

62968-9

62968-9

NO. 62968-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LINKON C. BROWN,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DEBORAH FLECK

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Could a rational trier of fact have found the defendant guilty of promoting prostitution in the second degree when he was arrested with the "buy money" in his hands in one of two hotel rooms he rented for "escort" services?

2. Did the trial court abuse its discretion in finding that an undercover detective's testimony about his observations in a hotel room about the woman he hired beginning to remove her clothing, was not hearsay evidence?

3. Did the sentencing court properly impose a \$100 DNA collection fee?

4. The defendant has sought a remand for entry of the findings of fact and conclusions of law related to the pretrial CrR 3.5 (pertaining to custodial statements) and CrR 3.6 (pertaining to search issues) hearings. At the time of the filing of the Brief of Appellant, the findings had not been entered. This has been rectified. With no prejudice alleged, or argument pertaining to the CrR 3.5 or CrR 3.6 hearings, is this issue now moot?

**B     STATEMENT OF THE CASE**

**1.     PROCEDURAL FACTS.**

A jury found the defendant guilty as charged of promoting prostitution in the second degree. CP 60, 62. With an offender score of six, the defendant received a standard range sentence of 25 months. CP 132-93. The defendant is currently out of custody pending appeal. CP \_\_\_\_, sub #106; CP \_\_\_\_, sub #111.

**2.     SUBSTANTIVE FACTS.**

The date of the charged offense is October 11, 2007. CP 62. However, the defendant's activities were known to the police long before that. In September of 2006, King County detectives began investigating prostitution ads listed on the online web cite Craigslist. 6RP 511. Detectives found 30 to 40 ads, all with the same phone number--later connected to the defendant--offering prostitution services in the Maple Valley area. 6RP 512-14, 518, 528-30, 544-47; 8RP 821. One of the girls went by the ad name Rhonda, later identified as Debra Bowers, the co-defendant. 6RP 513.

On October 30, 2006, acting undercover, Detective Anthony Mullinax called the number listed and asked to set up a date with

"Samantha," later identified as Lisa Ellis. 6RP 519, 544. Lisa Ellis is the girlfriend of the defendant's son. 7RP 640. Samantha's ad included the initials "FS," meaning full service sexual intercourse, and "NS," meaning anal intercourse. 6RP 528-29.

Debra Bowers answered the phone and said that she was in charge of scheduling. 6RP 519. Debra asked Detective Mullinax how much he wanted to spend and the Detective said \$150. Id. He was then told to take the Hobart Exit off of Highway 18 and call again. Id. When he called again, he was given an address in Maple Valley where the defendant lived. 6RP 519-20; 8RP 751.

Detectives then served a warrant on the defendant's home. 6RP 537. Both defendants were present, along with "Samantha" (Lisa Ellis), and others. 6RP 543. In the master bedroom detectives found men's clothing, identification belonging to the defendant, a business license for an escort service owned by the defendant, a credit card machine, a large number of condoms, sex toys, written agreements for many of the girls in the defendant's employ, and a notebook containing dates, girls, sexual services and dollar amounts. 6RP 550-55, 557-58, 562, 566.

The defendant told the police that what he was doing was legal, that the girls all were independent, had signed business

agreements whereby he posted the ads, but that the money the girls made simply went to paying the rent and bills for the house. 6RP 568. The defendant said he fully intended to continue running his escort service when he got out of jail. 6RP 563.

Approximately a year later, detectives were monitoring Craigslist and noticed that the defendant was starting to operate pretty heavily in King County again. 6RP 569. They found ads for Lisa Ellis, now going by the name "Porno," Rhonda, and a new girl going by the name, "The Secretary." 6RP 569. The Secretary was later identified as Denise Bowers, the daughter of co-defendant Debra Bowers. 6RP 580-81; 8RP 822-23. Among others, ads for The Secretary (Exhibit 15) and Rhonda (Exhibit 16) were posted on Craigslist the morning of October 11, 2007, again with the defendant's phone number. 6RP 569, 571-73; 7RP 666-67.

On October 11, 2007, acting undercover, Detective Michael Klokow called The Secretary and set up a date for 6:30 at the Red Lion Hotel in Tukwilla. 7RP 666-67. Detective Klokow went to the Hotel with two \$100 bills in prerecorded buy money. 7RP 670.

When the detective arrived at the Hotel, he was met outside by Debra Bowers. 7RP 669. Debra led the detective to room 102, opened the door with an access card, and the two entered the

room. 7RP 669. Detective Klokow asked where The Secretary was and then heard a voice coming from the bathroom. 7RP 669. Debra Bowers asked for the money, the detective gave her the \$200, and Debra left the room as The Secretary came out of the bathroom and was introduced. 7RP 669-70.

