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Court of Appeals  
Division II  
State of Washington  
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NO. 56211-1-III

THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ROBBY L. WHITE,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## A. ASSIGNMENTS OF ERROR

1. Mr. White's Fifth Amendment right to protection from self-incrimination was violated when the State commented on his silence.

2. The State elicited police witness testimony that Mr. White did not voluntarily provide additional information after being read his *Miranda* rights.

3. The State purposefully elicited testimony regarding Mr. White's silence.

4. The State used Mr. White's silence as substantive evidence of guilt.

5. A scrivener's error imposed an impermissible DNA collection cost.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Federal and Washington Constitutions protect individuals from self-incrimination. Implicit in *Miranda* is the principle that a defendant's silence after being advised of *Miranda* rights cannot be used as impeachment evidence,

substantive evidence of guilt, or as a suggestion of guilt. The State elicited testimony on cross-examination that Mr. White only answered the questions he was asked and did not voluntarily provide other details as he did during trial; elicited rebuttal testimony focused on statements Mr. White did not voluntarily provide; and argued these facts during closing arguments. Did the State violate Mr. White's constitutional rights by eliciting testimony that Mr. White only provided statements in response to questions and did not voluntarily provide additional information during the initial interrogation, relied on a police officer's comment on Mr. White's silence, and argued these facts to the jury during closing arguments as substantive evidence of guilt?

2. During closing arguments, the State cannot comment on a defendant's silence. The State argued, relying on police officer testimony, that Mr. White did not voluntarily provide additional information during the initial interrogation and therefore suggested Mr. White was not

entitled to a self-defense claim. Did the State commit prosecutorial misconduct by relying on police officer testimony Mr. White did not voluntarily provide information; Mr. White only answered questions asked and did not state more; and then highlighted these facts during closing argument in a deliberate, ill-intentioned and flagrant attempt to suggest Mr. White could not claim self-defense?

3. Must this Court remand to correct Mr. White's judgment and sentence that contains a scrivener's error imposing a \$100 discretionary legal financial obligation?

#### C. STATEMENT OF THE CASE

Mr. Robby White has struggled with homelessness over the last several years. During that time he would occasionally stay at the Share House, a local homeless shelter. RP 136. Sometime in late May or early June, Mr. Sorrick was assigned to Mr. White's room after Mr. Sorrick was involved in another incident in which someone chased him with a branch. RP 303.

In the late evening of July 20, 2020, to the early morning of July 21, 2020, Mr. White and Mr. Sorrick were in the room minding their own business. The two acknowledged each other's existence but that was the extent of their relationship. RP 304.

Mr. White and Mr. Sorrick provided different timeline and version of events. According to Mr. Sorrick he was watching TV when Mr. White's snoring became so loud the noise forced Mr. Sorrick to wake Mr. White. RP 309. Mr. White denied snoring stating he was not sleeping. Mr. Sorrick "left it at that, and I turned the TV off and laid down to go to sleep..." RP 309. At around 3:00 A.M. to 3:30 A.M., Mr. White got out of his bunk and started hitting Mr. Sorrick with a cane in the head and upper body. RP 309-13. After approximately ten minutes, Mr. Sorrick attempted to leave the room but Mr. White, who is handicapped and requires a cane to stand and move, jumped out of bed and blocked Mr. Sorrick's exit. RP 312-14. Mr. Sorrick testified that Mr.



White instructed Mr. Sorrick to get back on the bunk and not leave. RP 314.

Mr. Sorrick attempted to leave the room two more times over the next several hours. RP 315. In each instance, Mr. White would block Mr. Sorrick's path and would strike him with the cane across the upper body. RP 315. Mr. Sorrick stayed awake for the next several hours until Mr. White fell asleep, and then left the room. RP 316. Mr. Sorrick proceeded to another area where he cleaned himself, put sunglasses on, and went outside to smoke a cigarette. RP 316. Mr. Sorrick went back into the Share House and was going upstairs to the administrative office when he received help from another staff member. RP 316. In the office Mr. Sorrick reported the incident to Ms. Kandis Lemmon. RP 141-43. Ms. Lemmon reported the incident to law enforcement. RP 143. Mr. Sorrick was transported to a nearby hospital. RP 318.

