33873-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYRONE BELLE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Tyrone Belle committed the crime of attempting to elude a police vehicle because there was insufficient evidence to support the allegation he drove in a reckless manner after knowingly being signaled to stop.

2. The trial court erred when it ordered Mr. Belle to pay a $100 DNA collection fee.

II. ISSUES PRESENTED

1. Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the attempt to elude a police vehicle charge was proven beyond a reasonable doubt?

2. Did the defendant fail to preserve any DNA collection fee issue for appeal?

3. Does the $100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause or the equal protection clauses of the state or federal constitutions?

4. Did the trial court err when it ordered the defendant to pay the mandatory $100 DNA collection fee?

III. STATEMENT OF THE CASE

The defendant/appellant, Tyrone Belle, was charged by amended information in Spokane County Superior Court on March 19, 2015 with one count of attempt to elude a police vehicle and one count of violation of an ignition interlock requirement. CP 2.

The matter proceeded to a jury trial on September 21, 2015. Officer Seth Killian of the Spokane Police Department testified that on March 11, 2015 at 1:27 p.m., the date of the incident and in the early afternoon, he was in uniform and on patrol near the area of 1100 East Broad in northeast Spokane. RP 118-19, 121, 133, 136-37, 142. The officer was driving a fully marked patrol vehicle. RP 121. He observed and heard the suspect vehicle, a green late 1990's Chevy "dually" pickup,[1] approaching his vehicle from the south on East Helena. RP 122, 152. He initially and briefly activated his emergency lights to indicate to the driver of the pickup to slow down. RP 122. However, this had no effect on the driver. RP 125.

The officer remarked at trial: "[it] came flying around the corner. I could hear the exhaust and tires squealing." RP 122. More specifically, the

[1] The officer described the vehicle as being very wide, with an extended cab. RP 122, 124. The pickup was lifted; it also had a loud exhaust, black tinted windows, large driving lights on the grill, decorative flames on the side of the vehicle, and aluminum rims. RP 123-24.

officer was facing westbound, with cars parked on both sides of the road. The officer and a white car directly ahead of the officer pulled off to the side of the road. RP 123. The officer did so to avoid being struck by the pickup, as he believed the pickup was not going to stop. RP 123-24. The street was a narrow residential street. RP 108, 124.

The officer flashed his lights at the pickup. RP 125. The pickup nearly struck the officer's vehicle as it sped past him, with slight distance between the two vehicles. RP 124, 163. As the vehicle approached and passed, the officer observed the face of the suspect driver. RP 124, 180. The pickup also contained a passenger. RP 124, RP 159, RP 161. The area was posted at 25 mph, and the officer visually estimated the vehicle speed at approximately 50 mph at that time.[2] RP 160. The officer made a U-turn, using part of the sidewalk because of the narrow width of the street. RP 125, 167.

The officer accelerated toward the pickup, with his emergency lights activated. RP 125.[3] As the officer observed the vehicle, it slid around the corner at the intersection on Magnolia Street. RP 125, 168. The officer then

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[2] At the time of the incident, the officer was qualified in speed measurement, including radar, laser and visually estimating speed plus or minus two miles an hour. RP 115.

[3] The officer was not able to immediately inform police radio of the chase because of the high volume of radio traffic. RP 126.

activated his siren and air horn with several short bursts. RP 126-27. He did not continuously use the siren at this point because he was in a residential neighborhood. RP 125-26.

Several people in the neighborhood signaled to the officer and pointed toward the direction of the pickup. RP 127. As the officer turned the corner at the intersection, he had to slow down because there was a resident with his child on a bicycle in the roadway. RP 127. The officer again accelerated toward the pickup, and turned on his siren for a continuous discharge. RP 127. The officer then briefly turned his siren off so he could use his police radio to report the chase. RP 127.

The pickup came to a brief, slow roll, as the driver peered in his mirror at the officer. RP 127. The driver then spun the pickup's tires, and slid around the corner at the intersection at Everett. RP 127, 171. At this point, the officer was able to document the license plate number. RP 127. As this occurred, the officer observed children in the area, and he was concerned because he was near a park where children possibly could be crossing the street to access the park. RP 127-28.

The officer then terminated the chase because of the potential for injury to children and adults in the area. RP 128-29, RP 147. The officer turned around, obtained an address from police radio of the registered owner, a female who resided in northeast Spokane. RP 129-30. The officer

ultimately identified the defendant as the driver of the vehicle, with aid of a Department of Licensing photograph. RP 132-33. The defendant was also identified in court by the officer. RP 133.

