

March 11, 2016

NO. 73564-1-I

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

---

STATE OF WASHINGTON

Respondent

v.

ROBERT LEE TYLER,

Appellant

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 5

A. THE JURY INSTRUCTIONS DID NOT LIST ALTERNATIVE MEANS OF COMMITTING THE CRIME. IF THE INSTRUCTIONS LISTED ALTERNATIVE MEANS TO COMMIT THE CRIME, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH MEANS. .... 5

1. In Light Of Recent Authority The “To Convict” Instruction Did Not Provide For Alternate Means Of Committing Possession Of A Stolen Motor Vehicle. .... 5

2. There Was Sufficient Evidence To Prove The Defendant Acted As An Accomplice In Disposing Of The Stolen Motor Vehicle..... 10

B. THE DEFENDANT HAS FAILED TO PRESERVE FOR REVIEW A CHALLENGE TO THE CRIME VICTIM’S ASSESSMENT AND DNA COLLECTION FEE. THOSE MANDATORY OBLIGATIONS DO NOT VIOLATE SUBSTANTIVE DUE PROCESS. .... 12

1. The Defendant Has Not Preserved For Review A Challenge To Mandatory Financial Obligations. .... 12

2. The Mandatory Financial Obligations Do Not Violate Substantive Due Process..... 17

C. THE STATUTORY CHALLENGE TO THE LEGAL FINANCIAL OBLIGATIONS HAS NOT BEEN PRESERVED FOR REVIEW. RCW 10.01.160 DOES NOT APPLY TO EITHER THE DNA COLLECTION FEE OR THE VICTIM PENALTY ASSESSMENT. 26

1. The Statutory Challenge to the DNA Fee and Crime Victim Assessment Has Not Been Preserved For Review. .... 26

2. RCW 10.01.160 Does Not Apply To The DNA fee And Crime  
Victim Assessment..... 29

IV. CONCLUSION..... 33

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>Amunrud v. Board of Appeals</u> , 158 Wn.2d 208, 143 P.3d 571 (2006), <u>cert denied</u> , 549 U.S. 1282 (2007).....	18, 25
<u>In re Metcalf</u> , 92 Wn. App. 165, 963 P.2d 911 (1998), <u>cert denied</u> , 572 U.S. 1041 (1999).....	18
<u>State v. Beaver</u> , 184 Wn. App. 235, 336 P.3d 654 (2014) <u>affirmed</u> , ___ Wn.2d ___ (2015 WL 5455821) .....	18
<u>State v. Bertrand</u> , 165 Wn. App. 393, 267 P.3d 511 (2011), <u>review</u> <u>denied</u> 175 Wn.2d 1014 (2012).....	27
<u>State v. Blank</u> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	17, 20, 21, 22
<u>State v. Blazina</u> , 174 Wn. App. 906, 301 P.3d 492, <u>review granted</u> , 178 Wn.2d 1010 (2013), <u>remanded</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	17, 22, 25, 26, 27, 28, 29
<u>State v. Brewster</u> , 152 Wn. App. 856, 218 P.3d 249 (2009), <u>review</u> <u>denied</u> , 168 Wn.2d 1030 (2010).....	17, 19
<u>State v. Clark</u> , ___ Wn. App. ___, 362 P.3d 309 (2015).....	30
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992) .	13, 14, 21, 22
<u>State v. Farmer</u> , 116 Wn.2d 414, 805 P.2d 200 (1991).....	18
<u>State v. Fenwick</u> , 164 Wn. App. 392, 264 P.3d 284 (2011), <u>review</u> <u>denied</u> , 173 Wn.2d 1021 (2012).....	28
<u>State v. Gonzalez</u> , 168 Wn.2d 256, 226 P.3d 131, <u>cert denied</u> , 562 U.S. 928 (2010).....	11
<u>State v. Gray</u> , 174 Wn.2d 920, 280 P.3d 1110 (2012) .....	33
<u>State v. Hayes</u> , 164 Wn. App. 459, 262 P.3d 538 (2011)....	6, 10, 11
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 90 (1998) .....	9, 10
<u>State v. Johnson</u> , 179 Wn.2d 534, 315 P.3d 1090 (2014).....	20
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	13, 26
<u>State v. Krall</u> , 125 Wn.2d 146, 881 P.2d 1040 (1994).....	32
<u>State v. Kuster</u> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	13, 16, 30
<u>State v. Lillard</u> , 122 Wn. App. 422, 93 P.3d 969 (2004), <u>review</u> <u>denied</u> , 154 Wn.2d 1002 (2005).....	6, 7, 9, 10
<u>State v. Lindsey</u> , 177 Wn. App. 233, 31 P.3d 61 (2013), <u>review</u> <u>denied</u> , 180 Wn.2d 1022 (2014).....	8
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	13, 16
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992) .....	13
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	14
<u>State v. Mercado</u> , 181 Wn. App. 624, 326 P.3d 154 (2014)....	16, 17
<u>State v. Owens</u> , 180 Wn.2d 90, 323 P.3d 1030 (2014).....	5, 7, 8, 9
<u>State v. Peterson</u> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	7, 8, 10