Officer Sean Suarez was dispatched to the incident and met Mr. Sorrick at the hospital. RP 227. Officer Suarez left the hospital, after taking a statement and photographs, reported the information to dispatch, and headed for Share House. RP 233. Around the same time Officer Suarez was at the hospital, Mr. White was returning to Share House from doing errands. RP 349-50. Ms. Lemmon stopped Mr. White and instructed him to leave the premises. Mr. White complied and went to a nearby gazebo. RP 350. Four officers approached Mr. White a few minutes later, surrounded him, and initiated an arrest. Mr. White complied with all commands. RP 159, 350.

Officer Mary Long was one of the responding officers and the officer who placed Mr. White in handcuffs. RP 157. As she initiated contact, Mr. White asked why he was under arrest to which Officer Long responded for assault. RP 160. Mr. White responded "I know what this is about. It's Roy came up on me and I hit him over the head." RP 160.

a. Mr. White's Statements to Officer Suarez

Shortly thereafter, Officer Suarez arrived on scene and took custody of Mr. White. RP 236. Officer Suarez transported Mr. White to the nearby Clark County Jail for processing. While in the jail parking area, Officer Suarez advised Mr. White of his *Miranda* rights and asked if he would answer questions and/or provide a statement. RP 236. Mr. White acknowledged his rights and agreed to answer questions. RP 236-38.

During the interrogation, Mr. White acknowledged he struck Mr. Sorrick stating “[a]bout the guy I hit, Roy Something.” RP 238. Officer Suarez testified that Mr. White told him the confrontation was “a dispute over snoring. He claimed it was in self-defense, and he also told him that if he called the police he would ‘fuck him up,’ quote.” RP 238. Mr. White went on to tell Officer Suarez that he “felt threatened by Mr. Sorrick, due to his standing up and posturing...and Mr. White decided to strike Mr. Sorrick

first.” RP 239. According to Officer Suarez, Mr. White stated that he told Mr. Sorrick if he contacted the police “he would, quote ‘fuck him up.’ “ RP 240. Mr. White denied threatening Mr. Sorrick not to leave. RP 240. Once the report was done Mr. White was transferred to the jail for processing. RP 242.

Mr. White was charged with assault in the second degree under RCW 9A.36.021(1)(c) and .021(1)(a) (Count 1) and unlawful imprisonment under RCW 9A.40.040 (Count 2). CP 7.

b. Mr. White’s Testimony

Mr. White testified on his own behalf. RP 339. According to Mr. White, Mr. Sorrick was a drinker and on the night of the incident came into their room around 9:00 P.M. and immediately started “grumping about I was snoring.” RP 343. Mr. White confronted Mr. Sorrick, denying that he was snoring and that Mr. Sorrick was a “liar.” RP 343. Mr. White was laying on his bunk when Mr.

Sorrick approached, stumbled, and then struck Mr. White on the side of the head. RP 343.

Mr. White pushed Mr. Sorrick off and at the same time hit Mr. Sorrick in the head “maybe twice. I hit him enough to get him off of me, because he lounged (sic) on me, on my – on my bunk, so I hit him...” RP 343. Mr. White described Mr. Sorrick’s approach as “an attacking fashion.” RP 344. Mr. Sorrick went to his bunk and started to reach for his phone when Mr. White stated “You’re not gonna call the cops, and you’re not gonna call your friends. You’re gonna lay your drunk ass down and go to sleep.” RP 344. Mr. White denied striking Mr. Sorrick with his cane. RP 346. That morning Mr. Sorrick was still in bed when Mr. White left the room. RP 347.

During trial Mr. White acknowledged he hit Mr. Sorrick in the face and likely caused the black eye but denied hitting Mr. Sorrick anywhere else on his body. RP 347-48. Mr. White explained that he had never seen Mr.

Sorrick's arms or body the entire time the two were roommates and on the night/morning of the incident Mr. Sorrick was wearing a jacket. RP 348.

