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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON  
DIVISION III  
No. 32560-1-III  
(Consolidated with No. 32456-7-III)

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

NICHOLAS G. ALLEMAND,

Defendant/Appellant

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Respondent's Brief

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## A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. With regard to the lesser included instructions:
  - i. Defendant Allemand waived objection to the Trafficking in Stolen Property lesser included offense instruction by not raising it in the trial court.
  - ii. It was not an abuse of discretion for the trial court to refuse to give the lesser included theft jury instructions suggested by defense.
- b. Because Mr. Allemand did not object to either the accomplice liability instruction or to the convict instruction regarding trafficking in stolen property in the first degree at trial, the issue is waived and may not be raised on appeal.
- c. The restitution ordered in the case is supported by substantial evidence and it was not an abuse of discretion for the court to order the amount.
- d. The court should decline to address the legal and financial obligations issue in its discretion as the defendant has adequate other remedies.

- e. The \$100 DNA collection fee is mandatory; there was no error in the court order for him to pay that fee.
- f. Appendix 4.6 can be struck from the Judgment and Sentence as it was not ordered by the court.
- g. The defendant should follow the court orders with regard to repayment of legal and financial obligations and restitution.

#### B. ISSUES PRESENTED

- a. Did the defendant waive his objection to the Trafficking in Stolen Property lesser included instruction by not raising it in the trial court?
- b. Did the trial court abuse its discretion in declining to give the lesser included offense instructions proposed by the defendant for the Theft charge and the Trafficking in Stolen Property charge?
- c. May a defendant raise the issue of sufficiency of a jury instruction for the first time on appeal?
- d. Does the record support an award of restitution covering all of the losses testified to by the victim when the jury found the defendant guilty of two of three counts charged?

- e. Should the court use its discretion to address the defendant's ability to pay legal and financial obligations and restitution when the defendant has adequate other remedies to address any grievance with the court order?
- f. Should the court impose the mandatory DNA fee to all defendants who are convicted of qualifying crimes?
- g. Should the court remand the case to strike superfluous paperwork from the judgment and sentence that does not apply and amend the appendix regarding payment of legal and financial obligations?

### C. STATEMENT OF THE CASE

On August 19, 2011 Ann Black reported her home had been burglarized. RP (4/9/14) at 9. She had left her home on August 18, 2011 at 8:30 a.m. and had returned the next date on August 19, 2011 at 1700 hours or 5:00 p.m. RP (4/9/14) at 9. She reported the Burglary when she returned that night. She found her front door unlocked, her back door wide open, with the dead bolt lying on the floor. RP (4/8/14) at 32. She reported numerous personal items had

been taken from her house, namely jewelry. RP (4/8/14) at 33. The burglary was unique in that many valuables, electronics, and other commonly stolen items were in the house, but the person who went into Ms. Black's house appeared to have gone straight to her bedroom where she kept her safe and her jewelry. RP (4/8/15) at 61. Detective Ingraham with the Ellensburg police Department testified that in his experience, this type of behavior in a burglary indicates the person likely knows the victim or the contents of the home. RP (4/8/14) at 140-141.

The victim's son Chris Black reported that on August 18, Ms. Black came to Spokane. RP (4/8/14) at 73. Ms. Preston had been at Mr. Black's home in Spokane with Serena Ford and her then boyfriend Nick Allemand, the petitioner. RP (4/8/14) at 72. Ms. Ford and Mr. Allemand were gone from Chris' apartment in Spokane before Ann Black got there. RP (4/8/14) at 72.

Paul Parks lived with Ann Black at her residence prior to the burglary and was familiar with the residence. RP (4/8/14) at 89. Ann Black testified at trial that there were two bathrooms in her house, including one off her bedroom and that Mr. Parks had full access to her house while he lived there. RP (4/8/14) at 28-29.

On August 19 at 1300 hours, during the timeframe Ms. Black was gone from her home, Sergeant Hocter with the Kittitas County Sheriff's Office stopped Ms. Ford driving her car less than one mile from the victim's home. RP (4/8/14) at 111-113. Paul Parks and Nick Allemand were in the car with Ms. Ford and refused to identify themselves. RP (4/8/15) at 116-118).