<u>State v. Robinson</u> , 171 Wn.2d 292, 253 P.3d 84 (2011) .....	26
<u>State v. Sandholm</u> , 184 Wn.2d 726, 364 P.3d 87 (2015) .. 7, 9, 8, 10	
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007) .....	5
<u>State v. Stoddard</u> , __ Wn. App. __, __ P.3d __ (2016 WL 275318)	
.....	15
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	16
<u>State v. Thompson</u> , 153 Wn. App. 325, 223 P.3d 1165 (2009).....	17
<u>State v. Warfield</u> , 103 Wn. App. 152, 5 P.3d 1280 (2000).....	32

**FEDERAL CASES**

<u>Arizona v Gant</u> , 556 US. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).....	28
---	----

**WASHINGTON CONSTITUTIONAL PROVISIONS**

Article 1, §21 .....	5
----------------------	---

**WASHINGTON STATUTES**

Laws of Washington 1975-1976 2 <sup>nd</sup> Ex. Sess. Ch. 96, §1.....	27
Laws of Washington 1977, 1 <sup>st</sup> Ex. Sess., Ch. 302, §1.....	19
Laws of Washington 1982, 1 <sup>st</sup> Ex. Sess., Ch. 8, §1.....	19
Laws of Washington 2002, chapter 289, §4 .....	33
Laws of Washington 2008, chapter 97, §3 .....	33
RCW 7.68.035.....	22, 31, 33
RCW 7.68.035(1) .....	30
RCW 7.68.035(1)(a).....	32
RCW 7.68.035(4) .....	30
RCW 7.68.070.....	30
RCW 7.68.074.....	30
RCW 7.68.080.....	30
RCW 9A.56.068 .....	10
RCW 9A.56.068(1).....	10
RCW 9A.56.140(1).....	6, 10
RCW 9.94A.200 .....	14
RCW 9.94A.6333 .....	14
RCW 9.94A.760(5).....	24
RCW 9.94A.760(6).....	24
RCW 9.94A.760(7).....	24
RCW 9.94A.7701 .....	24
RCW 9.94A.7703(2),(3).....	24
RCW 9.94A.7705(4).....	24
RCW 9.94A.7708 .....	24
RCW 10.05.....	30
RCW 10.01.160.....	24, 26, 29, 31

RCW 10.01.160(1) .....	26
RCW 10.01.160(2) .....	30
RCW 10.01.160(3) .....	1, 25, 27, 29, 31
RCW 10.01.160(4) .....	28
RCW 10.101.010(3) .....	20
RCW 10.101.010(4) .....	20
RCW 10.73.160.....	19
RCW 10.82.090(1) .....	23
RCW 10.82.090(2) .....	23
RCW 36.18.190.....	24
RCW 43.43.753.....	18
RCW 43.43.7532.....	19
RCW 43.43.754.....	18
RCW 43.43.754(4) .....	31
RCW 43.43.7541.....	19, 31, 32, 33
RCW 46.61.502(1)(b).....	8
RCW 46.61.502(1)(c).....	8
RCW 72.09.100.....	21

**COURT RULES**

CrR 4.7(b)(2)(vi) .....	31
RAP 2.5.....	13
RAP 2.5(a) .....	14
RAP 2.5(a)(3).....	13

**OTHER AUTHORITIES**

<a href="http://www.dictionary.com/browse/dispose--of?s=t">http://www.dictionary.com/browse/dispose--of?s=t</a> .....	11
---	----

## **I. ISSUES**

1. Does the definition of "possessing stolen property" create alternative means of committing possession of a stolen motor vehicle when that definition is included in the "to convict" instruction?

2. Was there sufficient evidence that the defendant acted as an accomplice to disposal of a stolen motor vehicle?

3. Should the court review the defendant's challenge to the crime victim's assessment and DNA collection fee under either a constitutional or statutory analysis when the defendant did not challenge the imposition of those obligations at trial?

4. Do the victim penalty assessment statute and the DNA collection fee statute violate substantive due process?

5. Does RCW 10.01.160(3) require the trial court to evaluate the defendant's current or future ability to pay before imposing the victim penalty assessment or DNA collection fee?

## **II. STATEMENT OF THE CASE**

On January 9, 2014 Bruce Champagne discovered that his 1990 Honda Accord had been stolen from his driveway. He had left work gear and CDs in his car. They were stolen as well. Mr. Champagne did not know the defendant, Robert Tyler, or Tyson

Whitt. He did not give anyone permission to take his car. 1/30/15  
RP 17-27.

Tyson Whitt had stolen Mr. Champagne's Honda and brought it to his father's home in Darrington. Mr. Whitt's father told Whitt to get the car off his property. On January 10, 2014 about 2:30 a.m. Mr. Whitt drove it up forest service road 2070 for about one-half mile. That road is about 5 miles from Darrington. It is a gravel road surrounded by deep forest. It was pouring down rain. There are no street lights in the area, and it was very dark. Mr. Whitt removed the stereo and speakers from the car. He also took Mr. Champagne's CDs and equipment from the car. He jacked up the car and removed one of the wheels and the catalytic converter. Mr. Whitt called the defendant, Robert Tyler to come and pick him up. When the defendant arrived Mr. Whitt put the stereo, speakers, and other property in the front of the pickup next to the defendant. He put the tire in the bed of the pickup truck and then got in the bed of the truck. 3/30/15 RP 35-39, 52-53, 69; 3/31/15 RP 114-118.