During cross-examination, Mr. White continued to deny hitting Mr. Sorrick more than a couple of times including denying he hit Mr. Sorrick anywhere else besides his head. RP 352-53. After multiple questions regarding Officer Suarez's advisement of *Miranda* rights, Mr. White confirmed he understood his rights and his statements were voluntary. RP 356. The State and Mr. White had the following exchanges:

Q. So, those statements were made by you of your own volition?

A. The statements that I made were, yes.

Q. Okay. All right. So, we can get that out of the way. So, did you feel comfortable talking to him?

A. Yeah.

Q. Yeah, I mean, you know, if -- you -- he treated you fairly; right? Cordially?

A. Yes, sir.

Q. Okay. He didn't beat you down. He didn't drag you -- I mean, none of that stuff. Very professional?

A. Yes, sir.

Q. All right. So, you were comfortable talking with him?

A. Yes, sir.

Q. Okay. **You didn't tell him any of these details; did you?** Don't look at your lawyer, look at me.

A. I can't see my lawyer anyway.

Q. Okay. So, answer my question. **You didn't -- you didn't tell him any of these details; did you?**

A. What do you mean, details?

Q. About how Mr. Sorrick approached you; how you were laying in bed; how he struck you on the side of the head and then he, you know, all of that. **You didn't tell him -- you didn't tell this officer any of that; did you?**

A. He didn't ask any of that, so no, I didn't.

Q. Okay. Well, he didn't know what happened; did he?

A. Apparently he knew something, or he wouldn't have arrested me.

Q. Okay, he knew something, but he didn't know what happened; right? I mean, that's the whole point of him asking you questions about, hey, you know, what happened; right?

**A. And I answered the questions that he asked, yes.**

Q. Okay. **Well, you didn't tell him any of these details; did you?**

A. I think I -- I think I -- I think I explained to him it was self-defense.

Q. Okay. **But, like I said, you didn't -- you didn't tell him, step by step, like you are doing here today,** about how Mr. Sorrick -- how you had arrived at your room; you had laid down on your bunk?

**A. No, we didn't discuss any of that.**

Q. Okay. **You didn't tell him that?**

A. It wasn't in the discussion. **The only stuff I told him is the stuff we -- we discussed. If he had asked me what happened, I would have told him [indiscernible].**



Q. He did ask you what happened; didn't he? I mean, that's the whole point of asking you questions. When -- when an officer is investigating an incident, he has no idea what happened. He may have heard other people, but that's why he was asking you what happened; right?

A. I told him everything he asked. **Everything he asked, I told him.**

Q. Okay. **But you didn't tell these details that you provided in court here today?**

A. I think he -- I think he -- I think he heard some of them.

Q. Okay.

A. I think whatever came into the conversation. I did not hide anything from him while we were talking.

Q. Okay.

A. I did not make up anything afterwards, after we talked....

RP 356-58.

The State called Officer Suarez for rebuttal testimony. RP 366. Officer Suarez testified that he gave Mr. White the "opportunity to tell his side of the story..." RP

367. After testifying to the exact same facts during his initial testimony Officer Suarez stated

A. -- he stated Roy got in a posturing stance, so Mr. White struck him twice. At that point, he stated that argument was pretty much over. I asked him about his statement regarding him telling Mr. Sorrick that he would fuck him up, quote, if he called or contacted the police, and I clarified that with him and he said, "Yes, that's what I said," and I said, "Why?" and he says, "I don't know." **And that was the end of the conversation. He did not provide me any more detail about how the incident occurred; what it was over, besides the snoring; how it ended. There was ample time during my questioning, and I -- I believe that when I asked him "What happened?" and that was the only response I get, that there was maybe something** he didn't you about whatever it is that you're investigating?

RP 367-68 (emphasis added).

The State continued to ask Officer Suarez questions regarding the interrogation:

Q. All right. Now, you've been a police officer for a number of years; correct?

A. Yes.

Q. Okay. And as a police officer, is it your -- is it to your benefit for people to talk to you freely while you are looking for information about your investigation?

A. Yes.

Q. Okay. And do you encourage people to talk to you and tell you about whatever it is that you're investigating?

Mr. Anderson: I'd object, Your Honor. I think this is outside the scope of rebuttal.

Mr. Vu: This is -- this goes to the Defendant's testimony that this officer --

THE COURT: I'll overrule the objection, at least for this question. We'll see how far we go. Go ahead, Mr. Vu.

