

No. 45088-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Sitton,

Appellant.

Lewis County Superior Court Cause No. 13-1-00231-5

The Honorable Judge Richard L. Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE PROSECUTOR MISSTATED THE LAW IN CLOSING.

A prosecutor's misstatement of the law is a serious trial irregularity. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012).¹ Here, the prosecutor improperly argued that guilt attaches for possession whenever a person "can exercise dominion and control" over drugs. RP 181.

This is incorrect: the prosecution must prove *actual* dominion and control. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). The argument was improper. *Walker*, 164 Wn. App. at 736. Respondent erroneously contends the statement was "inartful," but "not a misstatement of the law, particularly when one takes into account the closing argument as a whole." Brief of Respondent, p. 10.

There are two problems with Respondent's position. First, in making the argument, Respondent misstates the law of constructive possession. Contrary to Respondent's assertion, a person is not in constructive possession if she or he "has dominion and control over... the premises." Brief of Respondent, p. 8. In fact, "it is not a crime to have

¹ In an unpublished decision, the Court of Appeals affirmed its prior decision on remand.

dominion and control over the *premises* where controlled substances are found.” *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997) (emphasis in original). Instead, dominion and control over premises is one factor a jury may consider. *State v. Stockmyer*, 136 Wn. App. 212, 220, 148 P.3d 1077 (2006). No single factor is dispositive.² *Id.*

Second, the prosecutor’s misleading statement occurred during rebuttal closing argument. RP 181. Respondent erroneously seeks to have it considered in connection with the initial closing argument. Brief of Respondent, pp. 9-10. But the prosecutor did not surround the misstatement during rebuttal with correct statements of the law, or otherwise provide a context that would somehow transform the misstatements into a correct statement of law. Instead, the prosecutor reiterated the misstatement:

As long as you know they are there and you *can* exercise dominion and control, guess what? You're guilty...[Y]ou are guilty as long as you *can* exercise dominion and control.
RP 181 (emphasis added).

Rather than solving the problem, the context magnifies the problem.

Misconduct that occurs “at the end of a prosecutor's rebuttal closing are

² As Respondent later acknowledges, jurors examine the totality of the circumstances. Brief of Respondent, p. 8. Dominion and control over premises raises a rebuttable presumption of constructive possession. *State v. Davis*, 176 Wn. App. 849, 863, 315 P.3d 1105 (2013) *review granted*, 179 Wn.2d 1014, 318 P.3d 280 (2014).

more likely to cause prejudice.” *State v. Lindsay*, 88437-4, 2014 WL 1848454 (Wash. May 8, 2014).

The error is not harmless, because there is a “substantial likelihood” the misconduct affected the verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The misstatement went directly to the only issue at trial: whether or not Mr. Sitton had dominion and control over the drugs.

Mr. Sitton’s convictions must be reversed, even if the prosecution presented sufficient evidence: “deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. *Glasmann*, 175 Wn.2d at 711. Respondent makes only passing reference to the “substantial likelihood” test. Brief of Respondent, p. 6. Respondent does not apply the substantial likelihood test, focusing instead on the sufficiency of the evidence. Brief of Respondent, pp. 11-12.

The prosecutor misstated the law in a manner that conflicted with the court’s instructions. There is a substantial likelihood the misconduct affected the guilty verdicts. Because of this, Mr. Sitton’s convictions must be reversed. *Id.*

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SITTON BASED ON POSSESSION OF MERE DRUG RESIDUE.

Mr. Sitton stands on the argument set forth in his Opening Brief.

III. THE ORDER IMPOSING ATTORNEY FEES AND A DRUG FUND CONTRIBUTION MUST BE VACATED.

- A. The court lacked the authority to order Mr. Sitton to pay the cost of his court-appointed counsel.

Respondent does not argue that any statute provides authority for the imposition of attorney fees. Brief of Respondent, pp. 18-24. The failure to argue this point can be treated as a concession on appeal. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Sitton presents no further argument.

- B. Mr. Sitton may challenge the scheme for imposing attorney's fees, which impermissibly chills the exercise of the right to counsel, for the first time on appeal.

A court impermissibly chills the exercise of the right to counsel by imposing attorney's fees upon accused persons without first determining that they have the present or future ability to pay them. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). The court must assess the person's current or future ability to pay prior to imposing the cost of a public defender. *Id.* The court ordered Mr. Sitton to pay \$1800 in attorney's fees without assessing whether he could afford to do so. CP 31; RP 196-197.

Respondent does not argue that the order was permissible under the Sixth Amendment. Brief of Respondent, pp. 18-21. Instead, the state claims that the issue cannot be raised for the first time on appeal. Brief of Respondent, pp. 18-21. Although the general rule under RAP 2.5 is that issues not objected to in the trial court are waived on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).³

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-

³ *See also*, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); *State v. Bunch*, 168 Wn. App. 631, 632, 279 P.3d 432 (2012) (overturning jury costs challenged for the first time on review); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* Those cases do not govern Mr. Sitton's claim that the court lacked constitutional authority to order him to pay attorney's fees without first finding that he was able to do so.