While Mr. Whitt was stripping Mr. Champaign's Honda Deputy Sheriff Stich was patrolling in the area. He turned up forest service road 2070 and encountered the defendant in the pickup, and Mr. Whitt in the bed, covered by a tarp. Anthony Coleman was

outside the pickup and Rebekah Nicholson was in the front passenger seat. The defendant told Deputy Stich that he had just purchased the truck and produced a bill of sale. 3/30/15 RP 35-41, 44, 57-58; 3/31/15 RP 100-102, 114.

Deputy Stich noticed that the Honda was jacked up so the driver's side wheels were off the ground. The wheels were partially unbolted. Deputy Stich talked to the defendant about why he was in that remote area at that time of night and who owned the Honda. The defendant gave conflicting statements, first saying that he did not know why he was up there, and then saying that he was helping a friend. He could not name the friend, and claimed that he did not know where the friend had gone. 3/30/15 RP 42-43, 48.

Deputy Stich also asked the defendant about the stereo, CDs and other items sitting on the seat next to him. The defendant claimed that he did not know anything about those items, either how they got in his truck or who they belonged to. Deputy Boice later arrived as back up. The defendant claimed tools located in the truck came with the truck. He continued to claim ignorance about the stereo and other items. 3/30/15 RP 44-45, 71-72.

When Deputy Boice arrived as backup Deputy Stich investigated the Honda further. The engine was still warm. The

stereo had been removed from the dash, and the speakers had been removed from the door panels. The car had a key with a Chrysler emblem on it in the ignition. That key had been shaved, making it easier to start the car than a key that had not been altered would. Deputy Stich ran the plate on the Honda and learned that it had been reported stolen. 3/30/15 RP 49-52.

Deputy Stich again asked the defendant what he and the others were doing up there. The defendant repeated his story, claiming to be up there to help some unknown friend. He continued to deny any knowledge about how the stereo and other items got in his truck. Deputy Stich then arrested the defendant. 3/30/15 RP 54.

After he was arrested the defendant agreed to talk to Detective Haldeman. The defendant said that he was helping Whitt's parents by helping Whitt. He said that he had followed Whitt up the forest service road and was present when Whitt was taking parts off the car. He also said that he knew that the car had been stolen. 3/30/15 RP 79-84.

### **III. ARGUMENT**

**A. THE JURY INSTRUCTIONS DID NOT LIST ALTERNATIVE MEANS OF COMMITTING THE CRIME. IF THE INSTRUCTIONS LISTED ALTERNATIVE MEANS TO COMMIT THE CRIME, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH MEANS.**

**1. In Light Of Recent Authority The “To Convict” Instruction Did Not Provide For Alternate Means Of Committing Possession Of A Stolen Motor Vehicle.**

Criminal defendants are entitled to a unanimous jury verdict. Washington Constitution Art. 1, §21. That right may be implicated in a case where the defendant has been charged with an alternative means offense. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

An alternative means crime is one that provides that the proscribed conduct may be proved in a variety of ways. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). When there is sufficient evidence to support each means the jury has been instructed on then no expression of jury unanimity is necessary. Owens, 180 Wn. at 95. However, when there is insufficient evidence of one means, a conviction will stand only if the jury has indicated which means it has agreed upon. Id.

Possession of stolen property is defined as “to receive, retain, possess, conceal, or dispose of stolen property knowing that

it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). The definition does not create alternative means of committing the crime. State v. Hayes, 164 Wn. App. 459, 476-478, 262 P.3d 538 (2011). However, this court found that when the definition is included in the “to convict” instruction” the terms should be treated as alternative means that the state must prove. Id. at 478-479, State v. Lillard, 122 Wn. App. 422, 434-435, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005).

Here the court included the definition of possession of stolen property in the “to convict” instruction:

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) that on or about the 10<sup>th</sup> day of January, 2014, the defendant knowingly received, retained, possessed, concealed, disposed of a stolen vehicle...

1 CP 27.

The defendant argues that pursuant to Lillard and Hayes the State bore the burden to produce sufficient evidence to support each of the means listed. He further argues that there was insufficient evidence to find him guilty of disposing the vehicle.

Under these circumstances he argues that he is entitled to have his conviction vacated.

Since Lillard the Supreme Court has decided three cases further analyzing when an offense constitutes an alternative means crime. State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010), Owens, supra, and State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015). Applying the analysis in these cases to the facts of this case suggests that the court did not instruct the jury on alternative means of committing possession of a stolen motor vehicle.

In Peterson the court held that failing to register as a sex offender was not an alternative means crime. The court compared the crime to theft, which could be accomplished by two means: (1) wrongfully obtaining or exerting control over another's property or (2) obtaining control over another property through color of aid or deception. While the theft statute described distinct acts that amount to the same crime, the failure to register statute contemplated a single act: moving without alerting the appropriate authority. Peterson, 168 Wn.2d at 769-770.

