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Court of Appeals
Division I
State of Washington
7/5/2018 3:28 PM

SUPREME COURT NO. 96098-4

NO. 75763-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANZEL L. PHIPPS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen J. Fair, Judge

PETITION FOR REVIEW

LUCIE R. BERNHEIM
KEVIN A. MARCH
Attorneys for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Danzel L. Phipps, the appellant below, seeks review of the Court of Appeals decision in State v. Phipps, noted at 3 Wn. App. 2d 1027, 2018 WL 1907502, No. 75763-6-I (Apr. 23, 2018) (Appendix A), following denial of reconsideration on June 4, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. The state charged Phipps with bail jumping. To prove that Phipps was released by court order, an essential element of bail jumping as charged, the state presented a court order containing the following preprinted language: "THE DEFENDANT SHALL MEET WITH HIS/HER ATTORNEY PRIOR TO THE OMNIBUS HEARING SET FORTH IN SECTION (1). FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN THE REVOCATION OF BAIL AND/OR PERSONAL RECOGNIZANCE PREVIOUSLY ORDERED IN THIS CASE." In failing to establish beyond a reasonable doubt that Phipps was released by court order, as distinguished from being admitted to bail, did the state fail to present sufficient evidence of bail jumping?

2. To support its bail jumping charge, the state presented the testimony of Heidi Percy, a judicial operations manager who lacked personal knowledge of any of the information contained in any of the forms presented. Percy testified that a clerk named "M. Stewart" noted in a minute

entry that Phipps failed to appear for his omnibus hearing on October 15, 2015. Was Phipps's right to confrontation violated where the court admitted a clerk minute entry and Phipps never had an opportunity to cross-examine the clerk?

3. Through Percy's trial testimony and in support of its bail jumping charge, the state also presented an order determining probable cause and directing the issuance of a warrant signed by the pretrial judge and the prosecutor. The order directed the issuance of a bench warrant, "it appearing to the court that the above-named defendant failed to appear for omnibus hearing 10/15/15 @ 9AM." Was Phipps's right to confrontation violated where the trial court admitted a pretrial court order stating that Phipps had failed to appear to his omnibus hearing but Phipps never had an opportunity to cross-examine the court?

4. Is review appropriate under RAP 13.4(b)(3) and (4) because the case involves significant constitutional questions and issues of substantial public interest that should be decided by this court?

C. STATEMENT OF THE CASE

The state charged Phipps with one count of rape in the second degree, one count of indecent liberties, and one count of bail jumping. CP 118-119. The jury returned not guilty verdicts on Count I (rape in the second

degree) and Count II (indecent liberties) and returned a guilty verdict on Count III (bail jumping). CP 40-42.

At trial, in regard to the bail jumping charge, the state presented the testimony of Heidi Percy. Percy works for the Snohomish County Clerk's Office as the judicial operations manager. 2RP[1] 164-83. She testified that her duties include overseeing day-to-day operations, ensuring that courts are staffed with clerks, ensuring that clerks are filling out orders and getting them entered, and managing the jury and confirmation offices. 2RP 164. She also testified that she handles and maintains court records and documents. 2RP 165. Percy testified that she was not the clerk who prepared any of the minute entries and that she lacked personal knowledge as to the information contained in the forms. 2RP 182.

Percy testified about various certified court documents that established the trial and hearing dates in Phipps's case. Exs. 2-6A; 2RP 165-81. This included the information filed August 12, 2015, Exs. 2 & 2A (unredacted and redacted); 2RP 165-66, 174. She also testified about an October 1, 2015 minute entry that reset the omnibus date to October 15, 2015. Ex. 3; 2RP 168-69. The October 1, 2015 minute entry noted that the defendant appeared on that date and that he was not in custody. Ex. 3; 2RP

[1] Consistent with the briefing below, Phipps refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcript of March 18, 2016 and August 30, 2016; 2RP—consecutively paginated transcript of July 11, 12, 13, and 14, 2016.