Fuller prohibits a court from *imposing* attorney's fees upon indigent persons without first determining whether they have the ability to pay them. *Fuller*, 417 U.S. at 45. Nonetheless, Respondent argues that Mr. Sitton's claim is not ripe because the state has not yet tried to *collect*. Brief of Respondent, p. 23. As argued in Mr. Sitton's Opening Brief, the scheme turns *Fuller* on its head by permitting the court to impose attorney's fees in every case and leaving the question of whether the accused can afford to pay to a later date. The Sixth Amendment does not permit such a system. *Fuller*, 417 U.S. at 45.

The state also argues that Mr. Sitton's claim is foreclosed by *State v. Curry*.⁴ But *Curry* dealt with the system for imposing costs and fees, in

⁴ 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

general. *Curry*, 118 Wn.2d at 914. It did not address the Sixth Amendment claim Mr. Sitton raises.

Finally, manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Respondent argues that this issue is not manifest. Brief of Respondent, pp. 19-21. This is incorrect: all of the facts necessary to decide Mr. Sitton's Sixth Amendment claim appear on the record, as does the prejudice he suffered. The court found Mr. Sitton indigent at the end of the proceedings. CP 38-39. No fact finder could determine that he has the present or future ability to pay \$1800 in attorney's fees.

The court violated Mr. Sitton's right to counsel by ordering him to pay the cost of court-appointed attorney without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Sitton to pay \$1800 in attorney fees must be vacated. *Id.*

C. A court sentencing an offender under the SRA may not order payment of a drug fund contribution.

1. The SRA does not authorize imposition of a drug fund contribution.

A statute authorizing costs is "in derogation of common law and should be strictly construed." *State v. Moon*, 124 Wn. App. 190, 195, 100 P.3d 357 (2004). Furthermore, if a criminal statute is ambiguous, the rule

of lenity requires the court to construe it in favor of the accused. *State v. Caton*, 174 Wn.2d 239, 242, 273 P.3d 980 (2012).

A court's sentencing authority is "limited to that expressly found in the statutes." *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993) (quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)); *In re Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013). This includes the sentencing court's authority to impose fines, costs, and fees. *See, e.g., State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).

The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). A court may not rewrite a statute even if the legislature intended something else but failed to express it adequately. *Martin*, 163 Wn.2d at 509. The judiciary may only correct inconsistencies that render a statute meaningless:

[T]here are three types of cases addressing legislative omissions: an understandable omission, an omission creating an inconsistency, and an omission rendering the statute meaningless. In the first type of case the court is able to ascertain why the legislature intended a literal reading of the statute. "The court does not correct this type of perceived legislative error." ...In the second type of omission case, the omission does not undermine the effectiveness of the entire statute but "simply kept the purposes [of the statute] from being effectuated comprehensively." If a statute contains an inconsistency but remains rational as a whole, this court will not correct any supposed legislative omission in order to

make the statute “more perfect, more comprehensive and more consistent.” Under these circumstances the court does not “suppl[y] the omitted language because it [is] not ‘imperative’ to make the statute rational.” By contrast, in the third type of omission case, the omission makes the “statute entirely meaningless.” This court will compensate for this type of omission if “it is ‘imperatively required to make it a rational statute.’ “ For example, an omission simultaneously qualifying a person for confinement *and* release is meaningless. Under this circumstance the statute is *completely* ineffectual unless corrected.

Martin, 163 Wn.2d at 512-513 (citations omitted).

No statute expressly authorizes sentencing courts to impose drug fund contributions for SRA sentences. The court’s general authority to impose fines, costs and fees stems from a provision permitting the court to “order the payment of a legal financial obligation as part of the sentence...” RCW 9.94A.760(1).⁵ The legislature has defined the phrase “legal financial obligation” using a somewhat circular definition: “‘legal financial obligation’ means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations...” RCW 9.94A.030(30). The statute goes on to state that such obligations

may include restitution to the victim, statutorily imposed crime victims’ compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys’ fees, and costs of defense, fines, and any other financial

⁵ RCW 9.94A.505 outlines the sentences a court may impose following a felony conviction. Under the statute, “If a sentence imposed includes payment of a legal financial obligation, it shall be imposed as provided in [RCW 9.94A.760].” RCW 9.94A.505(4). The statute also references three other provisions relating to restitution and DNA fees. RCW 9.94A.505(4).

obligation that is assessed to the offender as a result of a felony conviction...

RCW 9.94A.030(30).

At issue here is the reference to “county or interlocal drug funds.”

RCW 9.94A.030(30). The provision does not define LFOs to include *contributions* to county or interlocal drug funds; instead, it reads only “legal financial obligations... may include... county or interlocal drug funds.” RCW 9.94A.030(30).⁶ Whatever else it might mean, this language cannot be said to “expressly” grant the sentencing court authority to impose a drug fund *contribution*. *Furman*, 122 Wn.2d at 456.⁷ This is so for five reasons.