In Sandholm the court addressed whether the DUI statute created alternate means of committing the crime while "under the influence of or affected by" either intoxicating liquor or drugs, RCW

46.61.502(1)(b), or a combination of intoxicating liquor and drugs, RCW 46.61.502(1)(c). Following the analysis in Peterson the court held that the statute created a single means of committing the crime, "driving while under the 'influence of' or 'affected by' certain substances that may impair the driver." Sandholm, 184 Wn.2d at 735. The court described the two subsections of the statute as "facets of the same conduct, not distinct criminal acts." Id.

In Owens this court found there were eight alternative means of committing trafficking in stolen property: "knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property." Owens, 180 Wn.2d at 97. Because there was insufficient evidence to support at least one means the conviction was reversed. Id. at 94. The Supreme Court reversed this decision, relying on the reasoning in State v. Lindsey, 177 Wn. App. 233, 241-242, 31 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). There the court found that the statute listed only two alternative means of committing the crime. The first seven terms were all facets of a single means of committing the crime describing the act of facilitating or participating in a theft so that the items can be sold. Id. at 97-98.

These terms were slight variations on the same act, and therefore constituted only a single means of committing the crime.

These cases demonstrate that where a statute “describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” Sandholm, 184 Wn.2d at 734. Like the statute at issue in Owens, the possession of stolen property statute sets out a single means of committing the crime. The five terms, “receive, retain, possess, conceal, or dispose of” all relate to the defendant’s possession of the stolen item at some time. One cannot receive or retain an item unless one has actual possession of the item. One cannot conceal or dispose of the item unless one had possession of the item. In light of these cases this court should reconsider whether the related terms transform to alternative means when they are included in the “to convict” instruction.

This court concluded that the terms became alternative means relying on the reasoning in State v. Hickman, 135 Wn.2d 97, 954 P.2d 90 (1998). Lillard, 122 Wn. App. at 435, n. 26. There the “to convict” instruction included venue as an element of the crime of Insurance Fraud. Venue was not an element of the crime. Because no one objected to the unnecessary element it became

the law of the case, and the State was required to prove the crime occurred in the county in which it was alleged to have occurred. Id. at 101-105.

Unlike Hickman, possession of stolen property is an element of possession of a stolen motor vehicle. RCW 9A.56.068, RCW 9A.56.140(1). Employing the analysis in Peterson, Sandholm, and Owens the five terms used described a single means of committing the crime. The terms do not transform into individual means simply because they are included in the “to convict” instruction rather than being reserved for a definitional instruction. If they are not individual means of committing the offense then the court need not analyze the unanimity issue. Sandholm, 184 Wn.2d at 733.

**2. There Was Sufficient Evidence To Prove The Defendant Acted As An Accomplice In Disposing Of The Stolen Motor Vehicle.**

Even if this court concludes that Peterson, Sandholm, and Owens do not change the holdings in Lillard and Hayes, there was sufficient evidence to support the challenged means of committing possession of a stolen motor vehicle. For that reason the court should affirm the conviction.

The defendant argues that in the context of RCW 9A.56.068(1) the term “disposed of” means “to transfer into new

hands or the control of someone else” citing Hayes, 164 Wn. App. at 481. In Hayes the parties agreed to that definition of the term. Id. This court did not say that was the only definition of the term.

When interpreting a statute the court first examines the plain language of the statute. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131, cert denied, 562 U.S. 928 (2010). The plain meaning is discerned from the ordinary meaning of the word used in the statute. Id. The court may look to dictionary definitions to determine the meaning of terms that are not defined in the statute. Id.

The definition of the verb phrase “dispose of” means (a) to deal with conclusively; settle, (b) to get rid of; discard, (c) to transfer or give away, as by gift or sale, and (d) to do away with; destroy. <http://www.dictionary.com/browse/dispose--of?s=t>. To transfer or give away was the definition of that phrase that most closely described the facts and circumstances in Hayes. Here the facts and circumstances show that the defendant was “disposing of” the Honda by getting rid of it or discarding it.

Mr. Whitt took the Honda to a remote location in the middle of the woods, in the middle of the night, in the middle of the winter. He was in the process of gutting the vehicle of all potentially

valuable items when Deputy Stich came upon him. He had jacked up the car and removed at least one wheel. Both his actions and his testimony show that he intended to leave the Honda in that location, a place where it was unlikely to be found for a long time. The defendant knew that the car had been stolen. He acted as an accomplice to Tyson Whitt by providing transportation for Whitt and the items he had taken from the car away from that location. In this manner he assisted Whitt in getting rid of the car.

These facts establish sufficient evidence to prove that the defendant "disposed of" the Honda. The defendant does not challenge the sufficiency of the evidence to prove any of the other ways to possess stolen property listed in the "to convict" instruction. Because there was sufficient evidence as to each way the court should affirm the defendant's conviction.

**B. THE DEFENDANT HAS FAILED TO PRESERVE FOR REVIEW A CHALLENGE TO THE CRIME VICTIM'S ASSESSMENT AND DNA COLLECTION FEE. THOSE MANDATORY OBLIGATIONS DO NOT VIOLATE SUBSTANTIVE DUE PROCESS.**

**1. The Defendant Has Not Preserved For Review A Challenge To Mandatory Financial Obligations.**

The defendant argues the victim penalty assessment and DNA collection fee violate his right to substantive due process. He did not raise either argument in the trial court. 6/3/15 RP 3-4.

