93432-1
Supreme Court No. _____
Court of Appeals No. 33141-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IAN ANDERSON,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Anderson requests this Court grant review pursuant to RAP 13.4(b) of the published decision of the Court of Appeals, Division One, in *State v. Ian Anderson*, No. 33141-5-III, filed June 21, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals held there was no public trial right violation where a juror was questioned in private about his eligibility to serve based on his criminal history. Jury selection implicates a defendant's right to a public trial under article I, sections 10 and 22, and in *State v. Paumier*,[1] this Court found the public trial right was violated where the trial judge individually questioned potential jurors in chambers about private matters, such as their criminal history. Should review be granted where the Court of Appeals' decision is contrary to *Paumier* and raises an issue of substantial public interest? RAP 13.4(b)(1), (4).

2. The trial court admitted evidence of Mr. Anderson's attempt to flee from police, and their efforts to apprehend him, including detailed testimony about tasing him. While the Court of Appeals found the admission of evidence of the tasing was error, it determined the court's

[1] 176 Wn.2d 29, 288 P.3d 1126 (2012).

error was harmless and found the remainder of the challenged evidence admissible. Should this court grant review in the substantial public interest where any inference of consciousness of guilt from Mr. Anderson's attempt to flee was speculative, and evidence of the tasing was highly inflammatory and prejudicial? RAP 13.4(b)(4).

3. The Court of Appeals declined to review the imposition of legal financial obligations against Mr. Anderson, even though the trial court found Mr. Anderson did not have the ability to pay them, because it deemed the obligations "mandatory." RCW 10.01.160(3) directs the waiver of costs and fees for indigent defendants, and this Court emphasized the importance of performing an individualized inquiry into a defendant's current and future ability to pay before imposing legal financial obligations in *State v. Blazina*.[2] Should this Court grant review in the substantial public interest to determine whether a court may impose any costs and fees against a defendant who it has found does not have the ability to pay them? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Bryan Dugdale owned a Nissan Maxima, which was purchased used by his father in Montana. 1 RP 150. Mr. Dugdale drove the car for

[2] 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

about a year, but parked it permanently in back of his apartment after it began stalling out. 1 RP 151-52. After Mr. Dugdale made arrangements to sell the car to his neighbor, he removed the registration from the car and locked it. 1 RP 154. A few days later, he received a text message from his neighbor, asking where the car had gone, and Mr. Dugdale realized it had been stolen over the weekend. 1 RP 156-57.

A sergeant with the Spokane Police Department noticed a car with Montana plates and confirmed it was the Maxima that had been reported stolen. 1 RP 188. After the car stopped at a business and the sergeant boxed the vehicle in, he approached the driver, who was later identified as Ian Anderson. 1 RP 189-90, 193. Mr. Anderson was initially compliant with the sergeant's demands. 1 RP 194. Mr. Anderson kept his hands on the steering wheel and explained to the sergeant he had borrowed the car. 1 RP 194.

Once back-up arrived, the sergeant ordered Mr. Anderson out of the car. 1 RP 194. Mr. Anderson complied, but when the sergeant attempted to handcuff him, Mr. Anderson ran. 1 RP 197. Another officer grabbed Mr. Anderson and they took him to the ground by force. 1 RP 197-98. An officer tased Mr. Anderson, and Mr. Anderson was handcuffed shortly after. 1 RP 200. Mr. Anderson asked one of the officers what he was being arrested for and the officer responded that he

was under arrest for possession of a stolen motor vehicle and an outstanding warrant. 1 RP 177; CP 4.

At the start of jury selection, immediately before the prospective jurors were brought into the courtroom, the State notified the court that one juror had a felony conviction and it wanted to establish that the juror's rights had been restored. 1 RP 5. The trial court indicated that a specific individual, who was presumably a court staff member, could inquire of the juror outside the courtroom and release him if he indicated his rights had not been restored or if he did not know whether his rights had been restored. 1 RP 6-7. The parties did not discuss this juror again on the record, but the Record of Additional Jurors indicates he was struck for cause. CP 67.

