

FILED
October 14, 2015
Court of Appeals
Division III
State of Washington

32811-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON DEAN FLETT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR1

II. ISSUES PRESENTED1

III. STATEMENT OF FACTS2

IV. ARGUMENT6

 A. NO DUE PROCESS VIOLATION OCCURRED WHEN THE TRIAL COURT INSTRUCTED THE JURY ON DELIBERATE CRUELTY WHERE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE.6

 B. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO); THE LFOS IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS, AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).11

 C. THE DNA FEE IMPOSITION STATUTE, RCW 43.43.7541, DOES NOT VIOLATE THE DUE PROCESS CLAUSE.....14

 D. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION EVEN THOUGH A DEFENDANT MAY HAVE TO PAY THE FEE EACH TIME HE IS SENTENCED.17

 1. Defendant lacks standing to assert an Equal Protection claim17

 2. RCW 43.43.7541 does not violate equal protection because the fee is imposed at each sentencing for all qualifying offenses.....20

 E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT TO SUBMIT TO A COLLECTION OF HIS DNA WITH THE PROVISIO THAT THE ORDER DID NOT APPLY IF THE STATE PATROL ALREADY HAS A SAMPLE OF THE DEFENDANT’S DNA.....22

V. CONCLUSION23

TABLE OF AUTHORITIES

WASHINGTON CASES

Amunrud v. Bd. Of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006).....16

Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 864 P.2d
996 (1994).....20

Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 937 P.2d
1082 (1997).....18

Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744
P.2d 1032(1987), as amended 750 P.2d 254 (1988).....17

Harmon v. McNutt, 91 Wn.2d 126, 587 P.2d 537 (1978).....19

Oestreich v. Department of Labor and Industries, 64 Wn. App.
165, 822 P.2d 1264 (1992).....19

State ex rel. Gebhardt v. Superior Court, 15 Wn.2d 673, 131 P.2d
943 (1942).....18

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).....7

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997)19

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....11

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996).....7, 9

State v. Ferguson, 142 Wn.2d 631, 15 P.3d 1271 (2001).....7

State v. Gordon, 172 Wn.2d 671, 260 P.3d 884 (2011).....9

State v. Johnson, 179 Wn.2d 534, 315 P.3d 1090 (2014) as
amended (Mar. 13, 2014), cert. denied, 135 S. Ct. 139,
190 L. Ed. 2d 105 (2014).....18, 19, 20

State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (2013).....14

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013)14

State v. Payne, 58 Wn. App. 215, 795 P.2d 134 (1990)8

<i>State v. Rutherford</i> , 63 Wn.2d 949, 389 P.2d 895 (1964)	19
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	6, 7
<i>State v. Serrano</i> , 95 Wn. App. 700, 977 P.2d 47 (1999)	8
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177, 1180 (2013)	12, 13
<i>State v. Thornton</i> , 188 Wn. App. 371, 353 P.3d 642 (2015)	16, 17, 21
<i>State v. Tili</i> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	7, 9

FEDERAL COURT CASES

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	6
---	---

STATUTES

RCW 43.43.753	16
RCW 43.43.754	22
RCW 43.43.7541	14

RULES

RAP 2.5.....	11
--------------	----

OTHER

Wash. Pattern Jury Instr. § 300.10.....	8
---	---

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it instructed the jury on the aggravating circumstance of deliberate cruelty.
2. The evidence was insufficient to support the aggravating circumstance of deliberate cruelty.
3. The trial court erred in imposing an exceptional sentence.
4. The trial court erred when it ordered appellant to submit to pay a \$100 DNA-collection fee.
5. The trial court erred when it ordered appellant to submit to another DNA collection under RCW 43.43.754.

II. ISSUES PRESENTED

1. Was defendant's right to due process under Federal and State Constitutional provisions violated where the state proved the aggravating circumstance of deliberate cruelty to a jury?
2. Did the defendant fail to preserve any legal financial obligation (LFO) or community custody condition issue for appeal; are the LFOs imposed in his case mandatory financial obligations that are exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3)?
3. Does the \$100 DNA fee imposition statute, RCW 43.43.7541, violate due process?