A charged co-defendant who plead guilty before trial, Paul Parks, testified in trial for the state. He testified that he lived with the Serena Ford in August, 2011 off and on. RP (4/8/14) at 94. He testified that between August 16 and 27, 2011 he went to pawn shops with Nick Allemand and Serena Ford to pawn different items. RP at 97. He testified that during this time frame, although he did not specifically remember pawning a watch, Ms. Ford and Mr. Allemand asked him to pawn items for them. RP (4/8/14) at 96-97. He indicated his memory from this time frame was very hazy because of drug use. RP (4/8/14) at 101.

Paul Parks testified that when he would pawn the items he would give the money to Nick Allemand and Serena Ford. RP (4/8/14) at 98. On August 20, 2011 Paul Parks pawned a watch in Yakima. RP (4/8/14) at 95 -96. He identified his own signature on the pawn/sales slip from the pawn shop at trial. RP (4/8/14) at 95.

Ann Black positively identified the pocket watch which Paul Parks pawned as her property. RP (4/8/14) at 46-48.

The watch was very unique. RP (4/8/14) at 47. Ann Black testified that it was one of several watches she kept in a leather case full of old dead watches in a dresser drawer in her closet. RP (4/8/14) at 47-48. She testified that the watch was “quite a treasure” to her. RP (4/8/14) at 47. It had belonged to her grandfather who had given it to her father. RP (4/8/14) at 47. When pressed on cross examination, she testified that she honestly did not know the market value of the watch, but that that it had sentimental value and that it was very old and from her family. RP (4/8/14) at 61. Francisco Duarte testified that he bought the watch from Paul Parks on August 22, 2011 for \$40.00 for parts and that it was a non-functional gold-filled watch. RP (4/8/14) at 130-132. He indicated he could have paid more for the watch, but that because it was gold filled and not working, he bought it for parts. RP (4/8/14) at 131.

In discussing jury instructions, Ms. Ford’s attorney requested that an instruction be given for the lesser offense of Theft in the 3<sup>rd</sup> Degree. RP (4/8/14) at 453-4 (BECK)<sup>1</sup>. He also requested the lesser

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<sup>1</sup> Because two transcripts were prepared in this case, the transcript prepared by Mr. Beck for Mr. Allemand’s appeal is notated “BECK.” All other references to the transcripts are to the one prepared for Ms. Ford’s appeal.

included offense of Trafficking Stolen Property in the Second Degree.<sup>2</sup> RP (4/8/14) at 455 – 56 (BECK). When the court asked Mr. Allemend’s attorney if he joined the motions for lesser included offenses, Mr. Moser indicated he joined the motion with regard to the instruction for the Theft, 3<sup>rd</sup> charge only. RP (4/8/14) at 456. After argument and discussion, the court declined to give any of the lesser included offenses. RP (4/8/14) at 457 (BECK).

The petitioner was charged as a principle or accomplice to Residential Burglary, Theft in the 2<sup>nd</sup> degree, and Trafficking in Stolen Property in the 1<sup>st</sup> degree. CP 1-3. The jury found him guilty of Theft in the 2<sup>nd</sup> Degree and Trafficking in Stolen Property in the 1<sup>st</sup> degree. RP (4/10/14) at 2, CP 79-81. The court ordered the defendant to pay \$6, 635.77 in restitution to Mutual of Enumclaw joint and several with defendants Serena Ford and Paul Parks. CP 119. Ann Black testified at trial she submitted a claim for restitution for the items taken in the burglary and damage done to her back door

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<sup>2</sup> Ms. Ford’s counsel refers to Trafficking in the Stolen Property Second by indicating Ms. Ford’s involvement could have been reckless (as required by Trafficking Stolen Property in the Second) as opposed to intentional (as required by Trafficking in Stolen Property in the First).  
RCW 9A.82.050 Trafficking in stolen property in the first degree: A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree  
RCW 9A.82.055 Trafficking in stolen property in the second degree: A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree

to her insurance company, Mutual of Enumclaw. RP (48/14) at 36-37.