In a motion in limine, Mr. Anderson moved to exclude testimony about his initial failure to comply with the arrest. 1 RP 123. He also moved to exclude two exhibits proposed by the State, one of which showed the taser darts embedded in Mr. Anderson's back and one of which showed the marks on his back left by the taser darts. 1 RP 124. The trial court denied the first motion, finding that any evidence of Mr. Anderson's attempt to flee or resist arrest was admissible, including the fact that the officer tased him. 1 RP 132. The court initially reserved its ruling on whether the photographs were admissible but later admitted the

photograph of the taser darts on Mr. Anderson's back over his objection. 2 RP 215; Ex. 10. The sergeant subsequently testified at length about how a taser operates. 2 RP 216.

A jury convicted Mr. Anderson of possession of a stolen motor vehicle. CP 37. He was sentenced to 50 months incarceration. CP 42. At sentencing the judge recognized Mr. Anderson was unable to pay any fines and costs and stated, "I would totally waive these fines and costs but I can't." 2 RP 330. Finding that it was obligated to impose certain legal financial obligations (LFOs) regardless of Mr. Anderson's ability to pay, it imposed fees and costs totaling $800. 2 RP 330; CP 45. The Court of Appeals affirmed. Slip Op. at 16.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the Court of Appeals' holding conflicts with *State v. Paumier*, which held that questioning a juror about his criminal history in private violated the defendant's right to a public trial.

Article I, section 10 requires that in all cases, justice "be administered openly." Article I, section 22 guarantees a criminal defendant the right to a "public trial by an impartial jury." These "provisions echo the United States Constitution's Sixth Amendment, applicable to the states through the Fourteenth Amendment due process

clause." *State v. Fort*, 190 Wn. App. 202, 220, 360 P.3d 820 (2015); *Waller v. Georgia*, 467 U.S. 39, 44, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

While not every interaction between the court and the parties implicates the right to a public trial, "logic and experience" demonstrates that jury selection does. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); *State v. Russell*, 183 Wn.2d 720, 357 P.3d 38 (2015) (citing *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "A trial court may question potential jurors individually outside of the public's presence – thereby closing the courtroom – but only after considering the five *Bone-Club* factors on the record." *State v. Frawley*, 181 Wn.2d 452, 459, 334 P.3d 1022 (2014); *see also State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Immediately before the prospective jurors were brought into the courtroom, the State alerted the court it had learned Juror 31 had a prior felony conviction and stated, "we would need to establish that his rights have been restored." 1 RP 5. The deputy prosecuting attorney did not indicate how she learned about the felony conviction or provide any details about the conviction. 1 RP 5-6.

The trial court ruled that an inquiry of Juror 31 would be conducted outside of the courtroom by an individual identified only as "Ms. Ottoson." 1 RP 6. If Juror 31 informed Ms. Ottoson that his rights

had not been restored, or if he was unsure whether his rights had been restored, Juror 31 would be released from jury service without further consideration. 1 RP 7. The issue was not addressed again on the record, but the Record of Additional Jurors reflects that Juror 31 was ultimately struck for cause. CP 67.

Before isolating Juror 31 from the rest of the jury panel and instructing Ms. Ottoson to interview him outside of the courtroom and the parties' presence, the court did not perform a *Bone-Club* analysis. 1 RP 6-7. It simply directed that the juror be questioned and released unless he was certain his civil rights had been restored. *Id.*

The Court of Appeals held this questioning did not violate Mr. Anderson's public trial right because the juror's "dismissal was merely a pretrial administrative dismissal of a statutorily ineligible juror." Slip Op. at 7. However, this Court has repeatedly held that the individual questioning of potential jurors outside the courtroom is a closure that creates the presumption of prejudice. *See Wise*, 176 Wn.2d at 1118; *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Shearer*, 181 Wn.2d 564, 574, 334 P.3d 1078 (2014); *see also Fort*, 190 Wn. App. at 225 (recognizing that "the Supreme Court solidified the role of the public trial right in the context of voir dire" and finding a public trial right violation where counsel and the trial court questioned potential jurors in

chambers). In *Paumier*, this Court found that the trial judge's individual questioning of potential jurors in chambers about private matters, including their health issues, *criminal history*, and familiarity with the defendant and the crime, violated the defendant's right to a public trial. 176 Wn.2d at 33, 35. Finding reversal warranted, the Court held "the trial court erroneously closed the courtroom when it privately questioned potential jurors during voir dire without first conducting a *Bone-Club* analysis." *Id.* at 35.