The defendant had a suspended license at the time of the offense, and he was required to have an ignition interlock device[4] in the vehicle. RP 135. After locating the pickup in an alleyway, the officer looked through both its driver and passenger side windows, and he did not observe an ignition interlock device. RP 134-135, 177, 193-94, 207. A stipulation was read to the jury that the defendant was required to have an ignition interlock a vehicle before driving it. RP 235, CP 4.

The defendant was convicted as charged by the jury. CP 5, 6.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND EACH ELEMENT OF THE ATTEMPT TO ELUDE A POLICE VEHICLE BEYOND A REASONABLE DOUBT.

Mr. Belle claims there was insufficient evidence to establish that the defendant drove recklessly after he was knowingly signaled to stop by the officer and the essential elements of the crime did not occur in sequence. *See* Appellant's Br. at 5, 7.

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[4] An ignition interlock device cuts off the ignition to a vehicle if the driver's blood-alcohol level is above a preset limit. *See,* RCW 46.20.720.

Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed de novo. *Rich*, 184 Wn. 2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). An appellate court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence.

State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664 (2014).

A jury may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. *Jackson*, 112 Wn.2d at 875. An inference should not arise when other reasonable conclusions follow from the circumstances. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The jury may infer from one fact the existence of another essential to guilt, if reason and experience support the inference. *Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

Argument.

The attempt to elude a police vehicle statute provides:

> (1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024.

Our Supreme Court has held under the prior version of the statute that in order to be guilty of attempting to elude a police vehicle, "[a] suspect must (1) willfully fail (2) to *immediately* bring his vehicle to a stop, (3) and drive in a manner indicating a wanton and willful disregard for the lives or property of others (4) while attempting to elude police after being signaled to stop by a uniformed officer." *State v. Tandecki*, 153 Wn.2d 842, 848, 109 P.3d 398 (2005) (emphasis in the original).

"Willfulness" in the attempting to elude statute is identical to "knowledge". *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011); *State v. Mather*, 28 Wn. App. 700, 702, 626 P.2d 44 (1981).

The trial court's instruction number six, in relevant part, read as follows:

> To convict the defendant of the crime of attempting to elude a police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 11, 2015, the defendant drove a motor vehicle;
>
> (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
>
> (3) That the signaling police officer's vehicle was equipped with lights and siren;
>
> (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;

(5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a manner indicating a reckless manner; and

(5) That the acts occurred in the State of Washington.

CP 63.

The court's instruction number seven defining "reckless"[5] stated:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact.

CP 64.

[5] The jury instructions in the present case applied the outdated standard of RCW 46.61.024 requiring "wanton or willful disregard for the lives or property of others," which was superseded in 2003 with the lesser "reckless manner" standard. CP 64. *See* Laws of 2003, ch. 101, § 1. The current definition of reckless manner requires "rash or heedless manner, indifferent to the consequences". *See State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007). The appellant justifiably does not assign error to this higher standard of proof, as he could not establish prejudice from doing so. RCW 9A.08.010(2) allows proof of a higher mental state to establish the presence of a lower mental state. The term "reckless manner" contemplates a lesser mental state than the "wanton or willful" standard. *See, e.g., State v. Roggenkamp*, 153 Wn.2d 614, 626-29, 106 P.3d 196, 200 (2005).

The trial court's instruction number eight stated: "A person acts willfully when he or she acts knowingly." CP 65.

In *State v. Stayton*, 39 Wn. App. 46, 691 P.2d 596 (1984), the court considered an earlier version of the attempt to elude statute in the context of a challenged "to convict" jury instruction. *Id.* at 47. The court separated the requirements of the former statute into three elements that it claimed needed to occur chronologically: (1) a uniformed police officer whose vehicle is appropriately marked must give a signal, (2) the driver must be a person who willfully fails or refuses to stop immediately, and (3) while attempting to elude a pursuing police vehicle the driver drives recklessly. *Id.* at 49. The signal to stop may be given by the officer at the side of a road. *Id.* at 50. Circumstantial evidence may "indicate" a wanton and willful disregard, but the defendant may rebut that inference from circumstantial evidence. *State v. Sherman*, 98 Wn.2d 53, 59, 653 P.2d 612 (1982).

Here, at the time of the incident, the officer was in uniform and driving a patrol vehicle equipped with emergency lights and siren. The officer initially flashed his emergency lights to warn the driver of the pickup to slow down. After nearly striking the patrol car, the officer again activated his emergency lights, turned his vehicle around, and accelerated toward the pickup. The defendant's vehicle then slid as it negotiated the turn at Magnolia. The officer gave several short bursts from his siren and air horn,

signaling the defendant to stop. Within a short period of time, the officer turned on his siren. He briefly turned the siren off to communicate with police radio. As the officer approached the defendant with emergency lights activated, the defendant stared at the officer through the vehicle mirror, broke traction with the pickup tires, slid around the corner at the intersection of Everett Avenue and sped away.

