

March 19, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS JEROME CUMMINGS,

Appellant.

No. 49793-0-II

UNPUBLISHED OPINION

MAXA, C.J. – Nicholas Cummings appeals his conviction of first degree unlawful possession of a firearm, the imposition of certain mandatory legal financial obligations (LFOs), and the trial court’s setting of a \$50,000 bail for his release before trial.

We hold that (1) the trial court erred in admitting an officer’s testimony about another officer’s hearsay statement regarding Cummings’ birthdate that was used to show that he previously had been convicted of a serious offense, but the error was harmless because the State presented sufficient evidence to support Cummings’ conviction even without the hearsay statement; (2) as the State concedes, the criminal filing fee and the deoxyribonucleic acid (DNA) collection fee imposed as mandatory LFOs must be stricken; and (3) Cummings’ pretrial release claims are moot and will not be addressed.

Accordingly, we affirm Cummings' conviction of first degree unlawful possession of a firearm, but we remand for the trial court to strike the criminal filing fee and the DNA collection fee from Cummings' judgment and sentence.

#### FACTS

On April 9, 2016, officers Lloyd Lepell and Carl Murrell responded to a dispatch call regarding a fight involving a possible gun. Lepell contacted a person matching the description of one of the parties in the fight. The individual was carrying a backpack. The individual told Lepell that his name was Nicholas Cummings.

Lepell read Cummings his *Miranda*<sup>1</sup> warnings. Cummings acknowledged his rights and stated that he was a felon with a firearm. Cummings told Murrell that there was a pistol wrapped in a stocking hat in his backpack. Murrell searched the backpack and found the pistol with five rounds in the magazine. He also found mail addressed to Cummings.

The State charged Cummings with first degree unlawful possession of a firearm. The information alleged that Cummings previously had been convicted of a serious offense. At his arraignment on April 11, Cummings stated that he was working and earning \$15 an hour but that he was currently homeless. The trial court reserved argument on the issue of bail and set bail at \$50,000.

The trial court eventually held a bail hearing on October 24. Cummings argued that he had a confirmed place to stay with a family friend and had been very cooperative with the officers during his arrest. As a result, Cummings requested that bail be lowered to \$10,000. The State argued that setting bail at \$50,000 was warranted because Cummings previously had

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

required bench warrants on 12 cases and had eight previous felony convictions. The trial court denied Cummings' request to reduce bail.

At trial, Murrell testified that Leppell had identified the individual they had detained as Cummings through the law enforcement database. Murrell stated that it was common to identify an individual by obtaining a date of birth, and that he learned Cummings' birthdate from Leppell. The State asked Murrell to state the date of birth he had obtained, and Cummings objected on hearsay grounds. The trial court overruled the objection, ruling that the statement was not hearsay because it was a statement of identification. Murrell then testified about Cummings' exact date of birth.

Leppell testified that he identified the person he detained as Cummings because Cummings told him his name. Leppell did not testify about Cummings' birthdate.

Cummings did not stipulate that he previously had been convicted of a serious offense. The State presented a guilty plea statement and a judgment and sentence showing that a person named Nicholas Jerome Cummings with a date of birth of December 27, 1980 had been convicted of second degree burglary in April 2007.

The jury found Cummings guilty of first degree unlawful possession of a firearm. At sentencing, the trial court found that Cummings was indigent and waived discretionary LFOs. However, the court imposed as mandatory LFOs the criminal filing fee and the DNA collection fee.

Cummings appeals his conviction and imposition of mandatory LFOs. In addition, Cummings appeals the trial court's denial of his request to reduce bail.

ANALYSIS

A. ERRONEOUS ADMISSION OF HEARSAY TESTIMONY

Cummings argues that the trial court erred by admitting Murrell’s testimony regarding Cummings’ birthdate. He claims that the testimony was hearsay because Murrell obtained the birthdate from Leppell. Cummings further argues that the trial court’s error prejudiced him because without Murrell’s erroneously admitted testimony, there was insufficient evidence to prove that he previously had been convicted of a serious offense. The State concedes that the testimony was hearsay and that the trial court erred in admitting it but argues that the error was harmless. We agree with the State.

1. Legal Principles

a. Unlawful Possession of a Firearm

Cummings was convicted of first degree unlawful possession of a firearm. Former RCW 9.41.040(1)(a) (2014) states that a person is guilty of first degree unlawful possession of a firearm if the person has a firearm in his or her possession or control after having previously been convicted of any “serious offense.” Under former RCW 9.41.010(21)(a) (2015), a “serious offense” is defined to include any “crime of violence.” The definition of a “crime of violence” includes second degree burglary. Former RCW 9.41.010(3)(a).