#### D. ARGUMENT

- a. Mr. Allemand did not join Ms. Ford's motion for the lesser included instruction with regard to the Trafficking in Stolen Property in the First Degree charge and has waived that issue on appeal.

An appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). There is a two-step analysis to determine whether to examine alleged constitutional errors for the first time on appeal. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). First, the court must determine whether the alleged error involves a constitutional issue. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Second, the court must determine whether the error was manifest.

*Id.* An error is manifest if it has “practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Put another way, a “manifest error” is an error that is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting *Lynn*, 67 Wn. App. at 345). Purely formalistic errors are not manifest. Kronich, 160 Wn.2d at 899. Even where a constitutional error is manifest, it can still be waived if the issue is deliberately not litigated during trial. State v. Walton, 76 Wn. App. 364, 370 (1994).

Because the defendant was given the opportunity to join the codefendant’s request for a lesser included offense of Trafficking in the First Degree and chose not to join, he has deliberately not litigated the issue and it is not preserved for appeal.

- b. The trial court did not abuse its discretion in refusing to give the lesser included offenses as requested by defense

The standard of review applicable to jury instructions depends on the trial court decision under review. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the decision was based on a factual determination, it is reviewed for abuse of discretion. Id. at 772. If it was based on a legal conclusion, it is reviewed de novo. Id. In this case, the court concluded as a matter of fact that the evidence did not support an inference that Ford stole property valued at less than \$750 (to support the lesser included charge of Theft, 3<sup>rd</sup>)

The right to a lesser included offense instruction is statutory, codified at RCW 10.61.006. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). In State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), this court set forth a two-pronged test to determine whether a party is entitled to an instruction on a lesser included offense under RCW 10.61.006. Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Id. Under the second (factual) prong, the court

asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. Id. at 448. The requesting party is entitled to the lesser included offense instruction when the answer to both questions is yes. Id.

In this case, it was not an abuse of discretion for the trial judge to find that the evidence in this case did not support an inference that *only* the lesser offense was committed. It is true that the defendants were found not guilty of the burglary, but the jury did find them guilty, as principle or accomplice of Theft in the 2<sup>nd</sup> Degree.

The victim testified that when her home was burglarized, along with damage to her door, her actual losses sustained included the loss of personal property well over the limit of \$750 required for the Theft in the 2<sup>nd</sup> degree charge. It is true that the only property belonging to the victim that was ever recovered was one pocket watch; the watch pawned by Mr. Parks. There is a plethora of circumstantial evidence that supports a jury finding that although only one piece of property was

recovered the defendants may have been involved in the theft and the trafficking of additional items belonging to the victim, even when the jury found the defendant not guilty of the burglary.

Although it is unclear from Mr. Parks or Ms. Ford's testimony somehow, Mr. Parks came into possession of at least a stolen watch belonging to Ms. Black two to three days after her home had been burglarized and the watch taken.

The victim testified that the recovered watch was one of several watches she kept in a dresser drawer in her bedroom and that Paul Parks was familiar with the items in her home and had lived in a trailer in her yard for some time the year before the burglary. She testified that the watch itself was "a great treasure" and even the antique dealer who purchased the watch from Mr. Parks admitted he could have paid more for the watch, but bought it only for the parts.

The law requires that to mandate a lesser included instruction be given, there be substantial evidence that only the lesser included crime was committed. The

circumstantial evidence in this case supports the court's conclusion that the value of items stolen could have been more than \$750.00, thus evidence of the greater crime was committed was prevalent and it was not an abuse of discretion to deny the defense motion regarding the Theft, 3<sup>rd</sup> requested lesser included instruction.