Inside the room, the detective observed a handbag full of condoms and a condom on the bed. The Secretary, scantily dressed, began to remove her clothing and unwrap a condom, at which point the detective called in the arrest teams. 7RP 672.

After Debra Bowers left room 102 with the buy money, she entered room 108. 7RP 651. It was later determined that the defendant had rented both room 102 and 108 in his name for two nights. 7RP 660. When Detective Klokow signaled for the arrest team to come in, detectives knocked on the door to room 108. 7RP 653. The defendant answered and the buy money was in his hand. 6RP 582-83; 7RP 654, 8RP 744. After being placed under arrest, one of the detectives remarked, "so, you're still doing the escort business?" The defendant responded, "a man's gotta do what a man's gotta do to survive." 7RP 688-89.

Hannah Beasley, one of the defendant's ex-employees testified at trial and admitted that she had been a prostitute working

for the defendant--although after the October 11, 2007 incident. 8RP 702-28. Her duties, she described, were to provide company, time, and sex acts for men. 8RP 703. She said the defendant ran the business, took the photos of the girls and placed the ads in the Seattle Weekly, Stranger, and on Craigslist. 8RP 704-05. The ads, Beasley said, were for sex. 8RP 707.

Beasley testified that Lisa Ellis, Denise Bowers and Debra Bowers all worked for the defendant doing "dates" out of the house. 8RP 708. She said that, just like the Red Lion incident, another girl would take the money from the John and give the money to the defendant. 8RP 708-09, 722. The defendant did not give any of the money back to the girls, but they were provided with a place to live, food, and clothing. 8RP 723, 728, 735-36. Beasley said she left the defendant because she was sick of having sex for money and sick of getting high on crack; crack that was sometimes provided by the defendant. 8RP 709-10.

Co-defendant Debra Bowers testified and admitted to being a prostitute and working for the defendant. 9RP 889-92. She said that the ads were set up by the defendant, he set the prices and terms, and that all the money went to him. 9RP 890-92. She said

she never got paid, but that the defendant would provide her with drugs--every day--and she could stay in his house. 9RP 892, 905.

Debra admitted that the rooms at the Red Lion were rented for the entire weekend for the purpose of prostitution. 9RP 893. She also admitted that she took the money from the undercover detective in room 102, that the money was for sex, and that she gave the money to the defendant in room 108. 9RP 894, 903. She said that herself, Lisa Ellis, Denise Bowers and Tamara Williams were all going to provide prostitution services that weekend, that the ads were placed on Craigslist that day, and that the defendant took the photos. 9RP 897-99.

The defendant testified that he indeed owned an escort business and that he had started the business "because of the fact I have always mingled with the ladies of the night a lot." 8RP 755-57. He admitted that he marketed the girls, per agreement, but claimed that the girls were "independent." 8RP 762-66. He claimed that he did not receive any money for himself, "I was not holding a dime of their money. All money received was going to be allocated to the business or whatever, but it was not going to Linkon C. Brown, Jr.'s account." 8RP 762-66.

In regards to the Red Lion incident, the defendant claimed that Denise Bowers was not working for him at that time, although he admitted to helping post the ads for both Debra and Denise. 8RP 777, 804-05, 828-29. He claimed that Denise had come to visit her mother, Debra, and that she intended to start doing dates in the Seattle area and needed a room. 8RP 801, 804. He rented the two rooms, using his credit card to hold the room. 8RP 802, 814-15. Two rooms, the defendant claimed, because Denise would be using one, and the other room was for him to wait until Denise got the "necessary funds" to pay for the rooms and he could leave. 8RP 802, 877. He did not explain why both rooms were rented for two days.

Admitting that Debra had brought him the \$200 from the undercover detective, the defendant claimed that the money was just to pay for the room (the rooms cost \$155 total), and that none of the money was actually going to him. 8RP 803, 828; 9RP 943. He professed that he didn't know what Denise was doing in the other room, and that he had rules for the girls that worked for him, they were "not allowed to do sexual acts," because "as a legal

license escort agency, we're in and out, not allowed to do sexual acts, or have sexual acts in any way, shape or form." 8RP 841.

Additional facts are included in the sections they belong.

**C. ARGUMENT**

**1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF PROMOTING PROSTITUTION IN THE SECOND DEGREE.**

Promoting prostitution in the second degree is an "alternative means" crime; with both alternatives charged here. One can be convicted if one profits from prostitution or if one advances prostitution. The defendant argues that the evidence presented at trial was insufficient for any rational trier of fact to have found that he was intending to profit from the prostitution he was advancing. Specifically, the defendant wants this Court to accept his version of the evidence; that the \$200 in buy money recovered from his person--proceeds from prostitution, was not intended for his benefit. This argument--akin to a closing argument at trial--should be rejected. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. It is perfectly reasonable to infer that the proceeds from prostitution in the defendant's possession were for his benefit.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982).