In many cases in which the State is required to prove a defendant’s prior felony conviction, the defendant stipulates that he or she has a prior conviction to avoid prejudicing the jury with details of the conviction. *See State v. Streepy*, 199 Wn. App. 487, 502-03, 400 P.3d 339, *rev. denied* 189 Wn.2d 1025 (2017). However, Cummings did not stipulate that he previously had been convicted of a serious offense. Therefore, the trial court instructed the jury

that to convict Cummings, the State had to prove beyond a reasonable doubt that he previously had been convicted of second degree burglary, a serious offense.

b. Proving Identity

To prove that Cummings previously had been convicted of second degree burglary, the State presented documents showing that a person named Nicholas Cummings was convicted of that offense in 2007.

When criminal liability depends on the defendant being the person to whom a document pertains, the State must prove beyond a reasonable doubt that the person named in the document is the same person as the defendant. *State v. Sapp*, 182 Wn. App. 910, 917, 332 P.3d 1058 (2014). The State cannot sustain its burden by showing only that the defendant and the individual named in the document share a name; there also must be independent evidence that the person named is the defendant. *Id.* at 917-18.

2. Inadmissible Hearsay

Under ER 801(c), “hearsay” is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay generally is inadmissible under ER 802. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 366, 225 P.3d 396 (2010).

However, under ER 801(d)(1)(iii), a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is “one of identification of a person made after perceiving the person.” The rationale for the rule is that “evidence of pretrial identification has greater probative value than a courtroom identification because the witness’ memory is fresher and the identification occurs before the witness can be

influenced to change his mind.” *State v. Grover*, 55 Wn. App. 923, 931-32, 780 P.2d 901 (1989).

We review the trial court’s decision to admit evidence for an abuse of discretion. *State v. Quaaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). However, we review the trial court’s interpretation of the rules of evidence de novo. *Alvarez-Abrego*, 154 Wn. App. at 361.

Here, the trial court ruled that Murrell’s testimony regarding Leppell’s out-of-court statement to him about Cummings’ birthdate was not hearsay because Leppell’s statement was one of identification under ER 801(d)(1)(iii). However, ER 801(d)(1)(iii) states that a statement of identification is not hearsay if it is made after *perceiving* the person being identified. The statement about Cummings’ birthdate was unrelated to Leppell’s perception of him. Therefore, ER 801(d)(1)(iii) is inapplicable here. We hold that the trial court erred in admitting Murrell’s testimony about Cummings’ birthdate.

### 3. Harmless Error

The question here is whether the trial court’s error was harmless. We review the erroneous admission of hearsay evidence under the nonconstitutional harmless error standard. *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). Under that standard, an error is harmless unless there is a reasonable probability that, but for the error, the outcome of the trial would have been materially different. *Id.*

Cummings argues that without Murrell’s hearsay testimony, the State did not present sufficient evidence to prove that Cummings previously had been convicted of second degree burglary because the only evidence was that the person who was convicted of second degree burglary in 2007 had the same name as Cummings.

However, the State presented more evidence than merely showing that a person named Nicholas Jerome Cummings had been convicted of second degree burglary in 2007. Leppell also testified that Cummings admitted that he was a felon with a firearm. This admission supports an inference that Cummings was the same person who previously had been convicted of second degree burglary. Therefore, we hold that the evidence was sufficient to prove that Cummings was guilty of first degree unlawful possession of a firearm even without Murrell's testimony.

Cummings's only harmless error argument is that without the hearsay evidence the evidence was insufficient to convict him, which we have rejected. Accordingly, we hold that the trial court's error in admitting Murrell's hearsay testimony was harmless.

B. IMPOSITION OF MANDATORY LFOs

Cummings argues, and the State concedes, that the criminal filing fee and the DNA collection fee the trial court imposed as mandatory LFOs must be stricken. We agree.

In 2018, the legislature amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on an indigent defendant; and (2) RCW 43.43.7541, which established that the DNA collection fee no longer is mandatory if the offender's DNA previously had been collected because of a prior conviction. The Supreme Court in *State v. Ramirez* held that these amendments apply prospectively to cases pending on direct appeal. 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

Here, the trial court found that Cummings was indigent at the time of sentencing. Therefore, under the current version of RCW 36.18.020(2)(h) the criminal filing fee imposed on Cummings must be stricken. In addition, the State's records show that Cummings' DNA previously was collected. Therefore, under the current version of RCW 43.43.7541 the DNA

collection fee imposed on Cummings also must be stricken. Accordingly, we remand for the trial court to strike the criminal filing fee and the DNA collection fee.