- c. The defendant failed to object to either the accomplice instruction or the trafficking in stolen property instruction at trial and has waived any objection

Generally, issues raised for the first time on appeal will not be considered by an appellate court. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). There is a two-step analysis to determine whether to examine alleged constitutional errors for the first time on appeal. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). First, the alleged error must involve a constitutional issue. State v. Lynn, 67 Wn. App. 339, 345,

835 P.2d 251 (1992). Second, the error must be manifest. Id. An error is manifest if it has “practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Put another way, a “manifest error” is an error that is “unmistakable, evident or indisputable.” State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting Lynn, 67 Wn. App. at 345). Purely formalistic errors are not manifest. Kronich, 160 Wn.2d at 899. An appellate court will consider error raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial. Washington Const. art. 1, § 21; State v. McHenry, 88 Wn.2d 211, 213, 558 P.2d 188 (1977); State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974). See also State v. McDonald, 74 Wn.2d 474, 480-81, 445 P.2d 345 (1968); State v. Peterson, 73 Wn.2d 303, 438 P.2d 183 (1968).

Defense says that because the state asked for an accomplice instruction, it was relieved from its duty to prove each element of the charged offense. Looking to

the jury instructions, it is clear that even with the accomplice instruction, the jury was instructed that “to convict” on the trafficking charge, they must find what the statute requires. There was no relief from the burden of proving any element of the crime, even with the accomplice instruction.

In State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), the problem was not only with the state asking for the accomplice instruction as was the case here, but that they asked for a modified “to convict” instruction as well, which is not the case here. There was no limitation put on the con

Defense cites Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011) in support of the argument that there are some crimes where accomplice liability cannot lead to conviction because the language of the statute precludes that conclusion. In Hayes, the statute in question was RCW 9A.82.060 (1) (a), Leading Organized Crime. Both the title of the crime and the language of the statute, which includes the requirement for the state to prove the defendant intentionally “organiz[ed], manag[ed],

direct[ed], or financ[ed] any three or more persons...”  
(emphasis added). There is a requirement in the statute not only that the person be the leader, but that more than one person be involved in the activity, requiring a sort of de facto accomplice liability as the crime can only be accomplished by a group of people. In reading the Hayes case, it is clear that these types of joint ventures of group activities are the kinds that the state cannot prove also through the accomplice liability theories because the crimes require the participation of a certain number of people. 164 Wn. App at 469-70 (court discusses State v. Montejano, 147 Wn. App. 696, 699, 196 P.3d 1083 (2008) where the statute (RCW 9A.08.020 (3) also requires acting with three or more people activity).

The trafficking in stolen property statute has no requirement that a group of three or more people be involved, like the statutes cited in the cases by defense. While it is true, the plain meaning of language like “supervise” “direct” or “finance” to imply that others be involved, this does not preclude accomplice liability.

In the leading organized crime statute in Hayes, the defendant had to be the leader. There is no such requirement for the trafficking crime and the facts of this case demonstrate why. The logic is simple: if the crime is making it a crime to actually be the leader, you cannot be found guilty of the crime if you didn't lead, but instead only assisted. Here, giving someone a stolen watch and asking them to pawn it, doesn't necessarily mean you were the "leader" of the group, but were, in fact, an accomplice to the crime of trafficking.

Mr. Parks testified that he got the stolen watch from Serena Ford and Nick Allemand. Who was the leader? Who was the principle? The evidence does not point to a clear answer, but it is clear that acting together, Serena Ford and Nick Allemand instructed, directed, supervised, and/or financed Mr. Parks to sell the antique watch for cash and give the cash back to them. The accomplice instruction applies to both theories of liability under the statute: that they EITHER "knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, "OR

they “knowingly trafficked in stolen property.” If the jury believed that Ms. Ford only planned the sale of the watch to the antique store, she still used an accomplice or was an accomplice to doing so because she asked Mr. Parks to actually sell the watch.

The state was not relieved of proving any element of the trafficking charge; therefore there is no Constitutional issue and the sufficiency of the instruction may not be challenged for the first time on appeal.

d. The restitution claim was supported by substantial evidence at trial and the court did not abuse discretion in ordering the restitution amount requested by the victim.

“The size of [a restitution] award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse.” State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992) (citing State v. Davison, 116 Wn.2d 917, 919-20, 809 P.2d 1374 (1991)). A trial court's factual findings are reviewed for substantial evidence. Ingram v. Dep't of Licensing, 162 Wn.2d 514, 522, 173 P.3d 259 (2007).