First, the omission of language authorizing a court to impose a drug fund *contribution* is significant. Omissions from a statute are interpreted as exclusions. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014) (applying “[t]he principle of *expressio unius est exclusio alterius*”). The plain language of the SRA does not permit imposition of a drug fund *contribution* as part of

⁶ The Revised Code of Washington does not define the phrase “county or interlocal drug funds.” See RCW *generally*. Nor does there appear to be any enabling legislation at the state level specifically authorizing counties or interlocal authorities to create “drug funds.”

⁷ By contrast, the legislature has authorized courts to require an offender “to *contribute* to a county or interlocal drug fund” as a condition of probation. RCW 9.95.210 (emphasis added). Similarly, a court may require an offender “to *contribute* to a county or interlocal drug fund” when the court suspends a sentence pursuant to RCW 9.92.060 (emphasis added). Neither of these provisions apply to sentences imposed for crimes committed after July 1, 1984. RCW 9.92.900; RCW 9.95.900.

a felony sentence. Until the legislature “expressly” authorizes courts to require payment into a drug fund, an SRA sentence may not include an order requiring such a payment. *Furman*, 122 Wn.2d at 456.

Second, the remainder of the definition uses words such as “restitution,” “fees,” and “costs,” which clearly indicate the legislature’s intent to refer to money to be paid by the offender. By contrast, the phrase “drug funds” does not clearly reference money to be paid by the offender. RCW 9.94A.030(30).

Third, most of the other items referred to in the definition are expressly authorized by separate statute. *See, e.g.*, RCW 9.94A.505(7) (“[t]he court shall order restitution...”); RCW 10.01.160 (“[t]he court may require a defendant to pay costs.”); RCW 9.94A.550 (“...on all sentences under this chapter the court may impose fines...”). No separate statute expressly authorizes a court to order a drug fund contribution.

Fourth, if the language defining LFOs to “include... drug funds” is ambiguous, it must be strictly construed because it is in derogation of common law. *Moon*, 124 Wn. App. at 195. In addition, under the rule of lenity, it must be construed in favor of the accused person. *Caton*, 174 Wn.2d at 242.

Fifth, even if the legislature meant to include the word “contribution” in RCW 9.94A.030(30), the court cannot rewrite the statute

by adding the word. *Martin*, 163 Wn.2d at 512-513. The omission “does not undermine the effectiveness of the entire statute.” *Id.* Instead, the statute “remains rational as a whole.” *Id.* It is not the court’s role to “make the statute ‘more perfect, more comprehensive and more consistent.’” *Id.* (citation omitted). As written, the statute is not “‘entirely meaningless.’” *Id.* (citation omitted). Instead, it is “rational as a whole”—it provides a definition for legal financial obligations that is, for the most part, reasonable and comprehensible. *Id.*

The sentencing court lacked authority to impose a drug fund contribution. *Furman*, 122 Wn.2d at 456. The order imposing a drug fund contribution must be vacated. *Id.*

2. This court should not follow Division I’s opinion in *Hunter*.

As Respondent points out, Division I has reached a contrary result. Brief of Respondent, pp. 22-23 (citing *Hunter*, 102 Wn. App. at 633). The *Hunter* court found that “the legislature clearly contemplated the payment of drug fund contributions.” *Id.*, at 635. But *contemplating* something is not the same as *authorizing* something.

The *Hunter* court failed to construe the statute strictly. *Moon*, 124 Wn. App. at 195. Nor did it interpret the statute in favor of the defense, as required under the rule of lenity. *Caton*, 174 Wn.2d at 242. Instead, the court added the word “contribution” to the legislature’s bare reference to

“drug funds” in RCW 9.94A.030. *Hunter*, 102 Wn. App. at 635. This is exactly the kind of rewriting prohibited under *Martin*. *Martin*, 163 Wn.2d at 512-513. Even if the omission of such authorization constitutes an “inconsistency,” the statute “remains rational as a whole.” *Id.* In the absence of express authorization to order a drug fund contribution, the *Hunter* court erred by reading such authorization into the statute. *Moon*, 124 Wn. App. at 195.

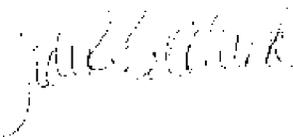
The legislature has not authorized courts to order payment of a drug fund contribution as part of an SRA sentence. Accordingly, the order imposing a drug fund contribution must be vacated. *Furman*, 122 Wn.2d at 456.

CONCLUSION

Mr. Sitton's convictions must be reversed and the case remanded for a new trial. In the alternative, the order imposing attorney fees and a drug fund contribution must be vacated.

Respectfully submitted on May 14, 2014,

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CERTIFICATE OF SERVICE

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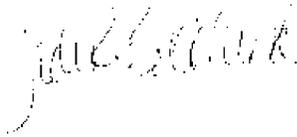
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 14, 2014.



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BACKLUND & MISTRY

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