Generally the appellate court will not consider a matter raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 826, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue then the defendant bears the burden to show the error was manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is "manifest" if the defendant shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. Kirkman, 159 Wn.2d at 927.

The defendant does not address his burden of proof under RAP 2.5. The error is not manifest because the defendant was not prejudiced when the fee was imposed on him pursuant to the statute.

Courts have held that statutes imposing mandatory financial obligations are not unconstitutional on their face. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (crime victims penalty assessment); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (crime victims penalty assessment, DNA collection fee); State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) (restitution, crime victims penalty assessment, DNA collection fee).

Constitutional principles are only implicated if the State seeks to enforce the debt at a time when the defendant through no fault of his own is unable to comply. Curry, 118 Wn.2d at 917.

The Supreme Court found the Sentencing Reform Act contained adequate safeguards to prevent imprisonment of indigent defendants. Those safeguards included former RCW 9.94A.200 that allowed a defendant the opportunity to show cause why he should not be incarcerated for a violation of his sentence. Id. at 918. Those same protections still exist. RCW 9.94A.6333. Because the defendant will not face any punitive sanction for failure to pay if he is indigent, he has not shown that he was actually prejudiced by imposition of the Crime Victim's Assessment or DNA collection fee without a determination of his ability to pay beforehand. For that reason the court should not consider the defendant's challenge to those statutes for the first time on appeal.

Additionally, in order to justify review under RAP 2.5(a) all of the facts necessary to adjudicate the claimed error must be in the record on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The court recently refused to review the same issue raised in this appeal when the defendant did not object to imposition of the DNA collection fee at trial on this basis in State v.

Stoddard, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (2016 WL 275318). The court observed that there was no information in the record other than his statutory indigence for hiring an attorney that he lacked funds to pay the \$100 fee. Id. ¶ 15. The court reasoned that the cost of an attorney far exceeded the DNA fee and without information that the defendant could not afford that minimal fee the record was insufficient to consider his claim. Id.

Similar to Stoddard this record contains little information about the defendant's assets, income, or debts other than he was found eligible for an appointed attorney by the Office of Public Defense prior to trial. 2 CP \_\_ (Sub 70, Motion and Declaration). At sentencing it was represented that he had a car but no job. 6/3/15 RP 3. He has served the time imposed, and was released by July 2015. 2 CP \_\_ (Sub. 75 Return on Commitment). There is no evidence in the record to indicate that he does not have an income, or the ability to obtain employment. Nor is there any evidence regarding any other assets he may have. Like Stoddard, this court should refuse to consider the defendant's challenge to either the victim penalty assessment statute or the DNA collection fee statute where the record does not contain sufficient information to afford review.

Alternatively the court should decline to consider the issue because the defendant invited the alleged error. Under the invited error doctrine a defendant may not seek appellate review of an error that he helped create, even when the alleged error involves constitutional rights. State v. Studd, 137 Wn.2d 533, 545-546, 973 P.2d 1049 (1999). In order for the error to be invited the defendant must engage in some kind of affirmative act through which he knowingly and voluntarily set up the error. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

Here the defense specifically stated there was no objection to the DNA collection fee. 6/3/15 RP 3. That was reasonable under the circumstances, given the court's recent decisions in Lundy and Kuster. A request to impose only mandatory obligations that had been upheld as constitutional allowed the defense to persuasively argue to mitigate his financial obligations by waiving other discretionary legal financial obligations. If it was error to impose the fee, the defendant knowingly and voluntarily set up that error.

In Mercado the court held that even if the defendant had invited the error at issue in that case, the defendant could nonetheless raise the issue for the first time on appeal because it involved an error in fixing punishment. Because a defendant cannot

agree to an illegal sentence, the court held that the invited error doctrine did not apply. Mercado. 181 Wn. App. at 631. Here the asserted error does not relate to the fixing of punishment. This court has held that the DNA collection fee is not punitive. State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 249 (2009), review denied, 168 Wn.2d 1030 (2010); State v. Thompson, 153 Wn. App. 325, 337, 223 P.3d 1165 (2009). The invited error doctrine should therefore preclude review of the issues raised on appeal.

## **2. The Mandatory Financial Obligations Do Not Violate Substantive Due Process.**

Even if the defendant failed to preserve the issue for review, the court may exercise its discretion and consider the defendant's substantive due process challenge to the mandatory financial obligations. State v. Blazina, 182 Wn.2d 827, 834-835, 344 P.3d 680 (2015). If the court does exercise its discretion to review this issue it should find no constitutional violation occurred.

Statutes are presumed constitutional. The party challenging the statute bears the heavy burden to prove the statute is unconstitutional beyond a reasonable doubt. State v. Blank, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). If at all possible statutes

should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991).

Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014) affirmed, 184 Wn.2d 321 (2015). The level of review depends on the nature of the right at issue. Amunrud v. Board of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006), cert denied, 549 U.S. 1282 (2007). The defendant does not claim that his property interest in a monetary assessment is a fundamental right. As a result, the claim is subject to the rational basis review. In re Metcalf, 92 Wn. App. 165, 176-177, 963 P.2d 911 (1998), cert denied, 572 U.S. 1041 (1999). Under that standard a statute must be rationally related to a legitimate state interest. Amunrud, 158 Wn.2d at 222.

The legislature found that DNA databases are important tools in criminal investigations, in excluding people who are the subject of investigations or prosecutions, detecting recidivist acts, and identifying the location of missing and unidentified persons. RCW 43.43.753. It created a DNA identification system to serve those purposes. RCW 43.43.754. Monies collected under RCW

43.43.7541 are put into an account administered by the state treasurer. They may be used only to create, operate, and maintain the DNA database. RCW 43.43.753; State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 240 (2009), review denied, 168 Wn.2d 1030 (2010).

The Legislature originally enacted the crime victim's statute "to provide a method of compensating and assisting innocent victims of criminal acts who suffer bodily injury or death as a consequence thereof." Laws of Washington 1977, 1<sup>st</sup> Ex. Sess., Ch. 302, §1. The statute was subsequently amended to include a provision intended to provide funds for "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." Laws of Washington 1982, 1<sup>st</sup> Ex. Sess., Ch. 8, §1; RCW 7.68.035(4).

The defendant acknowledges that the stated purposes for each statute are legitimate interests. BOA at 12. He argues that the mandatory nature of those statutes do not serve those purposes when applied to persons who do not or will not have the ability to pay them.

Like the two statutes at issue here, the statute addressing imposition of appellate costs, RCW 10.73.160, does not require an

ability to pay inquiry prior to assessing those costs. In the context of that statute the court observed that it is not necessary to inquire into a defendant's ability to pay or inquire into a defendant's finances before a recoupment order may be entered against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same holds true for the DNA fee and Crime Victims Assessment statutes.

Each defendant presents different circumstances. A person who is entitled to appointed counsel because he meets the statutory definition of indigence does not mean the person is completely without funds to make some payments, however minimal. RCW 10.101.010(3), (4). Nor does it mean that the defendant is without assets which he could use to finance those payments. Where a defendant had assets which he could use as collateral for a loan to pay a fine the court found he was not constitutionally indigent, even though he met the statutory definition of indigence which entitled him to appointment of counsel. State v. Johnson, 179 Wn.2d 534, 555-556, 315 P.3d 1090 (2014).

Here the defendant is out of custody and might obtain employment. Or he might have assets which he could sell or take

out a loan against in order to satisfy those obligations. An offender who is sentenced to prison may be employed in prison industries. RCW 72.09.100. In each case an offender may benefit from a gift of fund, such as an inheritance, from which the offender could pay those obligations. In any event an offender will not suffer an adverse consequence from his failure to pay unless he has wilfully failed to do so. Blank, 131 Wn.2d at 239, Curry, 118 Wn.2d at 918.

It is this feature of each statute that the court relied on when it concluded that no inquiry into an ability to pay was constitutionally necessary before imposing mandatory financial obligations at sentencing. Blank, 131 Wn.2d at 241-242, Curry, 118 Wn.2d at 918. In Curry the court specifically addressed the constitutionality of the mandatory victim penalty assessment. Id. at 917-918.

Nevertheless the defendant argues that Blank and Curry do not control whether an inquiry into an ability to pay is constitutionally required before the DNA fee and crime victims assessment may be imposed. He argues that neither case addressed whether it there was a rational relationship between the State's legitimate interest in providing funds for DNA collection and Crime Victims compensation and ordering indigent defendants to pay towards those funds. However the court did say that RCW

7.68.035 was not “unconstitutional on its face.” Curry, 118 Wn.2d at 917. As demonstrated there is a rational relationship between the interest to be served and statutory requirement. Although the defendant may have met the statutory definition of indigence that does not mean he is completely without the ability to make payments toward the obligation.

The defendant also supports his position by citing the court’s reference to the state’s “broken LFO system” in Blazina. In light of that comment the defendant argues Curry and Blank should be revisited. BOA at 15, citing Blazina, 182 Wn.2d at 835. That reference related to the courts reasons for accepting review of an unpreserved challenge to imposition of court costs under RCW 10.01.160. Id. It says nothing about the continued viability of the court’s holdings in either Curry or Blank.

The defendant also argues that a careful reading of Curry and Blank in light of the current collection scheme supports his position that an ability to pay inquiry is required before the DNA fee and crime victims assessment may be imposed. He points to various statutes imposing interest on judgments and mechanisms for collection to argue that enforcement actually occurs at the time the judgment enters. None of the statutes relied on however

imprison defendants for a non-willful failure to pay. For that reason the argument should fail.

The defendant points RCW 10.82.090(1) which states that financial obligations imposed in a judgment "shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments." The statute does not require immediate collection. It does take into account the defendant's ability to pay. It permits a court to waive non-restitution interest if the interest accrual causes a hardship on the offender or his immediate family. RCW 10.82.090(2). For this reason the court should reject the defendant's argument that the State's interest in uniform sentencing is not served by imposing mandatory obligations on defendant's who do not have the ability to pay them due to interest accrual on those obligations. BOA at 13.