168-69. Where the minute entry had designated places to indicate whether the defendant had been released on personal recognizance or to bail, the minute entry was silent. Ex. 3.

In regard to the October 1, 2015 hearing, Percy also testified about an Order Resetting Hearing Dates. Ex. 4; 2RP 176-79. That order noted a new omnibus hearing date as October 15, 2015. The order stated in part: "THE DEFENDANT MUST APPEAR FOR TRIAL AND FOR ALL SCHEDULED HEARINGS. FAILURE TO APPEAR MAY RESULT IN . . . CRIMINAL PROSECUTION FOR BAIL JUMPING." Ex. 4.

Percy's testimony also included the October 15, 2015 omnibus hearing minute entry. Exs. 5 & 5A (unredacted and redacted); 2RP 175. The October 15, 2015 minute entry was created by Clerk "M. Stewart." Ex. 5A. According to M. Stewart's minutes, Phipps failed to appear on that date and a warrant was authorized. Ex. 5A; 2RP 179. M. Stewart did not testify. Defense counsel objected to the admission of this document on confrontation grounds. CP 69; 2RP 23.

Through Percy's testimony, the state also presented an order determining probable cause and directing the issuance of a warrant signed by the judge and the prosecutor. Exs. 6 & 6A (unredacted and redacted); 2RP 180. The order directed the issuance of a bench warrant, "it appearing to the court that the above-named defendant failed to appear for omnibus hearing

10/15/15 @ 9AM." Ex. 6A. Defense counsel objected to the admission of this document on confrontation grounds. CP 69; 2RP 23.

The state attempted to elicit testimony from Percy that a minute entry stating that a defendant was not in custody meant that the defendant had been released. 2RP 169. The court did not allow Percy's answer, ruling that Percy could not testify that the court had released Phipps based on a minute entry that Phipps had failed to appear. 2RP 169, 171. The court asked if the state intended to offer a release order. 2RP 170. The state was unresponsive. Soon after, the court brought up the release order again: "You can make [the argument that a minute entry that the defendant is not in custody is the same as a minute entry that the court released the defendant], but I don't think she can testify to that, not to mention the fact that I am sure there is a release order in the case." 2RP 171-72. The state was again unresponsive as to the release order. The state did not present any other testimony concerning the bail jumping charge.

During the state's closing, the prosecutor pointed to two documents to establish the essential element of Phipps's release by court order. 2RP 270. First, she pointed to a "minute entry that says he was in court that day and he was told to come back on October 15th . . ." 2RP 270-71. Presumably, counsel was referring to Exhibit 3. Second, counsel referred jurors to "a sheet of paper that has the Defendant's signature on it that says

you have to come back to court on October 15th . . ." in support of her argument that the state had established that Phipps had been released by court order. 2RP 271. Presumably, counsel was referring to Exhibit 4.

Defense counsel pointed out this dearth of evidence to jurors during closing, arguing, "the State has to show he was released by court order and you are not going to have a court order releasing him in those documents . . . . They have not proved he was released on a court order." 2RP 273.

The state did not respond in rebuttal.

Neither the state nor the defense adduced evidence that Phipps had been released from custody by a court order.

Phipps appealed. CP 6-18. He argued that there was insufficient evidence of bail jumping because the state had not proven that he was released by court order and that the admission of the absent clerk's and court's statements, which the declarants would reasonably expect to be used prosecutorially, violated the Confrontation Clause. Br. of Appellant at 6-16.

Regarding his sufficiency argument, the Court of Appeals summarily rejected Phipps's claims because, viewed in the light most favorable to the state, a jury could reasonably infer from the October 1st order that "Phipps had been released from custody by court order, either by posting bail or on his personal recognizance." Appendix A at 4.