4. Does RCW 43.43.7541 violate equal protection because a defendant may have to pay the fee each time he is sentenced?

5. Did the trial court abuse its discretion when it ordered the defendant to submit to a collection of his DNA with the proviso that the order did not apply if the Washington State Patrol already has a sample of the defendant's DNA?

III. STATEMENT OF FACTS

On July 18, 2014, Defendant was charged by amended information with one count of premeditated murder in the first degree with aggravating circumstances. CP 4-5. The information alleged that on or about between October 27, 2012 and December 31, 2012, defendant caused the death of Ramona Childress and that at the time of the murder, defendant was armed with a deadly weapon, a knife or shovel; and further, it alleged that defendant's conduct manifested deliberate cruelty to the victim. CP 4.

Testimony at trial showed that Mr. Flett drove Ms. Childress, along with witness Isha Al-Harbi, to a remote location belonging to a member of his half-brother's family, where he dragged her out of the car by her hair, hit her in the face with a closed fist multiple times while she screamed and begged him to stop, and then choked her as she lay on the ground. 1RP 120-122. Mr. Flett choked her for five to eight minutes while she "put up a fight," and then pulled out a knife and stabbed her multiple

times in the neck. 1RP 122; 1RP 158-159. The defendant left her body on the ground, gasping and gurgling blood, while he walked to his family's house to get help with burying her body. 1RP 122-123; 1RP 127; 2RP 204. He returned approximately five minutes later, with his half-brother, Skylar Jones, and two shovels, at which time Ms. Al-Harbi told defendant that Ms. Childress was still breathing. 1RP 127. In response, Mr. Flett took a shovel and hit Ms. Childress in the face three or more times, "just like he was hacking wood." 1RP 127-128; 2RP 215.

Mr. Flett buried Ms. Childress in a shallow grave in a wooded area of the property. 1RP 127; 2RP 248; 2RP 281. Her body was not discovered until a year later, when a tip led police to interview Mr. Jones about Ms. Childress' disappearance. 2RP 227; 2RP 255. Mr. Jones took police to the location of Ms. Childress' body, and provided them with information that helped lead law enforcement to Mr. Flett. 2RP 227; 2RP 326.

The medical examiner determined that Ms. Childress' cause of death was homicidal violence with cranial, facial and neck trauma. 2RP 318. The medical examiner testified that Ms. Childress sustained at least eight separate stab wounds to her neck. 2RP 307. Ms. Childress' face was fractured into hundreds of small pieces; the facial bones and all their contours had been completely lost to the trauma she sustained.

2RP 311, 313. The medical examiner testified that with this degree of facial fracturing, Ms. Childress must have suffered damage directly to her brain as well. 2RP 311.

Defense counsel objected to the court instructing the jury on the aggravating circumstance of deliberate cruelty, arguing that the evidence did not support a finding that the cruelty was gratuitous. 3RP 410-413. The defense argued that simply because Ms. Childress' death was not done "in as quick of a manner as would be possible" did not mean it was gratuitous. The state cited *State v. Gordon*, 172 Wn.2d 671, 260 P.2d 671 (2011), and *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003), for its argument that the evidence was sufficient to instruct the jury on the aggravating circumstance of deliberate cruelty. 3RP 411-412. The court found that the facts were sufficient to warrant an instruction to the jury on the aggravator:

I'm looking at the notes that go along with the WPIC 300.10. And it talks about some of the cases [the prosecutor] has cited, particularly the *Tili* case. And it talks about a court considering the facts and that these are issues that are very fact-driven but there is also a component of the law with regard to it in terms of really whether or not this is an atypical premeditated first-degree murder. And it's very difficult sometimes to try to figure out what is typical and what is atypical.

But it is a jury call on this. And the facts reflect, the facts that I've heard, are that the cause of death or the manner of causing death was the choking, then the

stabbing, then the leaving, then the getting the shovel, then the – the hitting. I have in mind the witness, who I believe was Skylar Jones, testifying about the raising of the shovel and hitting her in the face five times. We then saw the autopsy pictures with basically all the bones of the face totally shattered and basically gone.

So I think there is enough to go to the jury. It's a jury decision, of course; but there is enough to distinguish this crime as perhaps being atypical. But again, it's a jury call, so I do think there was enough evidence for that to go [to the jury].