C. MONETARY BAIL CLAIMS

Cummings claims that the trial court violated CrR 3.2 and multiple constitutional provisions by setting a \$50,000 bail for his release before trial. We hold that Cummings' monetary bail claims are moot and decline to address them.

1. CrR 3.2 Requirements and Constitutional Claims

Regarding CrR 3.2, Cummings claims that the trial court did not follow the presumption of release on personal recognizance and failed to make the required findings to overcome the presumption of release. CrR 3.2(a) provides as follows:

Any person other than a person charged with a capital offense, shall at the preliminary appearance . . . be ordered released on the accused's personal recognizance pending trial unless:

- (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
- (2) there is shown a likely danger that the accused:
  - (a) will commit a violent crime, or
  - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

“The purpose of CrR 3.2 is to ‘alleviate the hardships associated with pretrial detentions and bail.’ ” *State v. Huckins*, 5 Wn. App. 2d 457, 465, 426 P.3d 797 (2018) (quoting *State v. Perrett*, 86 Wn. App. 312, 318, 936 P.2d 426 (1997)).

If the trial court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of several possible conditions, including bail. CrR 3.2(b). CrR 3.2(c) lists several relevant factors for deciding which conditions of release to impose.

If the trial court determines that a substantial danger exists that the accused will commit a violent crime or seek to intimidate witnesses or interfere with the administration of justice, the court may impose one or more of several nonexclusive conditions. CrR 3.2(d). Posting bail is one of the conditions, but that condition “may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.” CrR 3.2(d)(6). CrR 3.2(e) lists several relevant factors for deciding which conditions of release to impose.

Cummings also argues that the trial court violated (1) Article I, section 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution, which prohibit excessive bail; (2) due process, because he could not afford to post bail; (3) equal protection, because defendants without money are treated differently than defendants with money; and (4) the right to assistance of counsel, because his counsel was not available when the trial court first imposed the \$50,000 bail.

## 2. Mootness

An issue is moot if we can no longer provide effective relief. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). We generally do not consider questions that are purely academic. *Id.* Because Cummings no longer is subject to detention before trial, we cannot provide him with an effective remedy for the trial court’s alleged error. Therefore, his CrR 3.2 and constitutional pretrial release claims are moot.

But we may consider a moot issue if it involves matters of continuing and substantial public interest. *State v. Cruz*, 189 Wn.2d 588, 597-98, 404 P.3d 70 (2017). In determining whether a case presents an issue of continuing and substantial public interest, we consider (1) the public or private nature of the issue, (2) whether guidance for public officers on the issue is desirable, and (3) the likelihood that the issue will recur. *Id.* at 598.

This court recently addressed monetary bail issues under CrR 3.2 in *Huckins*. 5 Wn. App. 2d at 468-69. The court held that although the issue was moot, it was of continuing and substantial public interest. *Id.* at 463-64. Therefore, the court considered the CrR 3.2 claim on the merits. *Id.* at 464.

The court held that under the facts of that case, the trial court did not abuse its discretion under CrR 3.2(a) by concluding that there was a substantial danger that the defendant would commit a violent crime if released on his own recognizance. *Id.* at 467. However, the court held that the trial court failed to consider whether a less restrictive condition or combination of conditions would reasonably assure the safety of the community as required under CrR 3.2(d)(6) to order monetary bail. *Id.* at 469. Therefore, the court held that the trial court abused its discretion in setting monetary bail. *Id.*

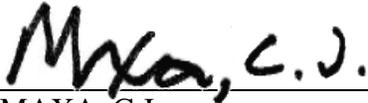
As in *Huckins*, we again emphasize that trial courts must comply with the requirements of CrR 3.2 when imposing monetary bail as a condition of pretrial release. We also acknowledge that trial courts must be guided by constitutional principles as well. However, under the specific facts of this case, we decline to consider as a matter of substantial public interest whether the trial court erred in imposing monetary interest here.

We hold that Cummings' monetary bail claims are moot and do not raise an issue of substantial public interest. Therefore we decline to consider them.

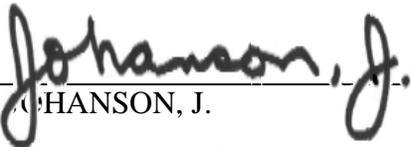
#### CONCLUSION

We affirm Cummings conviction of first degree unlawful possession of a firearm, but we remand for the trial court to strike the criminal filing fee and the DNA collection fee from Cummings' judgment and sentence.

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

  
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MAXA, C.J.

We concur:

  
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JOHANSON, J.

  
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LEE, J.