wn.2d at 730. In *Wilson*, the court determined the experience and logic test historically did not require the excusal of two jurors to be conducted in "open court" where those jurors were physically ill before

[2] Appellant has failed to utilized the three-step inquiry to analyze public trial right claims. *See State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014) (experience and logic test). A court first focuses on the process at issue to determine whether the public trial right is implicated. *Id*. Then, the court asks whether a closure occurred. *Id*. Finally, the court examines whether the closure was justified. *Id*. If the court concludes after applying the experience and logic test that the right to a public trial does not apply to the process, it need not reach the second and third steps in the analysis. *Id.* at 519.

voir dire began in the court room. *Wilson*, 174 Wn. App. at 345. "Because the trial court had broad discretion to excuse prospective jurors upon a showing of undue hardship or any reason deemed sufficient by the court pursuant to RCW 2.36.100(1), Wilson failed to satisfy the experience prong of the experience and logic test." *State v. Turpin*, __ Wn. App. __ , 360 P.3d 965, 969 (2015), citing *Wilson*, 174 Wn. App. at 346.

The distinction between administrative excusals and other disqualifications is consistent with the extant statutes and court rules governing juror qualifications.[3] "RCW 2.36.110 and CrR 6.5 place a *continuous obligation* on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." *Turpin*, 360 P.3d at 969, *quoting State v. Jordin*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). RCW 2.36.110 states, "It *shall* be the duty of a judge to excuse from further jury service any juror, *who in the opinion of the judge,* has manifested unfitness as a juror by reason of ... any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." (Emphasis in original.) Similarly, CrR 6.5 directs that if "at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror

[3] RCW 2.36.110 and CrR 6.5.

discharged." *Turpin*, 360 P.3d at 969. An incompetent juror is legally disqualified from juror service.

In the instant case, the *pre voir dire* excusal of a statutorily incompetent juror was an administrative function that is qualitatively different from "challenging a juror's ability to serve as a neutral factfinder in a particular *case* (as in peremptory and for-cause challenges)." *Russell*, 183 Wn.2d at 730-31 (emphasis in original) (citing case law, court rules and statutes).[4]

The pre voir dire dismissal of a statutorily disqualified incompetent juror, occurring before a panel had been selected or initially sworn in, was not a "proceeding" implicating the defendant's public trial right.

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[4] *State v. Russell*, 183 Wn.2d at 730-31:

> *See In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 117, 340 P.3d 810 (2014) (C. Johnson, J., lead opinion); *In re Pers. Restraint of Speight*, 182 Wn.2d 103, 105, 340 P.3d 207 (2014) (C. Johnson, J., lead opinion); *cf. State v. Irby*, 170 Wn.2d 874, 882, 246 P.3d 796 (2011) (drawing the distinction in the context of the defendant's right to be present). In addition to our own case law, this distinction is supported by the statutes and rules regarding juror selection proceedings. *See* GR 28(a) (setting forth "procedures for postponing and excusing jury service under RCW 2.36.100 and 2.36.110 and for disqualifying potential jurors under RCW 2.36.070"), (b)(3) (explicitly distinguishing between excusal for statutory reasons and "peremptory challenges or challenges for cause that fall outside the scope of this rule"); CrR 6.4 (governing voir dire, challenges for cause, and peremptory challenges).

B. THE TRIAL COURT DID NOT VIOLATE MR. ANDERSON'S CONSTITUTIONAL RIGHT TO BE PRESENT WHERE HE WAS PRESENT AND CONSENTED TO THE DISMISSAL OF THE STATUTORILY DISQUALIFIED JUROR.