3RP 413-414.

Defendant was convicted by a jury on August 18, 2014, as charged, and the jury found that the defendant was armed with both a knife and a shovel during the commission of the murder, and further, that the defendant's actions manifested deliberate cruelty. CP 54-57. At sentencing, the court considered Mr. Flett's criminal history which included an Assault First Degree from 2005, his demeanor to the court which showed a lack of remorse, and the type of violence that was inflicted on Ms. Childress. 3RP 494-495. The court found that the facts of the case justified an exceptional sentence of 540 months, with additional weapons enhancements of 48 months, for a total of 588 months. CP 82-83.

The court imposed a \$100 DNA fee as part of the sentence, listing RCW 43.43.7541 as the statutory authority for the fee. CP 85-86. Including the DNA fee, the mandatory fines imposed totaled \$800. CP 86.

The court imposed restitution in the amount of \$5,750. CP 86. All legal financial obligations were made payable at a rate of five dollars per month, beginning September, 26, 2015. CP 87. Mr. Flett timely appealed.

IV. ARGUMENT

A. NO DUE PROCESS VIOLATION OCCURRED WHEN THE TRIAL COURT INSTRUCTED THE JURY ON DELIBERATE CRUELTY WHERE THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE.

Defendant argues that he was deprived of due process when the trial court instructed the jury on the aggravating circumstance of deliberate cruelty because defendant alleges insufficient evidence existed to prove the aggravator beyond a reasonable doubt. Sufficiency of evidence review must be guided by the reason for sufficiency of evidence review, which is “to guarantee the fundamental protection of due process of law.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) . The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id.* A claim of

insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id.*

Jury instructions must “properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A trial court may instruct a jury on the aggravating circumstance of deliberate cruelty when the defendant’s conduct demonstrates gratuitous violence or inflicts physical, psychological, or emotional pain as an end in itself, *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996), or where cruelty goes beyond that normally associated with the commission of the charged offense or inherent in the elements of the offense, *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001). Thus, two inquiries apply in deliberate cruelty cases: (1) whether the violence was gratuitous or (2) whether the defendant’s conduct was atypically egregious compared to other similar crimes. *State v. Tili*, 148 Wn.2d at 369.

Gratuity is a purely factual issue that falls squarely within the jury's factfinding role. Atypicality, however, is not. Under the statute, atypicality requires an analysis of not only whether the defendant's conduct exceeded the statutory elements, but also whether the defendant's conduct is “normally associated” with this crime, a determination that requires a comparison of the current offense with similar offenses. Juries are not in a good position to make this decision — they have information

only about the current offense. For this reason, judges have traditionally decided these types of issues.

Wash. Pattern Jury Instr. § 300.10 (comment on use).

At trial, the court conducted its analysis of the issue under the “atypicality” prong, not the “gratuity” prong, considering the comment to WPIC 300.10 quoted, *supra*. 3RP 413-414. The court found, given the evidence of defendant’s multiple assaults on Ms. Childress, by striking, strangling, repeated stabbing and hitting with a shovel, there was enough to distinguish the facts of this case from other murder cases, such that it was “atypical,” and jury instruction on deliberate cruelty was appropriate. 3RP 414.

On appeal, defendant alleges that the “only basis to support the aggravating circumstance was the infliction of multiple wounds to the victim’s head,” ignoring the additional assaults on the victim by striking, choking and stabbing her. Appellant’s Br. at 16. Defendant cites *State v. Serrano*, 95 Wn. App. 700, 977 P.2d 47 (1999) and *State v. Payne*, 58 Wn. App. 215, 795 P.2d 134 (1990) to support his proposition that the facts of this case do not support a finding of deliberate cruelty. Appellant’s Br. at 14-16. In *Serrano*, the defendant shot the victim five times and in *Payne*, the defendant shot the victim six times. *Serrano*, 95 Wn. App. at 713; *Payne*, 95 Wn. App. at 216. In each of those cases, the court found that no

facts existed demonstrating a cruelty not usually associated with the crime of murder.¹