Circumstantial evidence is equally as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Promoting prostitution in the second degree is an "alternative means" crime. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Alternative means statutes identify a single crime and provide more than one means of committing that crime. In re Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). One can be convicted (1) if one profits from prostitution or (2) if one advances

prostitution. Id. As charged and presented here, the jury was required to find "[t]hat on or about October 11, 2007, the defendant knowingly profited from prostitution or knowingly advanced prostitution." CP 52; RCW 9A.88.080.

Where a single offense may be committed in more than one way--an alternative means case, the jury must be unanimous as to the guilt for the single crime charged. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The jury need not be unanimous, however, as to the means by which the crime was committed if substantial evidence supports each alternative means. Id. Here, the defendant does not contest that there was sufficient evidence for a jury to have found that he advanced prostitution. Rather, he argues only that there was insufficient evidence that he intended to profit from prostitution.

The term "profited from prostitution" "means that a person, acting other than as a prostitute receiving compensation for personally rendered prostitution services, accepted or received money or other property pursuant to an agreement or understanding with any person whereby he or she participated or was to participate in the proceeds of a prostitution activity." RCW 9A.88.060(2); CP 54.

The defendant argues as he testified, that the buy money in his hand was not intended for his benefit. However, this is a factual argument that the jury resolved against him. As such, the defendant's argument cannot prevail. See State v. Kees, 48 Wn. App. 76, 79-80, 737 P.2d 1038 (1987) (jury rejected Kees' argument he did not have an agreement to profit from prostitution-- the same factual argument he makes on appeal is thus rejected). It is the sole province of the jury to determine credibility and its determination is not reviewable. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

The evidence showed all money received from the acts of prostitution the defendant advanced was given to the defendant. The evidence showed that no girl ever received any money from the defendant for their acts of prostitution. This included the \$200 in buy money for an act of prostitution in the hotel room the defendant rented; a room that Debra Bowers testified was rented for just that purpose. The defendant wanted the jury to believe that the money for Denise Bowers' act of prostitution was to cover the cost of the two hotel rooms, with any extra money being returned to Denise. But the jury did not need to believe this testimony, and did not. The defendant's attempt to insulate himself with a claim that

money he received from the girls' acts of prostitution--prostitution he advanced--was merely to cover expenses was rejected by the jury. This Court should be satisfied that a rational trier of fact could have found the defendant's factual claim was not true that he did, in fact, profit from the prostitution he advanced.

**2. DETECTIVE KLOKOW'S TESTIMONY ABOUT HIS OBSERVATIONS OF DENISE BOWERS WAS NOT HEARSAY.**

The defendant contends that when undercover detective Michael Klokow testified about his observations of Denise Bowers' conduct in the Red Lion Hotel room, he was testifying about inadmissible "assertive nonverbal hearsay;" i.e., that Denise Bowers' conduct was an out-of-court statement. This argument should be rejected. The issue has not been preserved, and the conduct was not hearsay.

This issue involves around the testimony of undercover detective Michael Klokow. After Detective Klokow answered Denise Bowers' Craigslist ad offering sexual services, he arranged a "date" with her at the Red Lion Hotel. 7RP 665-67. When he arrived at the hotel, co-defendant Debra Brown led the detective to room 102 where Denise Bowers (using the name "The Secretary")

was supposed to be. 7RP 669. Debra Brown asked the detective for the money, the detective gave her \$200, and then Debra Brown left the room. 7RP 669. Denise Bowers then came out of the bathroom and introduced herself to the detective. 7RP 670. The following testimony then occurred:

Q: At some point did the Secretary come out of the bathroom?

A: Yes.

Q: What happened when she came out of the bathroom?

A: When she came out, Ms. Bowers [Debra] left the room with the money in hand.

Q: What happened next?

A: I expressed some concern about the money leaving, and she said I don't have to worry about that. And at that point I told her, I said, well, that's fine as long as we get to have sex.

Q: What happened then?

A: She said, well, the two hundred dollars is for--

Mr. Stimmel [attorney for co-defendant Debra Bowers]: Your Honor--

Q: Without stating anything that she specifically said, what physically happened next?