Defendant attempts to cast the pre voir dire dismissal of the juror as an "*Irby*" violation of his right to be present. As above, the excusal of a juror because he is statutorily unqualified to serve does not involve a type of juror "selection" implicating the public trial right, nor does it involve the type of juror selection discussed in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). In *Irby*, the Court found that trial court and attorney's email discussion and dismissal of jurors occurred *after* jurors had been sworn and received a juror questionnaire. These dismissals transpired after the jurors were evaluated individually, as part of the jury selection process. The Court distinguished this process, involving selection to sit on "this case," from the general qualification process dealing with a juror's ability to serve on any case:

> The fact that jurors were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend. *See, e.g., Wright v. State*, 688 So.2d 298, 300 (Fla.1996) (distinguishing general qualification of the jury from the qualification of a jury to try a specific case and holding that general qualification process is not a critical stage of the proceedings requiring the defendant's presence); *Commonwealth v. Barnoski*, 418 Mass. 523, 530, 531, 638 N.E.2d 9 (1994) (distinguishing "preliminary hardship colloqu[y]" from "individual, substantive voir dire").

> Indeed, the questionnaire that was given to the jurors after the juror's oath was administered indicated that filling out the questionnaire was "part of the jury selection process," and "designed to elicit information with respect to your qualifications to sit as a juror *in this case*." CP at 1234 (emphasis added). The subsequent exchange of e-mails resulted in decisions being made, at least in part, on the basis of the questionnaire about the ability of particular jurors to try this specific case. This decision making was clearly a part of the jury selection process, a part that Irby did not agree to miss.

Irby, 170 Wn.2d at 882.

Importantly, Defendant Irby was in jail and was not present or involved with the email selection process. He had no ability to confer with his attorney regarding the process and probably did not know the process was occurring.[5] In the instant case, the defendant was present and able to discuss his and his attorney's concurrence with the trial court's

[5] In *Irby*, the Court noted:

> As noted above, Irby was not present during this discussion because he was in his jail cell. Furthermore, because the trial judge sent his initial e-mail at 1:02 p.m., and Irby's attorneys replied at 1:53 p.m., it is unlikely that the attorneys spoke to Irby about the email in the interim. Even if "[d]efense counsel had time to ... consult him regarding excusing some of the jurors if they chose to do so," as the State suggests, Suppl. Br. of Pet'r at 16, "where ... personal presence is necessary in point of law, the record must show the fact." *Lewis*, 146 U.S. at 372, 13 S.Ct. 136. Significantly, the record here does not evidence the fact that defense counsel spoke to Irby before responding to the trial judge's e-mail.

Irby, 170 Wn.2d at 884.

excusal of the disqualified juror for statutory reasons. There is no error here. *See Wilson*, 174 Wn. App. at 328-329 (court notes that the bailiff acted purely administratively when she excused the two jurors for legitimate medical reasons, including that one of the jurors was on "narcotic pain killers" and having "problems standing and sitting"). Finally, there was no objection to the process and review is not available under RAP 2.5. There is no manifest error when a statutorily disqualified juror is excused from service prior to the commencement of voir dire.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF THE DEFENDANT'S IMMEDIATE FLIGHT FROM AND RESISTANCE TO HIS ARREST.

Standard of Review

An appellate court reviews decisions excluding or admitting evidence at trial under the same standard of review: abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The defendant claims the trial court erred by admitting the facts surrounding the immediate arrest of the defendant after the stolen vehicle

he was driving was stopped by Sgt. Vigessa. The trial court did not err in this regard.

During the arrest process, the defendant was asked by Sgt. Vigessa to place his hands behind his back. RP 195-96. The defendant immediately took off running until he was physically apprehended by another officer, Officer Yen, who managed to hold the escaping defendant long enough for Sgt. Vigessa to aid in controlling him. RP 197-98. The defendant continued to attempt escape and resist the arrest, even after being advised he was under arrest and to stop resisting. RP 198. This resistance continued until a taser was deployed. RP 200. These events took place at the scene of the crime where defendant was stopped in the stolen vehicle he possessed.

The defendant objected to the admission of this evidence at trial, originally arguing that the evidence was prejudicial.[6] RP 127-29. Now, on appeal, defendant argues that the reason the defendant attempted to flee and resist arrest was because he feared arrest for his *other crimes* and *outstanding warrants*. Appellant's Br. 22.