The facts of this case are more similar to those facts in *Gordon*, *Tili*, and *Copeland*, *supra*. In *State v. Gordon*, 172 Wn.2d 671, 674-675, 260 P.3d 884 (2011), the defendant punched the victim several times until he fell to the ground, at which point defendant and at least three other individuals punched, kicked and choked the defendant while he was on the ground; the victim subsequently succumbed to his injuries. In *Tili*, 148 Wn.2d at 355-356, the defendant repeatedly struck the victim in the head with a frying pan until she collapsed on the floor, raped her, forced her to say “she liked it,” and struck her again in the head when police arrived. In *Copeland*, 130 Wn.2d at 295-297, the victim suffered too many injuries to count, including trauma to the head, broken bones in the neck due to strangulation, broken ribs, stab wounds to the chest, and patterned puncture wounds on her back, thigh and arm, and the “violence far exceeded what was required to establish premeditated murder.”

¹ The court noted in *Serrano* that some Washington cases have upheld exceptional sentences solely on the basis of the number of wounds inflicted, stating that in those cases, the number of wounds inflicted demonstrated a cruelty not usually associated with the offenses. *Serrano*, 95 Wn. App. at 713, *citing State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (over 100 wounds); *State v. Drummer*, 54 Wn. App. 751, 775 P.2d 981 (1989) (stabbing 20 times); *State v. Harmon*, 50 Wn. App. 755, 750 P.2d 664 (1988) (stabbing/slicing 64 times).

The violence in this case also far exceeded what is required to establish premeditated murder – it was both “gratuitous” *and* “atypical.” Any one of the methods defendant used to assault and murder Ms. Childress could have ultimately killed her, but rather than choosing one method of murder, defendant employed multiple violent and painful methods to kill his victim. Defendant dragged Ms. Childress from a vehicle, hit her repeatedly with a closed fist, choked her for approximately five minutes as she struggled, and then stabbed her at least eight times in the neck. He left the scene for approximately five minutes, while she gurgled and gasped for air, and returned with shovels to bury her body. When he realized she was not yet dead, he smashed her face repeatedly with overhead swings of the shovel, until her face was fractured into hundreds of pieces, and her brain sustained damage.

Certainly this use of multiple methods to accomplish Ms. Childress’ very violent death with her needless suffering is sufficient evidence of deliberate cruelty, such that a jury may be instructed on the law. The trial court did not err in instructing the jury on deliberate cruelty;² nor did it err in imposing a sentence outside of the standard

² The court instructed the jury with the Washington Pattern Jury Instruction on deliberate cruelty, WPIC 300.10. 3RP 425. At trial, no exception was taken to the language of the instruction itself, nor has

range,³ where, as here, the jury unanimously found the aggravating circumstance was proven beyond a reasonable doubt. CP 49; CP 57.

B. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO); THE LFOS IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS, AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3).

The defendant failed to object to the imposition of his LFOs, and concedes this on appeal. Appellant's Br. at 17. Therefore, he failed to preserve the matter for appeal. RAP 2.5. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Id.* at 830. No constitutional issue is involved. *Id.* at 840 (Fairhurst, J. concurring in result). And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues and to provide guidance to our trial courts. *Id.* at 830. That

defendant argued on appeal that the language of the instruction was deficient to accurately instruct the jury on the law.

³ A sentencing court may impose a sentence outside the standard range for an offense if the defendant's conduct during the commission of the current offenses manifested deliberate cruelty to the victim. RCW 9.94A.535 (a).

guidance has been provided. *Blazina* was decided after the September 2014 sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object, and thereby give the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the

issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor declining review of this statutory,⁴ non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. CP 73-74. The \$500 crime victim assessment, \$100 DNA (deoxyribonucleic acid) collection fee, \$200 criminal filing fee and restitution due to the Crime Victim’s Compensation Fund (in this case \$5,750)⁵ are mandatory legal

⁴ Assuming the RCW 10.01.160(3) applied to mandatory fees.