Driving with utter disregard for the rules of the road, including driving double the speed limit through residential streets, sliding through three different intersections, spinning the vehicle tires in an effort to speed away from the officer, nearly striking other vehicles, with adults and children within the vicinity of the roadway during the incident individually and collectively show the defendant knew of and disregarded a substantial risk that a wrongful act may occur.

The defendant argues that because the officer did not continuously activate his siren, the State did not establish that the defendant had knowledge there was a pursuing police vehicle. *See* Appellant's Br. at 8.

It is disingenuous to argue the defendant had no knowledge the officer was pursuing him. Indeed, the officer initially activated his emergency lights when he observed the defendant slide the pickup around an intersection, and he and another driver had to take evasive action by pulling their vehicles to the side of the road to avoid being struck by the

defendant as he sped past both vehicles over double the speed limit[6] in broad daylight in a residential neighborhood.

Contrary to the defendant's argument, an officer in pursuit does not have to continuously activate the siren to constitute an attempt to elude. The signal given by the officer may be by hand, voice, emergency light, *or* siren. RCW 46.61.024 (emphasis added).

Lastly, the defendant's premise that he did not know he was being pursued is refuted by the facts; a jury certainly could find he had knowledge of the pursuit when he taunted the officer by momentarily stopping, watching the officer approach with emergency lights activated, and subsequently spun the tires, and immediately left the area at a high rate of speed. At that point in time, the defendant willfully failed to *immediately* bring his vehicle to a stop, and, as beforehand, continued to drive in a manner indicating a wanton and willful disregard for the lives or property of others while attempting to elude police after being signaled to stop by a uniformed officer.

The State presented substantial evidence that the defendant attempted to elude the officer.

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[6] *See State v. Malone,* 106 Wn.2d 607, 611, 724 P.2d 364 (1986) (noting that legislature enacted the eluding statute to address the dangers of high-speed chases).

B. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE DNA COLLECTION FEE IMPOSED IN HIS CASE IS A MANDATORY FINANCIAL OBLIGATION.

The defendant received $800 in mandatory LFOs. The $500 crime victim assessment, $100 DNA (deoxyribonucleic acid) collection fee, and $200 criminal filing fee, are mandatory legal financial obligations, each required irrespective of the defendant's ability to pay. CP 16-17. *State v. Lundy,* 176 Wn. App. 96, 102, 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 criminal filing fee is mandated by RCW 36.18.020(2)(h). In this case, the sole assignment of error is that the trial court erred by assessing the mandatory DNA fee.

The defendant failed to object to the imposition of the DNA fee, and failed to argue that he could not pay the fee. He raised no argument suggesting that the mandatory collection fee violated either the due process clause or equal protection guarantees. Therefore, he failed preserve the matter for appeal. RAP 2.5.

Moreover, the defendant fails to cite or discuss this Court's recent decisions on this issue. *See*, *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016), *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015). As in *Thornton*, the defendant here fails to provide facts from the record

establishing that he has paid or has been ordered to pay for the DNA fee in prior cases.[7] As in *Stoddard*, the issue here regarding due process was not raised, preserved, or developed in the trial court with supporting facts that would enable this Court to properly review the claim:

> We consider whether the record on appeal is sufficient to review [the defendant's] constitutional arguments. [The defendant's] contentions assume his poverty. Nevertheless, the record contains no information, other than [The defendant's] statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a $100 fee. The cost of a criminal charge's defense exponentially exceeds $100. Therefore, one may be able to afford payment of $100, but not afford defense counsel. [The defendant] has presented no evidence of his assets, income, or debts. Thus, the record lacks the details important in resolving Stoddard's due process argument.
>
> [The defendant] underscores that other mandatory fees must be paid first and interest will accrue on the $100

[7] In *Thornton*, this Court determined:

> Ms. Thornton provides no facts to support her new argument on appeal suggesting a sample was already collected and submitted to the Washington State Patrol Crime Laboratory under the prior cause number. *See Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors). Ms. Thornton thus makes no showing that RCW 43.43.754(2) even applies to her case, much less to support an argument that it precludes collection of the $100 DNA fee as a mandatory LFO.

State v. Thornton, 188 Wn. App. at 374.

> DNA collection fee. This emphasis helps [the defendant] little, since we still lack evidence of his income and assets.

Stoddard, 192 Wn. App. at 228-29.

This Court should not accept review of the due process or equal protection claim based upon an undeveloped record.