Q. (By Mr. Vu:) So, do you encourage people to tell you whatever information that you -- you need to know for your investigation?

A. I do.

Q. Okay. Did you -- do you discourage people not (sic) to tell you information?

A. I don't give people any legal advice. If they want to speak to me, I encourage their side of the story, so I can make the best, articulated decision.

Q. Okay. Now, in this case, do you believe that you provided Mr. White ample opportunity to tell his story to you?

A. Yes, I did.

Q. Okay. And his story to you was different from what he testified here today?

RP 367-69.

Mr. White's objection to Officer Suarez's response on this last question was sustained. RP 370

c. Closing Arguments

The State during closing arguments addressed Mr. White's credibility as it relates to his self-defense claim and the jury's role:

So, in terms of credibility, with the Defendant's credibility, you saw him testify today; okay? You saw the manner in which he testified. You saw the details that he, you know, that he provided in terms of information about Mr. Sorrick drinking, how -- how, you know, the timeline in which, you know, that -- it was the prior evening, and that how Mr. Sorrick struck him on the side of the head and that's why he, essentially, defended himself. Well, those are all important details; right? Very important details. **When was the first time anybody heard these details? It was when he**

**testified earlier today. When he was contacted and provided the opportunity by Officer Suarez to tell his story back on July 21st of last year, none of those details were provided. Nothing. He only said, well, I -- I - - I hit Roy because Roy came up on me. And I -- I hit him. That's it. No further details.** Well, the details only came now that he realizes the seriousness of this case. So, I would ask you to think about that and question his motive for his testimony, and then assess his credibility that way, you know, in -- in the context of the totality of the case...

RP 422-23 (emphasis added).

The State reiterated its point in summation:

Ladies and gentlemen, in this case I would [indiscernible] that you, like I said, review the entirety of the case. And the only way that the Defendant can assert a legitimate self-defense claim is if you bought his story. And the State submits that with the inconsistencies, as well as just the lack of [indiscernible] -- the incredibility, if you will, of **what he told you compared to what he told the police**, compared to the evidence in this case, there is no viable self-defense.

RP 429 (emphasis added).

d. Verdict, Sentence, and Appeal.

The jury found Mr. White guilty of assault in the second degree (count 1) but were not unanimous on whether the cane constituted a deadly weapon. CP 261, 263-64; RP 459-62. The jury found Mr. White guilty of unlawful imprisonment (count 2). *Id.*

The trial court found Mr. White indigent and waived all discretionary legal financial obligations. RP 504. The trial court sentenced Mr. White to a mid-range standard range sentence of 17.5 months. *Id.* This timely appeal follows.

D. ARGUMENT

1. THE STATE COMMENTED ON MR. WHITE'S POST-ARREST SILENCE.

The State repeatedly emphasized during cross-examination, rebuttal testimony, and closing arguments, Mr. White only answered questions asked, during the initial interrogation, but did not voluntarily provide additional facts he testified to during trial. Because the State's comment on

Mr. White's silence focused on what was not said, the State's repeated comments on Mr. White's silence was improper and violated his federal and state constitutional rights. Moreover, this error was not harmless. Despite counsel's failure to object, Mr. White can raise this issue for the first time on appeal because it raises a manifest error affecting a constitutional right. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); RAP 2.5(a)(3).

Mr. White's right to silence is derived from the Fifth Amendment, Fourteenth Amendment, and Article I, sec. 9 of the Washington Constitution. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); *State v. Burke*, 163 Wn.2d 204, 211, 181 P.3d 1 (2008); *Romero*, 113 Wn. App. at 786. These constitutional rights apply to both pre- and post-arrest interactions. *Easter*, 130 Wn.2d at 243. Due process is violated when the State comments "upon or otherwise exploit[s] a defendant's exercise of his right to

remain silent.” *Romero*, 113 Wn. App. at 786-87 (citing *Doyle*, 426 U.S. at 619).