As for Phipps's confrontation arguments, the court rejected Phipps's argument that the minute entry and court order contained testimonial statements of individuals who did not testify at trial. Appendix at 5. The court held that neither statement at issue was testimonial because neither statement was created for the purpose of proving some fact in anticipation of criminal prosecution. Appendix A at 5. Rather, the court reasoned, these statements were memorialized to create an independent record of what was occurring in court. Appendix A at 5. The court did not address Phipps's argument that both M. Stewart's minute entry and the court's order were made under circumstances which would lead an objective witness reasonably to expect that the statements would be used prosecutorially, constituting one classification of testimonial statements under Crawford v. Washington. 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

D. ARGUMENT IN SUPPORT OF REVIEW

1. THIS COURT SHOULD GRANT REVIEW TO ENSURE THAT THE GOVERNMENT IS REQUIRED TO PROVE EACH AND EVERY ELEMENT OF BAIL JUMPING AS DEFINED BY THE LEGISLATURE

The state bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed

where, viewing the evidence in the light most favorable to the state, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The legislature has defined the crime of bail jumping as follows:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170. The state did not charge in the amended information that Phipps was admitted to bail. CP 118-19. Instead, the state's charge against Phipps was based solely on its allegation that Phipps was released by court order. CP 118-19.

The jury instructions, which were consistent with the bail jumping statute and the state's amended information, provided only the released-by-court-order element. CP 59. Thus, the state was required to prove Phipps had been released by a court order. State v. Malvern, 110 Wn. App. 811, 813, 43 P.3d 533 (2002) (reciting elements of bail jumping to include that the defendant "was released by court order").

In its failed attempt to meet its burden, the state put on the testimony of Heidi Percy, a judicial operations manager for the Snohomish County Clerk's Office. 2RP 164-83. She testified regarding contents of certified

copies of various court documents that were admitted into evidence. 2RP 165-81; Exs. 2–6A. None of these documents was a court order releasing Phipps or a document establishing that Phipps had been released by court order.

Still, the Court of Appeals held that the Order Resetting Hearing Dates contained sufficient evidence of that Phipps had been released by court order, "*either* by posting bail or on his personal recognizance." Appendix A at 4, emphasis added; Ex. 4. But RCW 9A.76.170(1) differentiates between release by court order and being admitted to bail. Because the state's charge was based solely on its allegation that he was released by a court order, the state was obligated to prove Phipps's release by court order—distinct from any admission to bail—beyond a reasonable doubt.[2]

There was no evidence on the record, either direct or circumstantial, regarding the means by which Phipps was released from custody. Exhibit 4's preprinted language, even if considered evidence of Phipps's case specifically, only provides that Phipps was released on his personal recognizance *or* admitted to bail. Ex. 4. This form's ambiguous language, which was the only evidence that the state presented in support of its

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[2] In an unpublished decision involving very similar facts, Division One of the Court of Appeals reached the opposite conclusion, holding that the State must prove the specific statutory means by which the defendant is released—by court order or through admittance to bail. State v. Le, noted at 191 Wn. App. 1016, 2015 WL 7300787, at *2 (2015).

assertion that Phipps was released by court order and the only evidence relied on by the court of appeals to affirm Phipps's conviction, cannot satisfy the government's burden of proving beyond a reasonable doubt that Phipps was released by court order as opposed to being admitted to bail. Appendix A at 4.

Because the state bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process, see Winship, 397 U.S. at 364, the Court of Appeals' determination that preprinted ambiguous form language constitutes proof of an essential element beyond a reasonable doubt merits review under RAP 13.4(b)(3) and (4). Certainly, the state's failure to prove its case and an appellate decision upholding the conviction which fails to hold the state to its burden of proof constitutes a significant question of law under both state and federal Constitutions, meriting RAP 13.4(b)(3) review. Further, when an individual is deprived of his liberty after the state fails to present sufficient proof beyond a reasonable doubt of guilt, and when the Court of Appeals summarily determines that the dearth of evidence presented is essentially good enough, an issue of substantial public interest is presented that merits review under RAP 13.4(b)(4).