A: At that point, I started removing my shirt and stepped out of my shoes and started removing my shirt. I asked The Secretary to start removing

some of her clothing. She was wearing black stockings with like hot pants-type shorts and V-neck top. She pulled off her shorts, her hot-type pants, which just had her showing black stockings with a hole in the crotch area. She pulled back that area to expose her genitalia to me, and at that point she was unwrapping a condom, also.

Q: All right. Go ahead and have a seat, Detective. What happened at that point after The Secretary exposed her genitals to you and was unwrapping a condom, what did you do at that point?

A: I signaled the arrest team that I was ready for them to come.

7RP 671-73.

Prior to trial, counsel for co-defendant Debra Bowers said he objected "to any recitation of what she [Denise Bowers] said, including nonverbal communication, because it is hearsay and does not comply with the defendant's right to confront and cross-examination." 3RP 325. Judge Fleck indicated that she did not believe Denise's conduct would constitute hearsay but suggested the parties research the issue overnight. 3RP 327-29.

The next day counsel for co-defendant Debra Bowers raised the issue again. 4RP 375. The prosecutor indicated she did not intend to introduce any hearsay evidence, and argued that testimony about Denise's conduct would simply be evidence of a person committing a crime, such as sticking a screwdriver into the

ignition of a car in order to steal the car. 3RP 376. Counsel for the defendant finally chimed in and said that Denise Bowers' conduct could be viewed as assertive conduct, "she was asserting come have sex with me." 4RP 384. The court then stated, "I agree with Ms. Voorhees' [the prosecutor] analysis and do not find that it is some form of nonverbal conduct intended as an assertion." 4RP 385.

Preliminarily, the defendant here has waived his objection to the admission of the evidence because he did not renew his objection during trial. See State v. Clark, 91 Wn. App. 69, 954 P.2d 956 (1998), (in child molestation case, trial court denied defendant's pretrial motion to exclude child hearsay; on appeal, appellate court held evidentiary issue waived because objection was not renewed at trial), aff'd., 139 Wn.2d 152, 156 n. 1, 985 P.2d 377 (1999) (noting only confrontation clause issue accepted for review, evidentiary claim waived); Sturgeon v. Celotex Corp., 52 Wn. App. 609, 762 P.2d 1156 (1988) (party waived objection to admission of evidence when pretrial objection was not renewed); City of Bellevue v. Kravik, 69 Wn. App. 735, 742, 850 P.2d 559 (1993) (A party is obligated to renew an objection to evidence that is the subject of a motion in limine in order to preserve the error for review); but see,

5 WAPRAC: Evidence § 103.6 (4<sup>th</sup> ed. 1999) (recognizing conflicting case law).

Here, counsel for the defendant never raised any objection during the disputed testimony. Counsel for the co-defendant started to raise an objection when Detective Klokow began a non-responsive answer and started to discuss what Denise Bowers actually said to him. The prosecutor quickly interrupted the detective to prevent hearsay evidence from being admitted, and directed questions specifically to what the detective observed. Without an objection, it is unclear exactly what actions the defendant felt were admissible, and what actions the defendant felt were inadmissible hearsay by conduct. Certainly the trial court was not allowed to rule on any specific acts. Thus, the failure to renew his objection waives the issue on appeal. In any event, the trial court was correct; describing Denise Bowers' actions was not hearsay.

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). A decision to admit evidence will not be reversed absent a showing of abuse of discretion, a standard met only when a review court concludes that no reasonable person would have taken the

position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1992). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

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." ER 801(c). A statement "is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a). Out-of-court statements offered for a purpose other than the truth asserted do not qualify as hearsay. State v. Parris, 98 Wn.2d 140, 145, 654 P.2d 77 (1982).

"Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay." In re Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). Thus, "[t]he admissibility of nonassertive verbal or nonverbal conduct as circumstantial evidence of a fact in issue is governed by principles of relevance, not by hearsay principles." Penelope B., 104 Wn.2d at 652-53.

In the trial practice when evidence is offered on the theory that it is not an oral, written or nonverbal assertion and, therefore, not hearsay, a preliminary determination under ER 104 may be required to resolve the issue. Penelope B., at 654. In such case, "the burden is on the party claiming that an assertion is intended; doubtful cases are to be resolved against that party and in favor of admissibility." Penelope B., at 654.

That fact that nonverbal conduct can prove certain facts does not make the nonverbal conduct an assertion. Penelope B., at 653-54. The Supreme Court cited the following examples:

If tulips bloom, they are not making assertions that it is spring; but the testimony of a witness that tulips were observed to be blooming may be offered as circumstantial evidence of spring. If a dog limps, it is not thereby making an assertion and the testimony of a witness that the dog was observed to be limping may be offered as circumstantial evidence that the dog was injured. Similarly, the testimony of a witness that he or she observed a person limping may be offered as circumstantial evidence that the person was injured.