The defendant also points to various statutes that allow for payroll deduction, wage garnishment, and wage assignment. These statutes do not in themselves mean there is no rational relationship between the State's interests in the DNA fee and crime victims assessment and in making imposition of that fee and assessment mandatory on indigent defendants. If one has a wage, one necessarily has some income with which he may pay

something toward those obligations each month until they are retired.

Additionally there are statutory mechanisms to ensure the monthly payments are based on the offender's ability to pay. When collection is attempted an inquiry into the offender's ability to pay is done administratively, either by the Department of Corrections or the clerk's office. RCW 9.94A.760(5)-(7). A wage assignment is achieved through a petition and court order. RCW 9.94A.7701. The amount withheld for legal financial obligations from one or more judgments is capped at the 25% of the offender's wage. RCW 9.94A.7703(2),(3). Likewise the employers' service fee is capped at a minimal amount. RCW 9.94A.7705(4). An offender who is subject to a wage assignment may petition the court to quash, modify, or terminate the order upon showing that the order causes extreme hardship or substantial injustice. RCW 9.94A.7708.

The defendant also cites RCW 36.18.190 permitting the court to order as a court cost a sum for the remuneration for services or charges paid to collection agencies or for collection services. Court costs are governed by RCW 10.01.160. The court

is required to take into account the offender's ability to pay before imposing that cost. RCW 10.01.160(3), Blazina, 182 Wn.2d at 838.

Thus, if these interest and collection statutes had any bearing on the constitutionality of the mandatory provisions of RCW 43.43.7541 and RCW 7.68.035, then they support the conclusion that those statutes pass constitutional muster. No offender is punished for a non-willful failure to pay. These statutes provide significant safeguards to ensure that the defendant's ability to pay is taken into account before a payment schedule is imposed.

Finally, the defendant argues the mandatory obligations are unconstitutional because they do not serve the State's interest in uniform sentencing because they can subject those who are unable to pay to a longer period of involvement with the criminal justice system. BOA at 13. The State's interest in uniform sentencing is a different interest than the State's interest in funding DNA collection and preservation and crime victims' compensation and services. The defendant cites no authority that a statute must rationally relate to all of the State's legitimate interests rather than just one specific interest. In Amunrud the court reaffirmed that the rational basis test requires only an inquiry into whether the law bears a reasonable relationship to a legitimate state interest. Amunrud, 158 Wn.2d at

226, ¶33. As demonstrated the challenged statutes satisfy that test.

**C. THE STATUTORY CHALLENGE TO THE LEGAL FINANCIAL OBLIGATIONS HAS NOT BEEN PRESERVED FOR REVIEW. RCW 10.01.160 DOES NOT APPLY TO EITHER THE DNA COLLECTION FEE OR THE VICTIM PENALTY ASSESSMENT.**

**1. The Statutory Challenge to the DNA Fee and Crime Victim Assessment Has Not Been Preserved For Review.**

The defendant did not challenge the imposition of legal financial obligations at sentencing on the basis that he is or will be able to pay them. Appellate courts generally will not review a claim of error that has not been preserved in the trial court. Kirkman, 159 Wn.2d at 926). The rule is designed to encourage the efficient use of judicial resources by permitting a trial court to correct potential errors and thereby avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

The defendant relies on the court's reasons to exercise its discretion to review the unpreserved challenge to court costs in Blazina to justify review on the basis that imposing the two mandatory obligations violated RCW 10.01.160 in this case. In Blazina the Court of Appeals exercised its discretion to not review an unpreserved challenge to court costs that had been ordered under RCW 10.01.160(1) without performing the requisite ability to

pay analysis under RCW 10.01.160(3). Blazina, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013), remanded, 182 Wn.2d 827 (2015). The court noted that it had reviewed a similar issue despite no objection at the trial level because the defendant in that case had a disability that affected her likely ability to pay the costs. Id. citing State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), review denied 175 Wn.2d 1014 (2012). Because nothing suggested the present defendant's case was similar, the court did not accept review. Blazina, 174 Wn.2d at 911. The Supreme Court found the Court of Appeals properly declined review. Blazina, 182 Wn.2d at 834. It exercised its independent discretion to accept review because there had been calls to reform the legal financial obligation system. Id.

Like the Court of Appeals in Blazina, this court should refuse to review the defendant's statutory challenge to the legal financial obligations ordered by the trial court. Blazina was decided several months before the defendant was sentenced in this case. Moreover the relevant portion of RCW 10.01.160 has remained unchanged since it was originally enacted. Laws of Washington 1975-1976 2<sup>nd</sup> Ex. Sess. Ch. 96, §1. The defendant had every opportunity to raise the issue at the time of sentencing, but instead

chose to remain silent. In a similar situation the court refused to exercise its discretion to review an issue that had not been raised in the trial court. State v. Fenwick, 164 Wn. App. 392, 399, 264 P.3d 284 (2011), review denied, 173 Wn.2d 1021 (2012). (Refusing to exercise discretion to review a search and seizure issued based Gant<sup>1</sup> and its progeny where the trial occurred after those cases had been decided and no suppression motion had been argued.) Likewise this court should decline to review the defendant's statutory challenge to the legal financial obligations.