In *Shearer*, there was a question about whether a juror was disqualified from jury service due to a criminal conviction. 181 Wn.2d at 568. The judge conducted an in-chambers conference with the juror and the parties, but no record was made of what occurred during that meeting. *Id.* The State argued the closure was merely for a "ministerial or administrative matter" and therefore did not implicate the right to a public trial. *Id.* at 574. The Court disagreed, finding *Paumier* controlled and the trial court violated the defendant's article I, section 22, public trial rights when it evaluated the juror's fitness to serve in chambers without performing a *Bone-Club* analysis. *Id.*

The Court of Appeals' holding conflicts with both *Paumier* and *Shearer*. Just like in *Shearer*, a question arose as to whether Juror 31 was qualified to sit on the jury given a past criminal conviction. Similar to

considering the State's challenge to the juror's fitness in chambers, as the court did in *Shearer*, the trial court delegated the task to Ms. Ottoson, who conducted the inquiry outside the presence of the judge, the parties, and the public. This violated Mr. Anderson's public trial rights. *See Paumier*, 176 Wn.2d at 35; *Shearer*, 181 Wn.2d at 574. This Court should accept review because the court's holding is contrary to this Court's prior decisions and raises an issue of substantial public interest. RAP 13.4(b)(1), (4).

2. This Court should grant review in the substantial public interest because the trial court committed reversible error when it improperly admitted evidence of flight and force used by officers to subdue Mr. Anderson.

In order for evidence to be admissible at trial, it must be relevant. ER 402. "To be relevant... evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case." *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)). In addition, relevant evidence may be excluded if it is more prejudicial than probative, confuses the issues, or misleads the jury. ER 403; *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011).

Prior to trial, Mr. Anderson moved to exclude all evidence of his resistance to arrest. 1 RP 123. The trial court denied the motion, finding Mr. Anderson's resisting and attempt to flee was "fully admissible." 1 RP 129. According to the court, this included any evidence of the officer's use of the taser. 1 RP 132.

Evidence of flight is admissible only if it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001)). "Flight" may include "evidence of resistance to arrest, concealment, assumption of a false name, and related conduct" as long as jurors "can reasonably infer the defendant's consciousness of guilt of the *charged* crime." *McDaniel*, 155 Wn. App. at 854 (emphasis added). Because this type of evidence is typically only marginally probative, the inference of consciousness of guilt must be "substantial and real." *Id.*

The Court of Appeals rejected Mr. Anderson's argument that any inference of consciousness of guilt was speculative because Mr. Anderson had two outstanding warrants, finding that a connection between the warrants and Mr. Anderson's flight was not before the trial court. Slip Op.

at 11, n.2. However, the outstanding warrants were discussed during the motion to exclude, and the trial court had the information it needed to make the correct decision. 1 RP 127.

Defense counsel informed the court during the motion in limine that Mr. Anderson had two outstanding warrants, including one for an escape from custody while serving a prison drug offender sentencing alternative (DOSA). 1 RP 127. Mr. Anderson cooperated with the officers until he knew he was being placed under arrest. 1 RP 196. Thus, a suggestion that he ran from the police *because he knew he was driving a stolen vehicle* was nothing more than speculation. 1 RP 127. Instead, the circumstances suggested that Mr. Anderson attempted to flee not because he feared arrest for that crime, but because he knew he had absconded from the Department of Corrections (DOC) custody and had two outstanding warrants for his arrest.

The Court of Appeals held that the admission of evidence regarding the taser was error, but that this error was harmless. Slip Op. at 11. 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). Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is

required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

The irrelevant and inflammatory evidence admitted against Mr. Anderson suggested he ran from the police because he knew the car was stolen and that he was violent, and the trial court permitted the State to discuss this evidence at length. Two officers testified about how Mr. Anderson had attempted to leave the scene and went into great detail about the physical forced they used to subdue him. 1 RP 172-176, 197-200. They described trying to gain control over Mr. Anderson's different body parts, how Mr. Anderson was placed in a headlock, that Mr. Anderson would not cooperate even after they forced him to the ground, and that one of the officers tased him. 1 RP 174-75, 198-200.

The sergeant prefaced his testimony by stating that it was a "high risk stop" because "in most cases the subjects driving stolen cars are felons and in most cases these felons are armed with some type of weapon." 1 RP 188. He also discussed how a taser works, and described the photograph admitted into evidence, which showed the taser darts attached to Mr. Anderson's back. 2 RP 216; Ex. 10.

