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Jan 15, 2016  
Court of Appeals  
Division I  
State of Washington  
NO. 73143-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

PETER TYLER WHITMORE,

Appellant.

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

The Honorable Vickie I. Churchill  
Superior Court Cause No. 14-1-00215-8

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES .....1

    A. Did the trial court abuse its discretion by admitting evidence of the Defendant’s lawful arrest and surrounding circumstances? 1

    B. Did the trial court violate the statutory mandate to consider a Defendant’s ability to pay discretionary legal financial obligations? .....1

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

    A. Procedural History .....1

    B. Substantive Facts .....1

        1. Evidence presented in State’s case in chief .....1

        2. Defendant’s case .....3

III. ARGUMENT .....3

    A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT’S LAWFUL ARREST AND SURROUNDING CIRCUMSTANCES.....3

        1. Standard of Review .....3

        2. The trial court did not abuse its discretion in admitting res gestae evidence .....4

        3. Evidence admitted was part of the res gestae, relevant to police credibility and to prove knowing possession .....4

        4. Admission of res gestae evidence was not unfairly prejudicial .....8

        5. The admission of res gestae evidence was harmless .....10

    B. THE COURT DID NOT VIOLATE MANDATE TO CONSIDER DEFENDANT’S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.11

        1. Issue was not preserved for appeal .....11

2.	Standard and Scope of Review .....	12
3.	Sentencing court did in fact consider individual circumstances of the Defendant .....	12
IV.	CONCLUSION .....	14

TABLE OF AUTHORITIES

**WASHINGTON SUPREME COURT DECISIONS**

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610, 621 (1994) ..... 8, 9  
State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..... 3  
State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 11, 12, 13, 14  
State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) ..... 10  
State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981) ..... 4

**WASHINGTON COURT OF APPEALS DECISIONS**

State v. Baldwin, 63 Wn. App. 303, 818 P.2d 1116 (1991) ..... 12  
State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011)..... 12  
State v. Cameron, 47 Wn. App. 878, 737 P.2d 688 (Div. 1 1987) ..... 10  
State v. Fish, 99 Wn. App. 86, 992 P.2d 505 (1999) ..... 4  
State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004) ..... 4  
State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013)..... 12  
State v. Tharp, 27 Wn. App. 198, 616 P.2d 693(1980) ..... 3, 5

**WASHINGTON STATUTES**

RCW 10.01.160(3)..... 12

**I. STATEMENT OF THE ISSUES**

- A. Did the trial court abuse its discretion by admitting evidence of the Defendant's lawful arrest and surrounding circumstances?**
- B. Did the trial court violate the statutory mandate to consider a defendant's ability to pay discretionary legal financial obligations?**

**II. STATEMENT OF THE CASE**

**A. Procedural History**

The State agrees with the Whitmore's description of procedural history.

**B. Substantive Facts**

*1. Evidence presented in State's case in chief*

On June 14, 2014, Island County Sherriff's Office Deputies received a request for assistance from the Anacortes Police Department. 1 RP at 50, 77. The Anacortes Police requested that the Island County Sheriff's Office attempt to contact the Defendant, Peter Tyler Whitmore at 1917 Swantown Road in Oak Harbor, Washington. 1 RP at 50. While en-route to that location, police learned that Whitmore had an outstanding warrant for his arrest, and confirmed the warrant. 1 RP at 51-52, 77.

Upon arriving at this address the police knocked on the front door. 1 RP at 53. Whitmore's grandmother opened the door, and when the

deputies asked about Whitmore, she called into the interior of the house, “Peter, there’s some people here to see you.” 1 RP at 54. Whitmore came into view and when he saw uniformed officers at his door, said “oh shit.” 1 RP at 54. Deputies informed Whitmore of the reason for their visit: “that the Anacortes Police Department needed to talk to him about something they were doing.” 1 RP 55. The police then placed Whitmore under arrest based on the warrant. 1 RP at 55. Whitmore initially resisted the deputies’ attempts to handcuff him. 1 RP at 55. Deputy Davison ordered Whitmore to stop resisting. 1 RP at 55. Eventually, Whitmore was handcuffed and led to Deputy Davison’s patrol car. 1 RP at 56.