2. A CLERK'S OR JUDGE'S STATEMENT MADE UNDER CIRCUMSTANCES THAT WOULD LEAD AN OBJECTIVE WITNESS REASONABLY TO EXPECT THAT THE STATEMENT WOULD BE USED IN A FUTURE PROSECUTION IS TESTIMONIAL

The Sixth Amendment and article I, section 22 guarantee the accused the right to confront witnesses against him. State v. Jasper, 174 Wn.2d 96, 108-09, 271 P.3d 876 (2012). The confrontation clause prohibits admitting testimonial hearsay statements in a criminal case unless the declarant is unavailable and the accused has had a prior opportunity for cross-examination. State v. Fleming, 155 Wn. App. 489, 501, 228 P.3d 804 (2010). This is so regardless of whether a document falls within a firmly rooted hearsay exception. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Various formulations of testimonial statements exist, including pretrial statements that declarants would reasonably expect to be used prosecutorially. Crawford, 541 U.S. at 51. Statements made to establish or prove past events potentially relevant to later criminal prosecution qualify as testimonial. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

M. Stewart's statement that Phipps failed to appear, relevant to establishing a necessary element of bail jumping that the state was

required to prove, was offered against Phipps while M. Stewart was insulated from cross-examination. An objective witness would reasonably believe that the minute entry would be used at a later bail jumping trial because by not appearing Phipps had violated the court's previous order to appear.[3] Phipps also could not effectively cross-examine the witness that the state did present to introduce M. Stewart's minute entry, Percy, because Percy testified that she lacked any personal knowledge as to the information contained in the forms. 2RP 182.

The pretrial court's order, relevant to establishing a necessary element of bail jumping that the state was required to prove, was offered against Phipps while the court was insulated from cross-examination. An objective witness would reasonably believe that the order would be used at a later bail jumping trial because the court itself had stated as much. Ex. 4. Again, Phipps could not effectively cross-examine Percy because she testified that she lacked any personal knowledge of the documents about which she was testifying.

The Court of Appeals decision acknowledges that "[g]enerally, a statement is testimonial if . . . a reasonable person in the declarant's position would anticipate that his or her statement would be used against

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[3] In fact, the court file itself contained a warning to Phipps that his failure to appear may result in criminal prosecution for bail jumping, and this warning predated M. Stewart's minute entry. Ex. 4.

the accused in . . . prosecuting a crime. Appendix A at 5. Instead of answering the question of whether the statements at issue fall within this well-established definition, however, the court based its holding that the minute entry and court order were nontestimonial on its finding that they were "not created for the purpose of proving some fact in anticipation of criminal prosecution." Appendix A at 5.

The Court of Appeals based its holding on an erroneous reading of State v. Hubbard, 169 Wn. App. 182, 279 P.3d 521 (2012), and in so doing essentially carves out an exception to the confrontation clause for statements made by court staff and judges, even if those statements could reasonably be expected to be used prosecutorially. Appendix A at 5. There is no precedent for such an exception and to the extent the Court of Appeals excepts these statements based on a finding of reliability, such an exception ceased to exist post-Crawford. See 541 U.S. at 62.

In Hubbard, the court held that a clerk's minute entry memorializing that the defendant was served with a no-contact order at sentencing was not testimonial because it memorialized facts as they occurred in court without reference to future litigation. Id. at 184. Phipps's case is distinguishable. First, no objective witness would reasonably believe that the clerk's minute entry in Hubbard noting that a no-contact order was served would be used at a later trial. To so believe would

require an assumption that the defendant would later be charged with the criminal act of violating the no-contact order in the future, without any reason to make that assumption. This assumption is unreasonable. The Hubbard clerk's minute entry was therefore nontestimonial.[4]

In stark contrast, an objective witness would reasonably believe that M. Stewart's minute entry would be used at a later trial for bail jumping because the statement memorialized Phipps's alleged violation of a court order requiring his appearance. Similarly, an objective witness would reasonably believe that the court's order, noting that "it appear[ed] to the court that the above-named defendant failed to appear for omnibus hearing 10/15/15 @ 9AM," would be used at a later trial for bail jumping because, if true, Phipps had violated the court's previous order to appear and the court was memorializing that violation.