It is reasonably probable that absent this irrelevant and inflammatory evidence, Mr. Anderson would have been acquitted. The Court of Appeals' holding to the contrary, and finding that the evidence of

flights was properly admitted, raises an issue of substantial public interest and this Court should accept review. RAP 13.4(b)(4).

3. This Court should grant review in the substantial public interest because the trial court imposed legal financial obligations against Mr. Anderson after finding he lacked the ability to pay.

At sentencing, the trial court recognized that Mr. Anderson did not have the ability to pay any legal financial obligations (LFOs) but nevertheless imposed fees and costs totaling $800, including a $500 "Victim Assessment," $200 "Criminal Filing Fee," and $200 "DNA collection fee." 2 RP 330; CP 44-45. The judge stated:

> And what I'm going to do, sir, in terms of fines and costs, if I could waive all of this I would. I would totally waive these fines and costs but I can't The State doesn't allow me to so I have to impose 500 dollar victim impact fee, 200 dollars court costs and 100 dollars DNA fee. I would waive them sir, if I could and, counsel, I'm going to set a payment for the gentlemen at 25 a month but, Mr. Charbonneau, if you want to chat with Mr. Anderson, if you want to suggest a date, I'm amenable to whatever he would like to do. As far out as he wants, but it has statutory interest, sir, so the problem is it just sits there and builds up but I'll give you a second if you want to decide what you want to do with that.

2 RP 330.

The judge made it clear he did not believe Mr. Anderson could pay any LFOs and that he imposed the fees and costs only because he believed the law required him to do so. However, the legislature has mandated that

a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). In addition, this Court has emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

The Court of Appeals found that Mr. Anderson did not dispute "the mandatory nature of the LFOs imposed." Slip Op. at 13. This is incorrect. As Mr. Anderson explained in his opening brief, the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(h) (convicted criminal defendants "shall be liable" for a $200 fee); RCW 43.43.7541 (every felony sentence "must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

More than 20 years ago, this Court stated the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay.

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the VPA was *unconstitutional*. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted).

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."). Indeed, when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. Anderson challenges here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter).

GR 34, which was adopted at the end of 2010, also supports Mr. Anderson's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's

ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

Furthermore, construing the relevant statutes as precluding consideration of ability to pay raises constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. For example, holding that mandatory costs and fees must be waived for indigent civil litigants under GR 34 but may not be waived for indigent criminal litigants runs afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Anderson concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Anderson is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of

encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

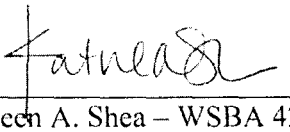
The trial court did not have the benefit of the Supreme Court's decision in *Blazina* when it held it was required to impose the LFOs regardless of its finding that Mr. Anderson could not pay them. Given that the trial court determined Mr. Anderson could not pay the LFOs, and repeatedly expressed its desire *not* to impose these fees and costs against Mr. Anderson, this Court should accept review in the substantial public interest. RAP 13.4(b)(4).

E. CONCLUSION

The Court should grant review of the Court of Appeals opinion affirming Mr. Anderson's conviction.

DATED this 19th day of July, 2016.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX

COURT OF APPEALS, DIVISION III OPINION

June 21, 2016

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 33141-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
IAN JONATHAN ANDERSON,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Ian Anderson appeals his conviction for possession of a stolen vehicle. He argues the trial court violated his right to a public trial and his right to be present at all critical stages when it directed a court staff member to speak with a venire juror outside of the courtroom to determine if his civil right to be a juror had been restored after his felony conviction. Mr. Anderson also argues the trial court abused its discretion by allowing evidence of his flight, resisting arrest, and being subdued by a stun gun, and this error was not harmless. Mr. Anderson further argues the trial court erred by imposing legal financial obligations (LFOs). In his statement of additional grounds for review (SAG), Mr. Anderson argues the State introduced irrelevant and prejudicial evidence at trial and also failed to prove he knew the vehicle was stolen. We disagree

with Mr. Anderson's constitutional, LFO, and SAG arguments. We agree that allowing evidence of his being subdued by a stun gun was an abuse of discretion, but determine the error to be harmless. We, therefore, affirm.