Penelope B., at 654.

Here, the defendant's argument that Denise Bowers' conduct was an assertion appears to be premised on his claim that facts can be derived from the testimony about her conduct. But this does not make her conduct an assertion. There is nothing to suggest

that Denise Bowers was intending her conduct to be a substitution for words to express a fact. Rather, as the trial court found, Denise Bowers was simply engaging in the crime, the beginning of an act of having sexual intercourse with a person she thought was a customer for prostitution. While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, the defendant would have to prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42. That, the defendant cannot do here.

Finally, an erroneous evidentiary ruling is harmless unless, within reasonable probabilities, it affected the outcome of the trial. State v. Thomas, 150 Wn.2d 821, 870, 83 P.3d 970 (2004). Here, even if the trial court's ruling was in error, the error was harmless. Testimony regarding the observations of the conduct of Denise Bowers was not necessary to convict the defendant. Detective Klokow had already provided the buy money to Debra Bowers after setting up a date that was clearly for the purpose of prostitution. That money was recovered in the hands of the defendant. In addition, the defendant's defense was not premised on a claim that

Debra Bowers was acting as anything other than as a prostitute. Rather, his defense was that he was not profiting from her activities. Under the facts of this case, any error was harmless.

**3. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.**

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced the defendant believing the fee was mandatory,<sup>1</sup> or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's arguments rest on his belief that the DNA collection fee is permissive, it is not. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause nor *ex post facto* clause.

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<sup>1</sup> When the court imposed the fee here, the judge stated, "I am going to impose \$250 in court costs, \$500 as the victim penalty assessment [VPA], which is mandatory, and \$100 as the DNA fee, which is mandatory, and I'll waive recoupment of attorney fees." 11RP 51. Defense counsel has early stated that "I know this \$600 is mandatory;" apparently referring to the combined VPA and DNA fee. 11RP 46.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

*Every sentence* imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant was convicted on June 30, 2008, and sentenced on January 21, 2009.

The defendant asserts that because he committed his criminal act in October 11, of 2007, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.<sup>2</sup> The defendant's two arguments, based on the savings clause and the *ex post facto* clause, are not persuasive.

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<sup>2</sup> The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in affect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-613, 5 P.3d 741 (2000). In applying RCW 10.01.040, the Supreme Court does "not insist that a

legislative intent to affect pending litigation be declared in express terms in a new statute;" rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also, State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in affect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future. Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the

legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).<sup>3</sup>

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under

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<sup>3</sup> See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The legislature stated, in pertinent part, that [t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions<sup>4</sup> forbids the State from enacting a law that imposes a

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<sup>4</sup> U.S. Const. art 1 § 10, cl. 1; WA Const. art. 1 § 23.

punishment for an act that was not punishable when the crime was committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299 (1976); In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other grounds, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would not,

therefore, constitute punishment for the purposes of an *ex post facto* determination").<sup>5</sup>

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

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<sup>5</sup> See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n. 8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

If the legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalf, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term has historically been considered a criminal punishment; (3) whether its enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. Metcalf, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors "must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be

punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second factor. Metcalf at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. In Metcalf, the Court reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The Court found that this sanction was not "applied to behavior that is already a crime" within the meaning of this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalf, at 182. Similarly, here the DNA fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of

collecting the DNA sample and maintaining the database. A nominal fee of \$100 appears proportionate to that purpose.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment. Therefore, imposition of the fee does not violate the *ex post facto* clause.<sup>6</sup>

**4. THE TRIAL COURT HAS ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

The defendant argues that because the Findings of Fact and Conclusions of Law related to the pretrial CrR 3.5 and CrR 3.6 hearings have not been entered by the trial court, his case must be remanded for entry of the findings. However, the Findings of Fact and Conclusions of Law have been entered pending appeal, and the trial attorney who reviewed the record and prepared the findings had no contact with the deputy prosecutor preparing the appeal, nor did she have any information regarding the issues on appeal. CP \_\_\_, sub # 125 (CrR 3.6 findings); CP \_\_\_, sub # 126 (CrR 3.5 findings). There has been no allegation that the defendant has been prejudiced by the belated entry of the findings. See State v.

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<sup>6</sup> The State will not address the defendant's ineffective assistance of counsel claim. In the event this Court finds the DNA fee is not mandatory, the case should be remanded for the sentencing court to exercise its discretion. It is clear here, the sentencing court believed as the State does, that the fee is mandatory.

Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1988). Now that the findings have been entered, remand is unnecessary.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 23 day of September, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BROWN, Cause No. 62968-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

9/23/09  
Date

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