⁵ The restitution was all owed to the CVC. CP 96. The trial court had a statutory obligation to order restitution. *See State v. McCarthy*, 178 Wn. App. 290, 313 P.3d 1247 (2013):

Subsection (7) demands that the trial court “order restitution in *all* cases where the victim is entitled to benefits under the crime victims’ compensation act.” RCW 9.94A.753(7) (emphasis [the court’s]). The section does not expressly identify what losses the court may impose on the accused, but the language urges that any benefits paid by the compensation fund be imposed upon the defendant. “The very language of the restitution statutes indicates legislative intent to grant broad powers of restitution.” *Davison*, 116 Wn.2d at 920, 809 P.2d 1374. The defendant’s reimbursement of the crime victims’ fund, under a loose rather than strict standard of causation,

financial obligations, and each is required irrespective of the defendant's ability to pay. *State v. Kuster*, 175 Wn. App. 420, 424-425, 306 P.3d 1022 (2013); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Because the trial court imposed only mandatory LFOs in Mr. Flett's case, there is no error in the defendant's sentence.

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

The DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in *every* felony sentence.⁶ The

further the goal of the defendant facing the consequences of his conduct. *See Enstone*, 137 Wn.2d at 680, 974 P.2d 828. To a limited extent, restitution also promotes the worthy objective of protecting the public purse. *See Dick Enters., Inc. v. King County*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996).

McCarthy, 178 Wn. App. at 300-01.

⁶ RCW 43.43.7541 provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the

defendant claims this statute violates the *substantive* due process clause. Appellant's Br. at 24-27. Defendant then argues an *equal protection violation* regarding an indigent defendant's inability to pay and the fact a defendant may be required to pay more than once. Appellant's Br. at 28-31.

As to the first argument, that RCW 43.43.7541 violates substantive due process, the defendant sets forth the correct standard of review: "Where a fundamental right is not at issue, as is the case here, the rational basis standard applies." Appellant's Br. at 24-25, citing *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). "To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.*" Appellant's Br. at 25.

Applying this deferential standard, this court assumes the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged

fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754. (Emphasis added).

law and a legitimate state interest. *Amunrud v. Bd. Of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).⁷

The DNA fee imposition statute is rationally related to a legitimate state interest. These fees help support the costs of the legislatively enacted DNA identification system, supporting state, federal and local criminal justice and law enforcement agencies by developing a multiuser databank that assists these agencies in their identification of individuals involved in crimes and excluding individual who are subject to investigation and prosecution. *See*, RCW 43.43.753 (finding “that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are subject of investigations or prosecutions...”). The legislation is supported by a legitimate financial justification. As this court recently held in *State v. Thornton*, 188 Wn. App. 371, 374-375, 353 P.3d 642 (2015):

The language in RCW 43.43.7541 that “[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars” plainly and unambiguously provides that the \$100 DNA database fee is

⁷ *See also*, *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 597, 55 P.2d 1083 (1936) (statute must be unconstitutional “beyond question”), *aff’d*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502, 537–38, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (every possible presumption is in favor of a statute's validity, and that although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless “palpably” in excess of legislative power); cited with approval, *Amunrud*, 158 Wn.2d at 215.

mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word “must” is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton’s felony drug conviction.

Thornton, 188 Wn. App. at 374-375.

Therefore, there is a rational basis for the legislation, and the imposition of the DNA fee does not offend substantive due process guarantees.

D. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION EVEN THOUGH A DEFENDANT MAY HAVE TO PAY THE FEE EACH TIME HE IS SENTENCED.

1. Defendant lacks standing to assert an Equal Protection claim

The defendant lacks standing to assert his equal protection claim - that the imposition of this mandatory fee upon defendants who cannot pay the fee violates equal protection. Defendant has not established that he has paid the fee before, but rather, speculates that because of his lengthy criminal history he must have been assessed and paid this fee before. Appellant’s Br. at 32. The general rule is that “[o]ne who is not adversely affected by a statute may not question its validity.” *Haberman v. Wash.*

Pub. Power Supply Sys., 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *as amended* 750 P.2d 254 (1988). This basic rule of standing “prohibits a litigant ... from asserting the legal rights of another.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997), citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)). It also mandates that a party have a “real interest therein.” *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).