FACTS

Bryan Dugdale had a green Nissan Maxima with Montana license plates. Mr. Dugdale did not use the car but kept it behind his apartment. Mr. Dugdale's father, a Montana resident, was the car's registered owner.

In June 2014, Mr. Dugdale arranged to sell the Maxima to his neighbor. Mr. Dugdale removed the registration from the car and locked it. On the morning of June 23, 2014, Mr. Dugdale's neighbor sent him a text asking where the Maxima was. It was then that Mr. Dugdale learned that the car was recently stolen, and he reported the theft to the Spokane Police Department.

On June 24, 2014, Spokane Police Sergeant Kurt Vigesaa was on patrol when he saw a green Maxima with Montana license plates. The sergeant recalled that a vehicle with a similar description had been reported stolen. He confirmed the car matched the one reported stolen and then followed the Maxima until backup could assist him. He saw the Maxima's driver turn into a parking lot and park the car. The sergeant then parked his patrol car behind the Maxima to prevent the driver from fleeing in the car.

Sergeant Vigesaa instructed the driver, later identified as Mr. Anderson, to remain in the car with his hands on the steering wheel. The sergeant told Mr. Anderson the Maxima had been reported stolen. Mr. Anderson replied he was just borrowing it.

When backup arrived, Sergeant Vigesaa instructed Mr. Anderson to step out of the car. The sergeant then instructed Mr. Anderson to turn and face the Maxima and sidestep toward the rear of the vehicle. Mr. Anderson complied with the sergeant's instructions. But when the sergeant instructed Mr. Anderson to place his hands behind his back, Mr. Anderson fled.

As Mr. Anderson fled past one of the officers, the officer grabbed him and forced him to the ground. Mr. Anderson continued to resist. Up to four officers assisted in trying to subdue him. The officers informed Mr. Anderson he was under arrest and to stop resisting. Mr. Anderson continued to struggle until an officer deployed a stun gun.

The State charged Mr. Anderson with one count of possession of a stolen motor vehicle. Prior to jury selection, each venire juror received an identification number. The State notified the trial court that venire juror 31 had a prior felony conviction, and it was unclear if the juror's civil rights had been restored so he could serve as a juror. The trial court suggested that a court staff member speak with juror 31 outside the courtroom and determine his status. The trial court further suggested, if juror 31 told the staff member

his rights had not been restored, or he was unsure, the trial court would excuse juror 31. Neither the State nor Mr. Anderson objected to the trial court's suggestions. The court staff member presumably spoke with juror 31, but a summary of the discussion was not placed on the record. According to a clerk's notation, juror 31 was struck for cause.

The jury found Mr. Anderson guilty of possession of a stolen motor vehicle. At sentencing, the trial court imposed LFOs on Mr. Anderson. These LFOs consist of a $500 victim assessment fee, a $200 criminal filing fee, and a $100 deoxyribonucleic acid (DNA) collection fee. The trial court stated it would waive these fines and costs but it could not. Mr. Anderson appeals.

ANALYSIS

A. *Right to a public trial*

Defendants have a constitutional right to a public trial. U.S. CONST. amend. VI; CONST. art. I, § 22. A violation of the public trial right can be raised for the first time on appeal. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Failure to object at trial does not constitute a waiver of a defendant's public trial right. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). Violation of a defendant's public trial right is a question of law reviewed de novo. *Wise*, 176 Wn.2d at 9 (quoting *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

The right to a public trial is not absolute. *Shearer*, 181 Wn.2d at 569. Competing rights and interests often require trial courts to limit public access to a trial. *Id.* Trial courts assess these competing interests by using the five factor analysis articulated in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court must consider the five *Bone-Club* factors on the record before closing the courtroom. *Wise*, 176 Wn.2d at 10. Closing the courtroom without considering the *Bone-Club* factors is structural error and is presumed to be prejudicial. *Shearer*, 181 Wn.2d at 569.