Importantly, the defendant neither cites to RAP 2.5 nor offers an argument on appeal suggesting the alleged error is reviewable when no objection was made supporting the claim at the trial court level. 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 DNA fee issue. *See, e.g.*, *State v. Lazcano*, 188 Wn. App. 338, 360, 354 P.3d 233 (2015), *review denied*, 185 Wn.2d 1008 (2016):

> The general rule remains that a criminal defendant may not obtain a new trial whenever he or she can identify a constitutional error not litigated below. *State v. Scott*, 110 Wn.2d at 687, 757 P.2d 492 (1988). The manifest error exception is a narrow one. *State v. Scott*, 110 Wn.2d at 687, 757 P.2d 492.

Lazcano, 188 Wn. App. at 360.

There is nothing manifest, i.e., so obvious, self-evident, axiomatic, indisputable, plain, clear, perspicuous, distinct, or palpable, appearing from the record provided as to warrant appellate review of the trial court's

imposition of the mandatory $100 DNA fee, a fee that is required by statute.[8]

C. THE DNA FEE IMPOSITION STATUTE, RCW 43.43.7541. DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars for every felony sentence. The defendant impliedly *admits* - as this Court has held[9] - that this statute serves a legitimate purpose, because it "[o]stensibly serves the state's interest to fund

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[8] 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 9.94A 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.

[9] In *State v. Thornton*, 188 Wn. App. at 375, this Court stated:

> 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.

the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate criminal identification. RCW 43.43.752-.7541." Appellant's Br. at 11. However, the defendant then claims this statute violates the substantive due process clause because "[w]hen applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA collection fee does not rationally relate to the state's interest in finding the collection, testing, and retention of an individual defendant's DNA." Appellant's Br. at 13.

As above, the conclusion that the defendant cannot pay the $100 DNA fee is not supported by the record and it is assumed by the defendant. Moreover, the defendant's argument that due process is violated - after admitting there is a rational basis for the mandatory DNA fee - is not an argument supported by citation to authority. The authority on this issue supports the opposite conclusion. 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).

D. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION.

Initially, defendant's equal protection claim is based on his assertion that "[h]ere, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times." Appellant's Br. at 15. "[H]aving been convicted of a felony, Mr. Belle is similarly situated to other affected persons within the afflicted group. *See* RCW 43.43.754; RCW 43.43.7541." Appellant's Br. at 14.

However, Defendant has not established that he paid or has been ordered to pay the DNA fee more than once. He speculates that a fee was already imposed in prior cases because of his convictions for several prior felony offenses. Appellant Br. at 11. However, this speculation does not establish a fact. *See Bulzomi v. Dep't of Labor & Indus.,* 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

Secondly, the defendant's argument "misses the mark." *Thornton*, 188 Wn. App. at 374. In *Thornton*, this Court noted that the 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.

All defendants sentenced for felonies receive the DNA assessment as part of their sentencing. Nothing is more equal than that.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT TO SUBMIT TO A COLLECTION OF HIS DNA WITH THE PROVISO THAT THE ORDER DID NOT APPLY IF THE STATE PATROL ALREADY HAS A SAMPLE OF THE DEFENDANT'S DNA.

The defendant was provisionally required to submit to a DNA collection. That order is contained at page 9, provision 4.4, of the Felony Judgment and Sentence. CP 18. That "order" contains the proviso that this

DNA requirement "*does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense*." This follows the statutory scheme set forth in RCW 43.43.754, where, under subsection (1) "a biological sample must be collected for purposes of DNA identification analysis from [a qualifying offender]"; then, under subsection (2), "[i]f the Washington State Patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted."[10]

The order follows the operation of the statute. There is no abuse of discretion in the trial court ordering that which is required by law.

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[10] Again, this issue was settled by this Court in its recent decision in *Thornton, supra*:

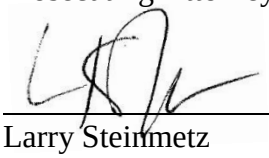
> The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction. *Thornton*, 188 Wn. App. at 375.

V. CONCLUSION

For the reasons stated herein, Respondent respectfully requests this Court affirm the conviction for attempt to elude a police vehicle, and the trial court's imposition of the mandatory DNA fee of $100.

Dated this 3 day of June, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



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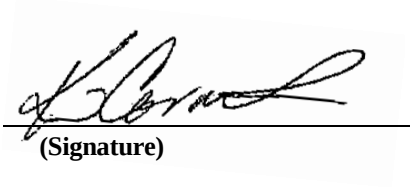
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. TYRONE BELLE, Appellant,	NO. 33873-8-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 3, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lisa E. Tabbut
ltabbutlaw@gmail.com

6/3/2016 **(Date)** Spokane, WA **(Place)**  **(Signature)**