Furthermore, the defendant has failed to establish he is unable to pay the \$100 fee. Defendant has not established the “constitutional indigence” necessary to raise this equal protection claim. The analysis of what constitutes “constitutional indigence” was recently set forth by our State Supreme Court in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090, *as amended* (Mar. 13, 2014), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014) :

Considering the totality of the circumstances, we hold that Johnson was not constitutionally indigent. While we do not question that the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent. Johnson had substantial assets in comparison to the \$260 fine the district court ordered him to pay. Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become

accustomed). Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

Johnson, 179 Wn.2d at 555.

Moreover, equal protection of the law under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978); *Oestreich v. Department of Labor and Industries*, 64 Wn. App. 165, 170, 822 P.2d 1264 (1992). Equal protection requires only similar treatment, not identical impact, on persons similarly situated. *Oestreich*, 64 Wn. App. at 170.

In *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that appellate costs, including a repayment obligation for the costs of appointed counsel, could be awarded *without* an inquiry into the offender's ability to pay. Costs may be imposed upon individuals who are indigent without any per se constitutional violation, so long as ability to pay is considered at the time of *enforcement*. *Id.* at 240-41. A person is "indigent" in the constitutional sense only when he lacks any assets and cannot meet his housing and food needs. *See Johnson*, 179 Wn.2d at 553-54. Indigency, moreover, is a relative term that must be considered and measured in each case by reference to the need or service to be met. *Id.*, at 555; *State v. Rutherford*, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964).

As the Court in *Johnson* noted:

Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed).⁸ Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

Johnson, 179 Wn.2d at 555.

This court should find that defendant lacks standing to raise an equal protection claim, and that under the rational basis test, the statute does not violate equal protection.

2. RCW 43.43.7541 does not violate equal protection because the fee is imposed at each sentencing for all qualifying offenses.

Defendant has not established that he paid or has been ordered to pay the DNA fee more than once. He speculates that a sample was already collected and submitted to the Washington State Patrol Crime Laboratory because of his convictions for numerous prior felony offenses.⁸ Appellant's Br. at 32. However, this speculation does not establish a fact. See *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so

⁸ Defendant asserts "there is no evidence suggesting his DNA had not been collected and placed in the DNA database" after his prior felony convictions. Appellant's Br. at 32.

reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

Secondly, the defendant's argument "misses the mark." *State v. Thornton*, 188 Wn. App. 371, 374-375. In *Thornton*, this Court noted that the statute requires the imposition of the DNA fee in every qualifying case:

The language in RCW 43.43.7541 that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars" plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word "must" is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

Thornton, 188 Wn. App. at 374-375.

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

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

The court's order for defendant to submit a sample of his DNA pursuant to his felony conviction is included in the Felony Judgment and Sentence, provision 4.4. CP 87. That "order" contains the proviso that this DNA requirement "*does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense.*" This follows the statutory scheme set forth in RCW 43.43.754, where under subsection (1) "[a] biological sample must be collected for purposes of DNA identification analysis from [a qualifying offender]," then, under subsection (2), "[i]f the Washington State Patrol Crime Laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted."⁹

⁹ Again, this issue was laid to rest by this Court in its recent decision *State v. Thornton*:

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

Thornton, 188 Wn. App. at 374-375.

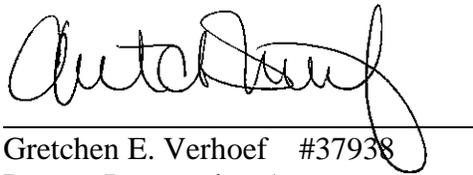
The order follows the operation of the statute. There is no abuse of discretion in the trial court ordering that which is required by law.

V. CONCLUSION

The trial court properly considered the facts of Mr. Flett's case and determined that there was sufficient evidence for the jury to consider the aggravating circumstance of deliberate cruelty. No error occurred when the court instructed the jury on the aggravator, or when the court imposed an exceptional sentence based on the jury finding of deliberate cruelty. The jury's finding of the aggravator and the court's imposition of the exceptional sentence should therefore be affirmed. Further, defendant's LFO sentence requirements should be affirmed as the issues were not properly preserved for appeal and the LFOS are mandatory and therefore, *Blazina's* requirements are inapplicable.

Dated this 14 day of October, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DEAN. FLETT,

Appellant,

NO. 32811-2-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 14, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David N. Gasch
gaschlaw@msn.com

10/14/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)