However, before determining if a public trial right violation has occurred, this court must first determine whether the court proceeding implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). The Washington Supreme Court has adopted the "experience and logic" test developed by the United States Supreme Court to determine if a court proceeding implicates the public trial right. *Id.* at 72-75. The "experience prong" asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The "logic prong" asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise Co.*, 478 U.S. at 8). If both questions are answered yes, then the court proceeding implicates the public trial right. *Id.*

"[I]t is well settled that the right to a public trial also extends to jury selection." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). However, "the mere label of a proceeding is not determinative." *State v. Slert*, 181 Wn.2d 598, 604, 334 P.3d 1088 (2014). Recent Washington Supreme Court decisions demonstrate the individual questioning of jurors conducted outside open court during voir dire is a violation of a defendant's public trial right. *State v. Paumier*, 176 Wn.2d 29, 32, 288 P.3d 1126 (2012); *Shearer*, 181 Wn.2d at 566; *Wise*, 176 Wn.2d. at 5-6.

But more recent cases have drawn a distinction between individual questioning of jurors occurring before and after the start of voir dire. *See, e.g.*, *State v. Russell*, 183 Wn.2d 720, 722-33, 357 P.3d 38 (2015) (chambers work session, occurring before voir dire, to excuse jurors for statutory reasons did not implicate the public trial right); *Slert*, 181 Wn.2d at 604-08 (chambers discussion, occurring before voir dire, of answers to jury questionnaires and subsequent dismissal of jurors with knowledge of case did not implicate the public trial right); *State v. Wilson*, 174 Wn. App. 328, 331, 298 P.3d 148 (2013) (excusal of two jurors for illness-related reasons before voir dire began did not implicate the defendant's public trial right).

A defendant's public trial right does not apply to every aspect of jury selection. *Slert*, 181 Wn.2d at 604-05; *Wilson*, 174 Wn. App. at 338-40. Experience demonstrates

the public trial right historically has not attached to the dismissal of certain statutorily excused jurors. *Wilson*, 174 Wn. App. at 342-46. Also, given how a trial court and its agents have "broad discretion" to excuse members of the jury for administrative reasons, logic does not suggest public openness during pre-voir dire dismissals would in any way enhance the fairness of the criminal justice system. *Id.* at 346-47.

Here, a court staff person questioned venire juror 31 before the jury pool was sworn in and before voir dire began. The record is clear the trial court was concerned with only whether juror 31, a convicted felon, was statutorily eligible to serve.[1] Venire juror 31's dismissal was merely a pretrial administrative dismissal of a statutorily ineligible juror. Both *Slert* and *Wilson* indicate such administrative dismissals do not implicate a defendant's right to a public trial. We conclude Mr. Anderson's public trial right was not implicated under these facts.

B. *Right to be present during all critical stages of trial*

Due process affords a criminal defendant the right to be present at all critical stages of trial. *State v. Jones*, No. 89321-7, 2016 WL 1594034, slip op. at 16 (Wash., Apr. 21, 2016) (quoting *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011)). Mr.

[1] RCW 2.36.070(5) provides that any person who has been convicted of a felony and has not had his or her civil rights restored is not eligible for jury service in Washington.

Anderson argues his right to be present was violated when the court staff member questioned venire juror 31 outside the courtroom.

An appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a). However, a party may raise an unpreserved claim for the first time on appeal if the claim concerns a manifest error affecting a constitutional right. RAP 2.5(a)(3). For such a claim to warrant review, the appellant must show, (1) the error is of constitutional magnitude, and (2) the error is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To be "manifest," the defendant must show the claimed error had "practical and identifiable" consequences at trial. *Id.* at 99.

In *State v. Jones*, the alternate jurors were chosen by a random drawing during an afternoon recess while Martin Jones was not present. *Jones*, slip op. at 3-6. When court reconvened and the trial court announced the alternate jurors, neither party was surprised, confused, nor objected. *Id.* at 6. The *Jones* court held the defendant's failure to object at trial waived his right-to-presence challenge and the court declined to address its merits. *Id.* at 17.

Here, Mr. Anderson did not object to the trial court's suggested procedure for determining whether venire juror 31 could statutorily serve as a juror. Mr. Anderson's failure to object at trial strongly indicates he did not perceive the procedure as prejudicial.

We also fail to see any prejudice in the procedure. We therefore decline to address the merits of Mr. Anderson's right-to-presence challenge.

C. *Evidence of flight, resisting arrest, and being subdued by a stun gun*

Mr. Anderson argues the trial court erred when it denied his motion in limine to exclude evidence of his flight, resisting arrest, and being subdued with a stun gun.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). An abuse of discretion occurs if a trial court adopts a view no reasonable person would take. *Id.* at 669 (quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)).