“The right against self-incrimination is liberally construed.” *Easter*, 130 Wn.2d at 236 (citing *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951)). “It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” *Id.* (citing *Doe v. United States*, 487 U.S. 201, 210-12, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). Post-arrest silence is insolubly ambiguous and therefore silence “in the wake of these warning may be nothing more than the arrestee’s exercise of these Miranda rights.” *Doyle*, 426 U.S. at 617.

In *Doyle*, the defendants agreed to sell drugs to a police informant. *Doyle*, 426 U.S. at 611-12. During the transaction, the informant paid with less money than agreed upon and after the transaction, the defendant’s realized the issue and gave chase to the informant. *Id.* It



was disputed whether nearby police saw the transaction. The defendants were arrested shortly after the transactions. *Id.*

At trial the defendants testified in accord with the State's case except they claimed the informant was framing them, that it was the informant offering to sell the drugs, and the defendants were the purchasers. *Id.* During cross examination "for impeachment purposes," the prosecutor asked the defendants why they did not tell the officers the frame up story and if they were innocent why did they not profess their innocence to the officers. *Id.* at n. 4.

The Court held that impeaching a testifying defendant with his/her post-arrest silence, after being advised of *Miranda*, is unfair and violates the defendant's Fifth Amendment right to protection from self-incrimination. *Doyle*, 426 U.S. at 619. In doing so, the Court expressly rejected the notion that the State be permitted to challenge

the defendant's testimony in the case of fabrication. *Doyle*, 426 U.S. at 617. The Court reasoned that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle*, 426 U.S. at 617-18. The *Doyle* Court highlighted Justice White's concurring opinion in *United States v. Hale*, 422 U.S. 171, 182-83, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975),

"When a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony...

*Doyle*, 426 U.S. at 619.

In *Belgrade*, the Court held the State commented on the defendant's silence when during closing arguments the

State emphasized to the jury the defendant did not say anything to several law enforcement officials and did not explain to police his trial defense. *State v. Belgrade*, 110 Wn.2d 504, 510, 755 P.2d 174 (1988). The Court reaffirmed *Doyle's* holding that the State cannot impeach the defendant's silence with the defendant's failure to voluntarily provide statements. The Court reasoned that the State's argument during closing focused on the defendant's "failure to make a statement immediately upon arrest," not a prior inconsistent statement. *Belgrade*, 110 Wn.2d at 512.

In Mr. White's case, the State went beyond the facts described in *Doyle* and *Belgrade*. Specifically, the State commented on Mr. White's silence during cross-examination, rebuttal testimony, and in closing arguments. First, here as in *Belgrade*, the State elicited testimony from Mr. White that he did not voluntarily tell Officer Suarez every fact as discussed at trial. This testimony, in essence,

was a way to argue to the jury that Mr. White failed to make a statement. This was a direct comment on Mr. White's silence. Moreover, the colloquy in this case is similar to the colloquy in *Doyle*, where the prosecutor's emphasis was on the failure to make a statement to suggest guilt. *Doyle*, 426 U.S. at 611-12, n. 4.

Second, the State reemphasized Mr. White's failure to make statements during Officer Suarez's rebuttal testimony. Officer Suarez testified he gives everyone the opportunity to speak voluntarily but that Mr. White did not provide more detail than what was asked. RP 367-68. And even after this testimony the State continued to elicit testimony that Officer Suarez "provided ample opportunity" for Mr. White to explain his side of the story. RP 367-69. Again, just as during cross-examination, this was a direct comment on Mr. White's silence and failure to make a statement. *Romero*, 113 Wn. App. at 790 ("it is

constitutional error for the State to purposefully elicit testimony as to the defendant's silence.”).

Third, the State's comment on Mr. White's silence during closing is almost identical to the State's remarks in *Belgrade*. Here the State argued that Mr. White's testimony included important details but when “he was contacted and provided the opportunity by Officer Suarez to tell his story back on July 21st of last year, none of those details were provided...That's it. No further details...” RP 422. As in *Belgrade*, the State's remarks were focused on Mr. White's failure to make a statement, not on prior inconsistent statements. *Belgrade*, 110 Wn.2d at 512.

Under *Doyle* and *Belgrade*, the State's comment was impermissible and violated Mr. White's constitution rights to be free from self-incrimination.

e. The State's Impermissible Comment on Mr. White's Silence was not Harmless.