Before being placed in the patrol car, Deputy Gronbach patted down Whitmore for officer safety. 1 RP at 56-57, 84. Upon manipulation of Whitmore’s front right pocket, Deputy Gronbach felt an object. 1 RP at 85. The deputy asked Whitmore what was in his right front pocket, to which Whitmore responded, “Oh, I think it’s a lighter.” 1 RP at 85. When Gronbach attempted to push this object out of Whitmore’s pocket to determine what it was, a plastic bag which was on top of the object, came out first. 1 RP at 85-86. The plastic bag contained a small amount of methamphetamine. 1 RP at 56. The object that Deputy Gronbach felt was, in fact, a lighter. 1 RP at 86.

2. *Defendant's case*

At trial, Whitmore argued the affirmative defense of unwitting possession. Whitmore testified that he did not know there was meth in his pocket and that the pants he was wearing were not his. 2 RP at 147-49, 150-51. On cross-examination, Whitmore also admitted that at the time of arrest he had several objects in his pants pockets which were his own, including cigarettes and a lighter, which he had accessed several times over the course of the day prior to being arrested. 2 RP at 151-153.

**III. ARGUMENT**

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S LAWFUL ARREST AND SURROUNDING CIRCUMSTANCES

1. *Standard of Review*

A trial court's determination of the admissibility of evidence is reviewed for abuse of discretion, that is, "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693, 698 (1980) *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981) (quoting, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

2. *The trial court did not abuse its discretion in admitting res gestae evidence*

Under the res gestae or “same transaction” exception, evidence of other crimes or bad acts is admissible “to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505, 509-10 (1999) (quoting State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)). Evidence of surrounding circumstances must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *Id.*; see also State v. Lillard, 122 Wn. App. 422, 431-32, 93 P.3d 969, 974 (2004); State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961, 962 (1981) (affirming admission of “an unbroken sequence of incidents ... all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening”). Admissibility under the res gestae exception is a matter within the discretion of the trial court. Fish, 99 Wn. App. at 94.

3. *Evidence admitted was part of the res gestae, relevant to police credibility and to prove knowing possession*

In this case, the trial court admitted limited testimony from law enforcement witnesses regarding the reason for their contact with Whitmore. This testimony included reference to an Island County warrant

as well as the Anacortes Police Department's request for an "agency assist." Both of these facts were crucial to the jury's understanding of how the deputies discovered Whitmore's possession of methamphetamine. Without these facts, the deputies' presence at Whitmore's residence and their search of his pockets incident to arrest would be confusing to a jury and would appear to be an unjustified intrusion, administered at random. This, of course, is not the truth. A trial court is not required to constrict the presentation of evidence so as to hamper the truth-seeking function of trial. See Tharp, 27 Wn. App. at 205 ("The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction").

If the trial court had excluded this limited explanation of the circumstances immediately preceding the discovery of meth in Whitmore's pocket, the jury would have received "a truncated or fragmentary version of the transaction." *Id.* A reasonable juror presented with this incomplete story would have to wonder why the police did what they did, and would be forced to make assumptions (either about the police or the Defendant) to resolve this confusion. As the Appellant admits, credibility was at issue in this case. This includes both the credibility of the police as well as the Defendant. In fact, Whitmore's

testimony contradicted the testimony of police witnesses more than once. *Compare* 1 RP at 55 (Dep. Davison testifies that Defendant "...began to struggle; appeared he was trying to get away) *with* 2 RP at 160 (Defendant testifies that he immediately complied with police and did not resist); *compare also* 2 RP at 166 (Deputy Davison testifies that Defendant's pants were clean and not covered in any dust) *with* 2 RP at 162 (Defendant testifies that pants were dirty and covered with sheetrock dust in support of argument that they were "communal" work pants).

If presented with facts suggesting that the police randomly arrested Whitmore at his grandmother's home without justification, a reasonable jury would likely have inaccurately concluded that the police engaged in misconduct when they searched Whitmore. A juror's negative view of police credibility would likely follow from this mistaken conclusion about such misconduct. Thus, evidence that the arrest was conducted properly and lawfully was relevant to the credibility of the State's witnesses – credibility which was put at issue by Whitmore's own testimony and further highlighted in defense counsel's closing argument. 2 RP at 201 (Suggesting that Deputy Gronbach did not conduct a proper, methodical search of Whitmore's pockets, as the deputy had testified to.)