A court's authority to impose restitution is statutory. Davison, 116 Wn.2d at 919. A judge must order restitution whenever a defendant is convicted of an offense that results in loss of property. RCW 9.94A.753 (5). The amount of restitution must be based “on easily ascertainable damages.” RCW 9.94A.753 (3). While the claimed loss “need not be established with specific accuracy,” it must be supported by “substantial credible evidence.” State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994). “Evidence supporting restitution ‘is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.’” State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting Fleming, 75 Wn. App. at 274-75), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). “Restitution is allowed only for losses that are ‘causally connected’ to the crimes charged,” State v. Tobin, 161 Wn.2d

517, 524, 166 P.3d 1167 (2007) (quoting Kinneman, 155 Wn.2d at 286). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Tobin, 161 Wn.2d at 524. A court can, in its discretion, order restitution up to double the amount of the victim's loss. RCW 9.94A.753 (3).

When the State produces evidence of the amount of restitution, it is doing so not only in aid of punishing the defendant commensurate with the losses caused by the criminal act, but also in aid of compensating the victim for those losses. State v. Griffith, 164 Wn.2d 960, 969, 195 P.3d 506, 510 (2008). Restitution contains “a strong remedial component” because by statute it is connected to the victim's losses. State v. Shultz, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999). Indeed, “restitution payments are paid to the superior court clerk and disbursed directly to the victims, not to the State.” Id. at 644.

In this case, the victim testified that her losses sustained due to the burglary and the theft in this case

was over \$6000 and submitted a claim to Mutual of Enumclaw for \$6,635.77. In supporting the remedial support to the victim, well within the court's power, the court ordered the defendant to pay back the restitution requested by the victim and supported by her testimony, which was substantial evidence.

- e. The court in its discretion can refuse to address the failure of the court to inquire about the defendant's specific ability to pay legal and financial obligations because the defendant has other adequate remedies.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), cited by Defendant, recognized that a defendant's ability to pay was not an issue that the court had to address on appeal if it had not been raised below. Blazina, 344 P.3d 680, 682-83. In fact, RAP 2.5 only permits an appellate court to review errors of constitutional magnitude on appeal, and the requirement of a court's consideration of a defendant's ability to pay was based on RCW 10.01.160, a statutory provision. Blazina, 344 P.3d at 686 (J. Fairhurst concurring).

Moreover, discretionary legal financial obligations are subject to revision and are not final because the court has the authority under RCW 10.01.160(4) to modify them when payment would “impose a manifest hardship on the defendant or his family.” State v. Lundy, 176 Wn. App. 96, 104 (2013); see also, State v. Smits, 152 Wn. App. 514, 524 (2009). The DOC also has the ability to modify a defendant’s legal financial obligations during the course of supervision:

During the period of supervision, the department may make a recommendation to the court that the offender’s monthly payment schedule be modified so as to reflect a change in financial circumstances. If the department sets the monthly payment amount, the department may modify the monthly payment amount without the matter being returned to the court. During the period of supervision, the department may require the offender to report to the department for the purposes of reviewing the appropriateness of the collection schedule for the legal financial obligation.

RCW 9.94A.760 (7) (a). Post supervision, the county clerk also has the authority to make a recommendation to the court that a defendant’s monthly payment be modified. RCW 9.94A.760 (7) (b). RCW 9.94A.760 also contemplates that offenders

meet with DOC *prior* to sentencing to assist the court in setting an appropriate monthly sum. RCW 9.94A.760 (5).

- f. Defendant did not raise the argument about paying any of the mandatory fees below and is precluded from making this argument for the first time on appeal.

A defendant's ability to pay may not be raised for the first time on appeal. State v. Duncan, 180 Wn. App. 245, 327 P.3d 699 (App. III 2014) review granted \_\_\_ P.3d \_\_\_ (2015).

In Duncan, this court reasoned that the defendant's interest in raising issues of indigency at the time of sentencing is pivotal and not one likely to be overlooked by criminal defendants. 180 Wn. at 253.

- g. The court ordered the defendant to pay mandatory costs pursuant to RCW 43.43.7541 for the DNA collection fee which does not require any inquiry into ability to pay. This order must be affirmed.