This new "other crime argument" presented as the reason for defendant's flight was not raised in the lower court and may not be raised for the first time on appeal. Indeed, an appellate court reviews objections

[6] This was the only argument defendant made.

to evidence only on the *same ground* asserted at trial. *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007). RAP 2.5(a) states that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson,* 171 Wn.2d 292, 304–05, 253 P.3d 84 (2011). Accordingly, Defendant Anderson failed to preserve his claim for this Court's review.

Additionally, attempted flight in circumstances immediately surrounding the crime has long been considered competent evidence. *See State v. Bruton,* 66 Wn.2d 111, 112, 401 P.2d 340 (1965). This is because "flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." *Bruton,* 66 Wn.2d at 112. Over a century ago, the Supreme Court announced that "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen v. United States,* 164 U.S. 492, 499, 17 S.Ct. 154, 41 L.Ed. 528 (1896); *and see United States v. Ballard,* 423 F.2d 127, 133 (5th Cir. 1970) (quoting

Wigmore[7] noting: "[I]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself").

Defendant cites *State v. Freeburg*, 105 Wn. App. 492, 20 P.3d 984, 987 (2001), as supporting his position that the admission of evidence of his immediate attempted flight, escape, and resistance to his arrest is not relevant. Appellant's Br. 22. The present case is not a case that should be favorably compared to *Freeburg*, one in which the defendant was not arrested until *three years* following the charged crime. In *Freeburg*, the trial court admitted evidence of a handgun found on Freeburg when he was arrested three years after the crime, based on the fact that it was evidence of flight. The Court of Appeals reversed, noting no connection between the handgun found on the defendant and the charged crime. Here, however, the time gap is dissimilar, and involved an obvious and *immediate* attempt at flight followed by resistance to arrest. The present facts create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt, and was a deliberate effort to evade arrest and prosecution. *See State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106

[7] WIGMORE, EVIDENCE, § 276 (3d ed. 1940)

(1982) (flight from the officer reasonably could be considered a deliberate effort to evade arrest and prosecution for the burglary and could also reasonably be considered probative of his consciousness of guilt). Therefore, the flight and resistance evidence here was considerably more relevant and not as prejudicial as in *Freeburg*.[8] The trial court did not abuse its discretion when it considered the prejudice involved, considered the flight and resistance, noting it was immediate and continuing to the extreme.[9] To the extent defendant complains separately regarding the

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[8] *United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982) contains an excellent discussion of cases finding flight admissible, as well as cases in which flight evidence has been held inadmissible, noting that the latter cases contained particular facts tending to detract from the probative value of such evidence – such as where the defendant was unaware that he was the subject of criminal investigation, or where a great deal of time elapsed between the crime and the flight.

[9] Court:

> But this is a series of events where contacted by law enforcement the defendant initially tries to, well, he tries to flee at one point. He then has to be taken to the ground. He then continues to resist and cannot be handcuffed. Eventually, because the resistance is so extreme, he is tasered by one of the officers and then they're able to finally handcuff him. This all happens in a very short period of time when he's trying to flee the scene. I do think that's relevant. I do think its relevance outweighs any potential prejudice and I do think it should come into evidence.

RP 126-27.

evidence surrounding his tasering, the court found that evidence relevant because it showed the attempted flight and resistance was extreme and continuing. RP 126-27.

Additionally, the trial court noted that by chopping out portions of the evidence in the case they "would get to the point here we're going to be cutting and pasting this so much that it's not going to make sense [to the jury]." RP 129. The flight and taser evidence was separately admissible under the res gestae or "same transaction" exception to ER 404(b), "because evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

The trial court did not abuse its discretion when it admitted evidence of defendant's immediate flight from, and resistance to, his arrest for possession of a stolen vehicle. Additionally, any error in this regard was harmless. To the extent defendant argues that the testimony of Ms. Danieal M. Warnken aided him, her testimony was eviscerated upon cross examination. She stated she had bought the car from a Lucas Hainey after "someone mentioned [her need for a car] to somebody and they gave me a call." RP 240. She agreed she met this complete stranger in a parking lot, never examined the vehicle's registration, and did not notice

the Montana plate on the car. She stated that she never received title, or registration; that this complete stranger appeared at a gas station with a vehicle that was licensed in a different state in a hurry to sell, wanted cash, and that she believed there was no reason to be concerned about that. RP 243-44, 249, 252. Finally, she stated she presently had the bill of sale to the car, but then could not explain how the bill of sale that was with the defendant in the glove box *at the time of his arrest* got back to her when she had not seen the vehicle since his arrest. RP 263-64.