He also argues that it is not practical to require defendants to employ the remission process provided in RCW 10.01.160(4) if they are truly indigent and unable to pay. The issue in this case relates to the defendant here and not defendants in general. As the court observed in Blazina, the legislature intended legal financial obligations to be imposed on a case by case basis. Blazina, 182 Wn.2d at 834. Because the error was unique to each defendant's case, and review would not promote sentencing uniformity, the court said the Court of Appeals properly declined review. Id. The remedial portion of that statute is likewise unique to each

---

<sup>1</sup> Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

defendant. For that reason it similarly does not justify the court's exercise of discretion to accept review.

The defendant also points to the boilerplate language in paragraph 2.5 of the judgment and sentence arguing that this is a systematic error used in a majority of the courts around the state, and calls for a systematic response. BOA at 28; 1 CP 7. There is no evidence in this record that most courts around the state use the same preprinted language in their judgment and sentence forms. Additionally the Supreme Court already gave a systematic response to the asserted problem in Blazina. The defense chose to waive the claim of error when it did not bring that ruling to the trial court's attention. This court should refuse to review the statutory challenge to the defendant's legal financial obligations.

**2. RCW 10.01.160 Does Not Apply To The DNA fee And Crime Victim Assessment.**

If the court does review the defendant's statutory challenge to the legal financial obligations it should reject the defendant's arguments that RCW 10.01.160 applies to the DNA fee and the crime victims' assessment. The court recently rejected the argument that the court should conduct an ability to pay determination under RCW 10.01.160(3) before imposing the

mandatory obligations under RCW 43.43.7541 and RCW 7.68.035. Kuster, 175 Wn. App. at 424, State v. Clark, \_\_\_ Wn. App. \_\_\_, 362 P.3d 309, ¶10 (2015). Likewise this court should reject that argument.

RCW 10.01.160 relates to court costs. Court costs are “limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). Costs include expenses for serving warrants, jury fees, administering a deferred prosecution, pretrial supervision, and incarceration. Id. Neither the DNA fee nor the crime victims’ assessments are court costs.

The crime victims’ assessment provides funds for victims of crimes generally. The assessment applies even when there is no crime victim, such as when the defendant is convicted of a drug charge or felony DUI. RCW 7.68.035(1). It provides funds for a “comprehensive program[ ] to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035(4). It also provides benefits for victims injured as a result of a criminal act. RCW 7.68.070, RCW 7.68.074, RCW 7.68.080. It is designed to aid all crime victims, not just the victim of the defendant's

ability to pay inquiry is required before imposing obligations under either statute. However the rules of statutory construction do not support his arguments.

Courts construe statutes to give effect to the object and intent of the Legislature. State v. Warfield, 103 Wn. App. 152, 156, 5 P.3d 1280 (2000). Where the meaning of a statute is clear on its face the court gives effect to the plain language without resort to the rules of statutory construction. Id. Here each statute is clear on its face. Each uses mandatory language to require the court to impose the financial obligation without first conducting an ability to pay determination. "Every sentence imposed for a crime specified in RCW 43.43.7541 must include a fee of one hundred dollars." RCW 43.43.7541. "When a person is found guilty in any superior court of having committed a crime... there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035(1)(a). The word shall in a statute created a mandatory requirement unless it is apparent that there is a contrary legislative intent. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994).

Neither statute contains a requirement that the court first conduct an ability to pay inquiry before imposing those obligations. The defendant argues for the court to read into those statutes that

omitted language. Whether the legislature has omitted language from a statute either intentionally or inadvertently the court will not read into the statute the language it believes was omitted. State v. Gray, 174 Wn.2d 920, 928, 280 P.3d 1110 (2012).

A review of the legislative history of RCW 43.43.7541 shows that statute has never required an inquiry into an offender's ability to pay. As the defendant acknowledges under a prior version of the statute the DNA fee was mandatory unless the court found that imposing the fee would result in undue hardship. See Laws of Washington 2002 chapter 289, §4. The legislature amended the statute to remove that hardship consideration. Laws of Washington 2008, chapter 97, §3. To read RCW 7.68.035 and RCW 43.43.7541 to require an ability to pay consideration would contravene the legislature's intent.

#### **IV. CONCLUSION**

Respectfully submitted on March 11, 2016.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TYLER,

Appellant.

No. 73564-1-I

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

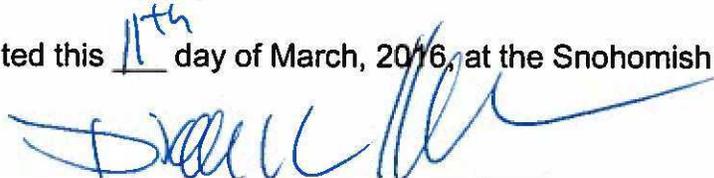
The undersigned certifies that on the 11<sup>th</sup> day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, [nelsond@nwattorney.net](mailto:nelsond@nwattorney.net); and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

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

Dated this 11<sup>th</sup> day of March, 2016, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office