The Court of Appeals' conclusion that the statements at issue are nontestimonial because they were not made for the express purpose of

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[4] A hypothetical helps clarify the distinction between Hubbard and the case at hand. Assume that the clerk in Hubbard noted in the minutes that the no-contact order was properly served at sentencing, a nontestimonial statement. Also assume that at a subsequent hearing where the defendant and the protected party appear, the clerk noted in the minutes that the defendant spoke with the protected party in open court. Assume further that the clerk noted in the minutes that the defendant struck the protected party in court and was taken into custody. All three statements would be clerk minute entries memorializing facts as they occur in court, but not all three would be nontestimonial. Because an objective witness would reasonably believe that the latter two minute entries would be used in a later prosecution, they are testimonial statements under Crawford.

proving some fact in anticipation of criminal prosecution runs contrary to established constitutional precedent and creates an untenable exception to the Confrontation Clause for those whose job it is to memorialize events as they are alleged to occur in court. The reasoning employed by the Court of Appeals essentially boils down to a finding that these statements are somehow more reliable because they are made for some purpose other than to aid in the prosecution of a crime. But Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), which allowed a jury to hear evidence untested by the adversary process based merely on a judicial determination of reliability, was abrogated by Crawford, 541 U.S. at 60. Crawford requires "not that evidence be reliable but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, 541 U.S. at 61. The Court of Appeals' decision to do away with this requirement in the context of judicially created documents presents an important constitutional question and a question of public importance, meriting RAP 13.4(b)(3) and (4) review.

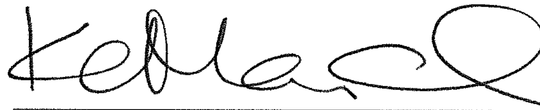
E. CONCLUSION

Because he satisfies RAP 13.4(b)(3) and (4) review criteria, Phipps asks that this petition for review be granted.

DATED this 5th day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



LUCIE R. BERNHEIM, WSBA No. 45925
KEVIN A. MARCH, WSBA No. 45397
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. DANZEL L. PHIPPS, Appellant.	)	No. 75763-6-I UNPUBLISHED OPINION FILED: April 23, 2018

VERELLEN, J. — Danzel Phipps appeals his conviction for bail jumping. Phipps contends there was insufficient evidence that he was released by a court order. The State presented evidence the court warned Phipps that failure to comply with an order resetting an omnibus hearing "may result in revocation of bail and/or personal recognizance previously ordered in this cause."[1] Because a jury could reasonably infer from this warning that Phipps had been released from custody by a court order, there was sufficient evidence to support Phipps' bail jumping conviction.

Phipps also argues the trial court violated his confrontation right by admitting a minute entry and an order directing the issuance of a bench warrant. Because both documents were nontestimonial and certified court records falling

[1] Ex. 4.

within the public records exception to the hearsay rule, the trial court properly admitted these documents.

Phipps challenges the constitutionality of the mandatory victim penalty assessment (VPA) and DNA collection fee as applied to him. Because Phipps does not assert any new arguments, we follow existing case law and conclude imposition of these mandatory fees did not violate Phipps' due process right.

On cross appeal, the State argues the court abused its discretion in failing to impose a $200 criminal filing fee. The criminal filing fee is mandatory under RCW 26.18.020(2)(h). Therefore, we remand for imposition of a $200 criminal filing fee.

FACTS

On August 12, 2015, the State charged Phipps with indecent liberties. On August 26, 2015, the court arraigned Phipps and released him on bail. The court set an omnibus hearing for September 17, 2015. On September 17, 2015, Phipps appeared in court, and the court reset the omnibus hearing for October 1, 2015. On October 1, 2015, Phipps appeared in court, and the court reset the omnibus hearing for October 15, 2015.