All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. Facts tending to establish a party's theory of the case will generally be found to be relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986). The threshold for relevance is very low, and minimally relevant evidence may be admitted by a trial court. *Salas*, 168 Wn.2d at 669 (quoting *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006)).

Relevant evidence should be excluded by a trial court if the danger of unfair prejudice substantially outweighs its probative value. ER 403. Evidence likely to elicit

an emotional response rather than a rational decision carries a risk of unfair prejudice. *Salas*, 168 Wn.2d at 671. The burden of showing unfair prejudice is on the party seeking to exclude the evidence. *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). Trial courts are given wide discretion in balancing the probative value of evidence against the danger of unfair prejudice. *Id.* at 225-26.

Evidence of flight is admissible if the trier of fact can reasonably infer the defendant's consciousness of guilt of the charged crime. *State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001)). Such inferences are too attenuated if substantial time elapses between the defendant's criminal conduct and arrest, or if the defendant is unaware of the reason for his arrest. *United States v. Borders*, 693 F.2d 1318, 1324-27 (11th Cir. 1982).

Here, Mr. Anderson fled almost immediately after the arresting officer told him he was driving a stolen car. When deciding to admit the evidence of flight, resisting, and being subdued by a stun gun, the trial court stated:

> 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.

Report of Proceedings (RP) at 125-26. In addition, evidence of flight and resisting was relevant because it tended to contradict Mr. Anderson's recent statement that he had borrowed the car. Because Mr. Anderson's flight and resisting occurred almost immediately after the arresting officer informed him he was driving a stolen car, a jury could reasonably infer consciousness of guilt of the charged crime. We hold that the trial court did not abuse its wide discretion in allowing the State to present evidence of flight and resisting.[2]

Having admitted evidence that it took four officers to subdue Mr. Anderson, there is almost no relevance to the fact an officer employed a stun gun to subdue him. Such evidence risks an emotional rather than a thoughtful response from a jury. The trial court's denial of this aspect of Mr. Anderson's motion in limine was an abuse of discretion.

But we are firm in our determination the error was harmless. Mr. Anderson's defense was he borrowed the car from a woman. This woman testified at trial. She testified she purchased the car from a person she never met before. The State's cross-

[2] Mr. Anderson argues consciousness of guilt was speculative because he had two outstanding warrants, and his flight and resistance were related to the warrants. Mr. Anderson's two outstanding warrants were mentioned during the motion in limine. But the connection between those warrants and his flight was not made on the oral record, and the written motion in limine is not part of the appellate record. Because we are unable to

examination of this witness made her story unbelievable. She testified she looked at the car, but did not notice the out-of-state plate, nor did she ask to look at the car's registration. She claimed to have received a bill of sale when she purchased the car. She admitted she had not seen the car since Mr. Anderson's arrest, but claimed to have the bill of sale in her possession.

> [Prosecutor:] Okay. And you have the bill of sale now?
> [Witness:] I do have the bill of sale.
> [Prosecutor:] . . . 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 [now]?
> [Witness:] *That's a good question.*
> [Prosecutor:] Nothing further.

RP at 264 (emphasis added).

D. *Imposition of LFOs*

Mr. Anderson argues the trial court erred by imposing LFOs against him. He argues when LFOs are imposed against a person without the ability to pay, they violate due process. The State counters with three responses: First, Mr. Anderson did not raise any LFO objection to the trial court, and this court therefore should refuse to consider this unpreserved error. Second, all of the LFOs imposed on Mr. Anderson are mandatory. Third, citing *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), the State argues that constitutional concerns are not implicated until the State seeks to enforce payment. Mr.

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verify this argument was made below, we will not consider it on appeal. RAP 2.5(a).

Anderson does not dispute his failure to object below or the mandatory nature of the LFOs imposed. He instead responds that we should review and strike the LFOs because such relief is consistent with *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

In *Blazina*, the court exercised its discretion under RAP 2.5(a) to review the defendant's argument first raised on appeal that the trial court violated RCW 10.01.160(3) when it imposed *discretionary* LFOs without considering his ability to pay. *Blazina*, 182 Wn.2d at 830. Contrary to Mr. Anderson's argument, *Blazina* does not encourage either review or reversal of *mandatory* LFOs. We, therefore, exercise our discretion and decline to review Mr. Anderson's unpreserved claimed LFO error.