Similar to the Victim Compensation statute, this court has also ruled on the DNA collection statute: a defendant's argument that the record did not support an implicit finding by the trial court that he had the ability to pay legal financial obligations had no application in relation to the DNA collection fee because the fee was statutorily mandated. Because the fee was not discretionary, the ability to pay requirement of RCW 10.01.160 did not apply. State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (App. III 2013).

There is no change in law regarding the statutory and mandatory imposition of the DNA collection fee since this court heard Kuster. A judge does not have discretion in ordering a defendant pay and a defendant's ability to pay is irrelevant.

- h. RCW 43.43.7541 does not violate equal protection because someone who commits multiple qualifying offenses is not in the same class as someone who commits only one qualifying offense.

The equal protection clauses of the state and federal constitution require that people within the same class or people who are similarly situated be treated the same. U.S. Const. amend XIV; Wash Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104 - 05 (2000). State v. Thorne, 129 Wn.2d 736, 770-71 (1994). A law which is otherwise valid, but that is administered in a way that unjustly discriminates against similarly situated people violates equal protection. State v. Gaines, 121 Wn. App. 687 (2004). To be recognized, a claim that someone's equal rights have been violated must include that he or she is similarly situated with other affected persons. Id. at 704.

The defendant claims he is in the same class as everyone who is assessed the DNA collection fee. He is drawing the class too broadly. The main distinction between him and others is not that they have all been convicted of a crime, but that he has been convicted multiple times of a qualifying offense under the DNA collection fee. This fact distinguishes

him from all others. He is not similarly situated; he has multiple qualifying offenses. He is treated differently than others who have ONE qualifying offense because he has more than one qualifying offense. Thus an equal protection claim fails.

- i. The trial court did not abuse its discretion in ordering Mr. Allemand to submit another sample of his DNA pursuant to RCW 43.43.7541.

The state agrees with the legal standard stated by the appellant on this issue, except, as summarized above, the defendant did not raise this issue below and should be barred from arguing it for the first time on appeal.

In this case, to put the burden on Superior Court judges to determine whether a defendant's DNA has already been collected and is in fact in the system places an undue burden on an already overburdened system. The statute leaves it within the judge's discretion and nothing in the record indicates an abuse of discretion when there is no information before the judge about whether a DNA sample has in

fact already been submitted or is in fact in the system.

Even the petitioner cannot provide definitive

information about whether this defendant's DNA is in

fact in the database. He provides a speculation that

since Mr. Allemand has two convictions after 2002; it

"must" be in the system. If the petitioner's own

attorney does not have this information, how does a

Superior Court judge have it?

- j. The state agrees Appendix 4.6 does not apply to the defendant and should be stricken.

The court did not order community custody on

this case. Appendix 4.6 does not apply. It is

superfluous to the judgment and sentence and should

be stricken.

- k. The Appendix ordering Mr. Allemand to make \$100 payments per month within 30 days of the judgment and sentence should be amended.

The Judgment of the court was that the

defendant makes \$100 payments to the court on legal

and financial obligations once he was released from

custody as contained in the body of the Judgment and



PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on December 23, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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/s/

/s/ Jodi M. Hammond, WSBA #043885  
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,	)	Court of Appeals No. 32560-1-III
Respondent.	)	(Consolidated with No. 32456-7-III)
	)	
NICHOLAS G. ALLEMAND,	)	AFFIDAVIT OF SERVICE
Appellant.	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss.  
 County of Kittitas )

The undersigned being first duly sworn on oath, deposes and states:

That on the 3<sup>rd</sup> day of September, 2015, affiant an electronic copy directed to:

Renee Townsley	David N. Gasch,
Court of Appeals	gaschlaw@msn.com
Division III	
500 N. Cedar Street	
Spokane, WA 99210	

containing copies of the following documents:

- (1) Affidavit of Service
- (2) Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 3<sup>rd</sup> day of September, 2015, by THERESA BURROUGHS.



Lorraine A. Hill  
 NOTARY PUBLIC in and for the  
 State of Washington.  
 My Appointment Expires: 09-10-17