On October 15, 2015, Phipps failed to appear. The court issued a bench warrant. The State filed an amended information adding a count of bail jumping and second degree rape.

At trial, the court admitted the original information, the minute entry showing Phipps' out-of-custody appearance on October 1st, the October 1st order resetting

the hearing dates, the minute entry showing Phipps failure to appear on October 15th, and the order directing the issuance of a bench warrant. The jury found Phipps guilty of bail jumping and not guilty of the other counts.

At sentencing, the court imposed a $500 VPA and a $100 DNA collection fee. The court refused to impose a $200 criminal filing fee.

Phipps appeals and the State cross appeals.

ANALYSIS

I. Sufficiency of the Evidence

Phipps contends there was insufficient evidence to sustain his conviction for bail jumping.

"'The sufficiency of the evidence is a question of constitutional law that we review de novo.'"[2] To determine whether there is sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[4]

To convict a defendant of bail jumping, the State must prove beyond a reasonable doubt that the defendant "(1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the

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[2] State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)).

[3] State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

[4] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

requirement of a subsequent personal appearance; and (3) knowingly failed to appear as required."[5]

Phipps claims the State failed to present evidence that he had been "released by a court order." At trial, the court admitted the October 1st order resetting the omnibus hearing. The order stated, "Failure to comply with this order may result in the revocation of bail and/or personal recognizance previously ordered in this cause."[6]

Viewed in the light most favorable to the State, a jury could reasonably infer from the statement in the October 1st order that Phipps had been released from custody by court order, either by posting bail or on his personal recognizance. Thus, we conclude that the State presented sufficient evidence to support Phipps' bail jumping conviction.

II. Right to Confrontation

Phipps argues the trial court violated his confrontation right by admitting as evidence (1) exhibit 5A, the October 15th minute entry, and (2) exhibit 6, the October 15th order directing the issuance of a bench warrant.

"We review alleged confrontation clause violations de novo."[7] The Sixth Amendment guarantees a criminal defendant's right to "'be confronted with the

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[5] State v. Malvern, 110 Wn. App. 811, 813-14, 43 P.3d 533 (2002).

[6] Ex. 4.

[7] State v. Hubbard, 169 Wn. App. 182, 185, 279 P.3d 521 (2012) (quoting State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002)).

witnesses against him.'"[8] The confrontation clause prohibits the admission of testimonial hearsay statements in a criminal case without an opportunity for cross-examination.[9] "Generally, a statement is testimonial if made to establish or prove some fact or if a reasonable person in the declarant's position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime."[10]

Phipps claims the minute entry and order are testimonial and therefore he must be allowed to confront the authors before their admission. Clerk M. Stewart created the minute entry and Judge Linda Krese authored the order. The State offered the testimony of Heidi Percy, a judicial operations manager, to authenticate these documents. Percy testified that she did not prepare either document or have personal knowledge as to the information contained in either document.

Here, the October 15th minute entry was not created for the purpose of proving some fact in anticipation of criminal prosecution. Rather, the purpose of the clerk's minute entry is to create "an independent record of what is occurring in court."[11] Similarly, in State v. Hubbard, Division Two of this court determined that a minute entry was not testimonial because it was prepared for the purpose of memorializing a court action of serving a defendant with a no-contact order.[12] And

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[8] U.S. CONST. amend. VI.

[9] Hubbard, 169 Wn. App. at 185.

[10] State v. Hart, 195 Wn. App. 449, 459, 381 P.3d 142 (2016).

[11] Report of Proceedings (RP) (July 12, 2016) at 167.

[12] 169 Wn. App. 182, 185-87, 279 P.3d 521 (2012)

the October 15th order directing the issuance of a bench warrant was not created for the purpose of proving some fact in anticipation of criminal prosecution. The court order was prepared for the purpose of obtaining Phipps' presence in court.