> **[Prosecutor]**. Okay. And you have the bill of sale now?
>
> **[Ms. Warnken]**. I do have the bill of sale.
>
> **[Prosecutor]**. Okay. So need you to track with me here. If the bill of sale were in the glove box of the car that you gave to Mr. Anderson to drive, how would you have it?
>
> **[Ms. Warnken]**. *That's a good question*.
>
> **[Prosecutor]**. Nothing further.

RP 264 (emphasis added).

This testimony seems to have aided the State, not the defendant.

D. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL, AND THE FEES IMPOSED ARE MANDATORY IN NATURE.

The defendant failed to object to the imposition of his LFOs. Therefore, he failed preserve the matter for appeal. RAP 2.5. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d

680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved. And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues, and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided after the January 2015 sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object and thereby give the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at

749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
>
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor not allowing review of this statutory,[10] non-constitutional LFO issue.

1. <u>The LFO's ordered are mandatory LFO's</u>

The $500 crime victim assessment, the $100 DNA (deoxyribonucleic acid) collection fee, and the $200 filing fee are mandatory legal financial obligations, each required irrespective of the defendant's ability to pay. *State v. Lundy,* 176 Wn. App. 96, 102,

[10] Assuming the RCW 10.01.160(3) applied to mandatory fees.

308 P.3d 755 (2013). The $500 victim assessment is mandated by RCW 7.68.035, the $100 DNA collection fee is mandated by RCW 43.43.7541, and the $200 filing fee is mandated by RCW 36.18.020(h). These statutes do not require the trial court to consider the offender's past, present, or future ability to pay. To the extent that the trial court imposed mandatory LFOs, there is no error in the defendant's sentence.

The court DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in every sentence imposed for a felony.[11] To the extent the defendant claims this statute violates the due process clause, this argument has been put to rest by this Court's recent decision in *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642

[11] RCW 43.43.7541 provides:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94.A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

(2015). In *Thornton*, this Court noted that the DNA fee imposition statute *requires* the imposition of the DNA fee in every qualifying case:

> The language in RCW 43.43.7541 that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars" plainly and unambiguously provides that the $100 DNA database fee is mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word "must" is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

Thornton, 188 Wn. App. at 374-375.

Additionally, it should be noted that monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because "'[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,'" and "'[i]t is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.'" *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213

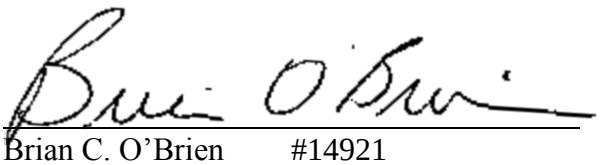
(1997) (most alterations in original) (internal quotation marks omitted) (quoting *State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166 (1992)); *and see State v. Thompson,* 153 Wn. App. 325, 336–38, 223 P.3d 1165 (2009) (DNA fee); *State v. Williams,* 65 Wn. App. 456, 460–61, 828 P.2d 1158, 840 P.2d 902 (1992) (victim penalty assessment). There was no error in the fee imposition in this case.

V. CONCLUSION

For the reasons stated above the defendant's conviction and sentence should be affirmed.

Dated this 16 day of December, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, vs. IAN JONATHAN ANDERSON, Appellant.	NO. 33141-5-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 16, 2015, I e-mailed a copy of Brief of Respondent, pursuant to the parties' agreement, to:

Kathleen A. Shea
wapofficemail@washapp.org

Dated this 16 day of December 2015

Spokane, WA
(Place)

Kim Cornelius
(Signature)