The State bears the burden of proving a constitutional error was harmless. *Easter*, 130 Wn.2d at 242. A constitutional error is harmless when the reviewing court is “convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Id.* (citing *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (internal punctuation modified). When, as here, the error was not harmless, this Court must vacate and remand for a new trial. *Id.* (citing *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)).

In *Holmes* the Court held that the State's comment on the defendant's silence during its case-in-chief and closing arguments was prejudicial that warranted reversal. *State v. Holmes*, 122 Wn. App. 438, 447, 93 P.3d 212

(2004). Specifically, the State asked its police witness what the defendant's demeanor was at the time of arrest. The officer responded the defendant did not appear surprised and there was no denial of the charges as would be expected. *Holmes*, 122 Wn. App. at 442. During closing arguments, the State told the jury "they placed the defendant under arrest at 2:00 o'clock in the afternoon and told him he was being arrested for rape of a child, how did he react? How did Detective Roth tell you he reacted? He wasn't surprised, didn't appear surprised." *Holmes*, 122 Wn. App. at 442-43.

The Court held the error was not harmless because the comment left the jury with the powerful suggestion that "Holmes knew he was guilty, and for that reason was not surprised to be confronted with the charges." *Holmes*, 122 Wn. App. at 447. In vacating the conviction, the Court noted that the case came down to credibility and "[c]redibility determination[s] cannot be duplicated by a review of the

written record, at least in cases where the defendant's exculpatory story is not facially unbelievable." *Id.* (quoting *State v. Gutierrez*, 50 Wn. App. 583, 591, 749 P.2d 213 (1988) (internal quotation marks omitted)).

Mr. White's statements to Officer Suarez and at trial were consistent: he struck Mr. Sorrick in self-defense. The State's repeated and concerted effort to impeach Mr. White on his silence in the failure to voluntarily provide additional facts was focused on Mr. White's self-defense claim. Specifically, the State argued to the jury that if Mr. White's credibility was in doubt, then his self-defense claim is not legitimate, and cannot be asserted. As in *Holmes*, Mr. White's version of events was not facially unbelievable making this case solely about credibility. This error was not harmless and this Court must vacate and remand. *Holmes*, 122 Wn. App. at 447.



## 2. SCRIVERNERS ERROR MUST BE CORRECTED

Under CrR 7.8 “[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” A scrivener’s error in a judgment and sentence requires remand to the trial court for correction. *In re pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

Here, the trial court found Mr. White indigent and waived all non-discretionary legal financial obligations (LFOs). RP 504. However, Mr. White’s judgment and sentence indicated a \$100 DNA collection fee. This is in error because Mr. White’s criminal history indicates two recent class C felony convictions in which DNA was taken and a fee imposed. CP 408, 415. 420. This Court must reverse so the trial court can correct the error.

E. CONCLUSION

The State violated Mr. White’s federal and state constitutional rights by commenting on Mr. White’s silence. This error was not harmless and this Court must vacate and remand. Mr. White’s felony judgment and sentence contains a scrivener’s error that must be corrected.

DATED this 25th day of February 2022.

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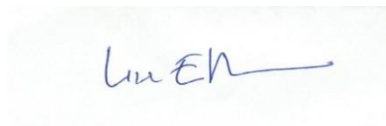
I, Kyle Berti, certify that the number of words in this document is 4778, exclusive of the words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial image.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Kyle Berti", written over a horizontal line.

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KYLE BERTI  
WSBA No. 57155  
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Lise Ellner", written over a horizontal line.

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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Kyle Berti, a person over the age of 18 years of age, served the Clark County Prosecutor ([cntypa.generaldelivery@clark.wa.gov](mailto:cntypa.generaldelivery@clark.wa.gov); [aaron.bartlett@clark.wa.gov](mailto:aaron.bartlett@clark.wa.gov)) and Robby White (1115 W 13th St 7, Vancouver, WA 98661) a true copy of the document to which this certificate is affixed on (2/25/2022). Service was made by electronically to the prosecutor, and Robby White by depositing in the mails of the United States of America, properly stamped and addressed.



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KYLE BERTI  
WSBA No. 57155  
Attorney for Appellant