Similarly, in State v. Hart, Division Two of this court determined that an order to appear was not testimonial because it was prepared to inform the defendant of his obligation to appear in court at a certain date and time.[13]

"Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception."[14] Certified court records fall within the recognized hearsay exception for public records.[15]

Here, the minute entry and court order are nontestimonial certified court records falling within the public records exception to the hearsay rule.

We conclude the trial court did not violate Phipps' confrontation right under the Sixth Amendment in admitting the minute entry and order.

III. VPA/DNA Collection Fee

Phipps contends the sentencing court violated his right to due process by ordering him to pay a $500 VPA and $100 DNA collection fee without first inquiring into his ability pay such costs.

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[13] 195 Wn. App. 449, 460-61, 381 P.3d 142 (2016).

[14] Hubbard, 169 Wn. App. at 187 (quoting State v. Saunders, 132 Wn. App. 592, 601, 132 P.3d 743 (2006)).

[15] Id. (citing RCW 5.44.010, .040; State v. Benefiel, 131 Wn. App. 651, 654-55, 128 P.3d 1251 (2006)).

"[U]nlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay."[16] Accordingly, Washington courts have routinely rejected identical due process challenges to mandatory fees.[17]

Because Phipps does not assert any new arguments, we follow existing case law and conclude that imposition of the VPA and DNA collection fee did not violate Phipps' right to due process.

III. Criminal Filing Fee

On cross appeal, the State argues the court erred in failing to impose a mandatory criminal filing fee.

"[A] $200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay."[18]

At sentencing, the State asked the court to impose mandatory legal financial obligations, including the criminal filing fee. The court imposed the mandatory VPA and DNA fee and stated, "I do believe that he is indigent at this point. So I am going to waive the other costs, fees and assessments."[19]

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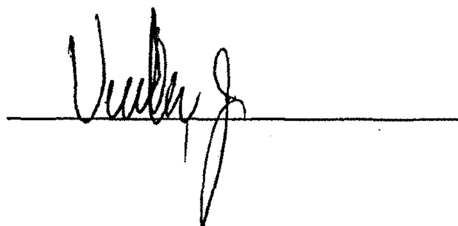
[16] State v. Shelton, 194 Wn. App. 660, 673-74, 378 P.3d 230 (2016); see also State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016) ("Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees.").

[17] See Mathers, 193 Wn. App. at 927-29.

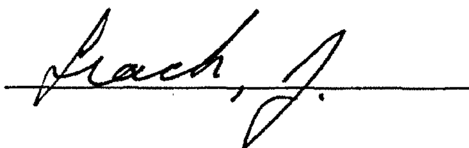
[18] State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

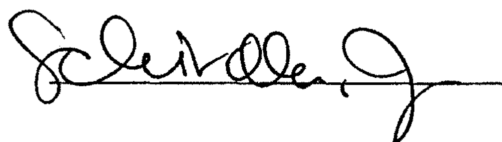
[19] RP (Aug. 30, 2016) at 15.

We conclude the trial court erred in failing to impose the mandatory filing fee. Therefore, we remand for imposition of a $200 criminal filing fee.



WE CONCUR:





APPENDIX B

FILED
6/4/2018
Court of Appeals
Division I
State of Washington

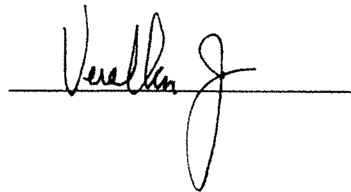
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 75763-6-I
v.	)	
DANZEL L. PHIPPS, Appellant.	)	ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's April 23, 2018 opinion. Respondent filed an answer at the request of the court. Following consideration of the motion and answer, the panel has determined the motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



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Appellate Court Case Number:	75763-6
Appellate Court Case Title:	State of Washington, Resp/Cross-App v. Danzel L. Phipps, App/Cross-Resp
Superior Court Case Number:	15-1-01723-8

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