SAG ISSUE 1: *Whether the trial court improperly admitted evidence concerning two duplicate keys recovered at scene of the crime*

Mr. Anderson does not specify exactly which witness or what keys were allegedly used prejudicially by the State. However, during the trial Mr. Dugdale and Sergeant Vigesaa testified about the contents of the Maxima when they recovered it. Mr. Dugdale testified one of the items the police recovered from the Maxima was a reproduction of the key to the Maxima made without his consent. Sergeant Vigesaa confirmed with Mr. Dugdale the reproduced key was not Mr. Dugdale's. The police found the key along with a mechanic's check sheet stating the key was for the Maxima.

Sergeant Vigesaa testified he recovered two other reproduced vehicle keys at the scene. He explained it is very common to find multiple sets of keys (some shaved and some unshaved) when investigating stolen motor vehicles. Sergeant Vigesaa based his explanation on the approximately 500 stolen motor vehicle investigations he has been involved in as a police officer. He further explained, based on his experience, it is common practice for motor vehicle thieves to have multiple sets of keys to multiple vehicles, and it is possible for someone to have a key made for a stolen vehicle. On cross-examination, Sergeant Vigesaa testified that as many as 60 percent of stolen vehicle cases involve shaved keys, and as many as 50 percent involve damage to a vehicle (e.g. punctured ignition, removed stereo, etc.). Defense counsel noted Sergeant Vigesaa's report did not include information about any shaved keys or damage to the Maxima.

All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. Relevant evidence may be excluded by a trial court if the danger of unfair prejudice substantially outweighs the probative value. ER 403. Facts tending to establish a party's theory of the case will generally be found to be relevant. *Mak*, 105 Wn.2d at 703. Evidence likely to elicit an emotional response rather than a rational decision carries a risk of unfair prejudice. *Salas*, 168 Wn.2d at 671. The State used the keys at trial to show that Mr. Anderson was guilty of possession of a stolen motor vehicle. Sergeant

Vigesaa never used this evidence to assert that Mr. Anderson had stolen other vehicles or was a career criminal. There is no evidence the use of the keys at trial elicited an emotional reaction from the jury. On cross-examination, defense counsel effectively countered Sergeant Vigesaa's testimony by noting that he did not indicate in his report that a shaved key was recovered at the scene or that the Maxima was damaged, despite earlier testimony that shaved keys or damage to a vehicle occurs in 50 percent to 60 percent of stolen vehicle cases. The evidence of the keys was not overly prejudicial and was relevant as part of the State's case against Mr. Anderson for the crime of possessing a stolen motor vehicle. We find no abuse of trial court discretion.

SAG ISSUE 2: *Whether the State presented sufficient evidence to prove the knowledge element of the crime charged*

Mr. Anderson argues the State failed to prove he knew the car was stolen. In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When a defendant challenges the sufficiency of the evidence, the proper inquiry 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]ll reasonable inferences from the evidence must be drawn in favor of the State and

interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). This court's role is not to reweigh the evidence and substitute its judgment for that of the jury. *See State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because the jurors observed the witnesses testify firsthand, this court defers to the jury's resolution of conflicting testimony, evaluation of witness credibility, and the decision regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person is guilty of a class B felony, possession of stolen vehicle, if he or she possesses a stolen motor vehicle. RCW 9A.56.068(1). The statute lacks a "knowledge" element. But we infer "knowledge" is an element because we doubt the legislature intended to incarcerate someone up to 10 years for driving a car he did not know was stolen. *See* 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL, 77.21 cmt. (3d ed. 2008) (The legislature must have intended "knowledge" to be an element of the offense, or else the class B felony would be a strict liability offense

for simple possession.).

At trial, the State offered the following evidence to show Mr. Anderson acted with knowledge that the car was stolen. Mr. Anderson told the sergeant he had borrowed the car, and the woman who testified did a very poor job corroborating Mr. Anderson's story. A jury could infer that if the witness's story was false, so was Mr. Anderson's. Also, Mr. Anderson fled and resisted arrest soon after the sergeant told him he was driving a stolen car. Viewing the evidence in the light most favorable to the State, a rational trier of fact could find, beyond a reasonable doubt, Mr. Anderson knew the car was stolen.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 33141-5-III
	)	
IAN ANDERSON,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] IAN ANDERSON 800352 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JULY, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710