Appellant states that the circumstances of the arrest, and the arrest itself, had no relevance to any issue in dispute and lacked any probative

value. Br. App. at 5, 7. On the contrary, Evidence showing that Whitmore initially resisted the lawful arrest by the police suggests that he knew he was going to be searched and that he knew he had methamphetamine in his pocket. It would have been impossible to present evidence of this resistance without evidence of the arrest itself

The fact that Whitmore cannot come up with any workable alternative to the trial court's solution, is indicative of the strength of Appellant's claim of error. Confusingly, Defendant suggests that it would have been sufficient for officers to report they acted upon "information received" rather than that they acted upon a confirmed arrest warrant. Br. App. at 6. Importantly, Whitmore does not explain how this different phrasing would give the jury proper context for the ultimate search of Whitmore's pockets. Under Whitmore's revision, would law enforcement witnesses be allowed to testify that they searched the Defendant incident to arrest, or would the fact of the arrest itself, based on "information received", also suggest that the Defendant was a "serial criminal"? Br. of App. at 8. Is Appellant suggesting that evidence of the arrest itself should not have been presented, or just that the arrest should appear to the jury to be unjustified? Surely, justice does not require trial courts to hide so much of the truth from the jury. See Carson v. Fine, 123 Wn.2d 206, 225, 867

P.2d 610, 621 (1994) (“it should go without saying that ER 403 must be administered in an evenhanded manner).

4. *Admission of res gestae evidence was not unfairly prejudicial*

Next, in arguing that testimony regarding the “agency assist” was unfairly prejudicial, Appellant asserts that “the officers’ testimony essentially told the jury that Whitmore was already a criminal and the Anacortes police suspected him of yet other crimes.” Br. App. at 7. But this assertion is not supported by the record. At trial, Deputy Davison testified: “I explained to him why we were there. That the Anacortes Police Department needed to talk to him about something they were doing.” 1 RP at 55. This testimony provides context without unfair prejudice. There is no indication in this testimony that Anacortes Police “suspected Whitmore of yet other crimes” or that he was already a criminal – the police simply “needed to talk to him about something they were doing.”

Note that in evaluating a trial court’s application of ER 403, appellate courts are not concerned with “ordinary prejudice” as all relevant evidence is prejudicial. Fine, 123 Wn.2d at 224-25. Instead, “Washington cases are in agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision

among the jurors.” Fine, 123 Wn.2d at 223 (citing Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987)). Further, “[E]ffective use of voir dire and cross examination, proper instructions to the jury concerning its duty to weigh credibility, and the standard admonition not to permit sympathy or prejudice to affect the verdict are the tools to direct the jury to a proper consideration of the evidence.” Fine, 123 Wn.2d at 224-25. In this case, evidence of prior bad acts (e.g., the reason the warrant was issued) was not admitted by the trial court. Regarding facts not before them, the jury was instructed “Do not speculate whether the evidence would have favored one party or the other.” 2 RP at 177. The jury was also instructed, “You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you; not on sympathy, prejudice or personal preference.” 2 RP at 180.

The fact that Whitmore was searched incident to arrest on a valid warrant and that another police department wanted to talk to him are not likely to provoke an emotional or irrational response by jurors. This evidence is not so unfairly prejudicial as to cause reasonable jurors to abandon the trial court’s clear instruction on speculation, prejudice and emotion.

In sum, the circumstances of Defendant's arrest had significant probative value, were not unfairly prejudicial, and the trial court's decision to admit this evidence ultimately avoided jury confusion. The trial court's sound decision to allow a limited explanation of these circumstances was prudent, and not an abuse of discretion.

5. *The admission of res gestae evidence was harmless*

Even if this court determines that the trial court erred in admitting testimony of the circumstances surrounding Whitmore's arrest, such error was harmless. "It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed under the lesser standard for non-constitutional error." State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207, 219 (2012). "The question, then, is whether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (internal quotations omitted); State v. Cameron, 47 Wn. App. 878, 737 P.2d 688 (Div. 1 1987) (same).

In this case, the existence of an arrest warrant and the fact that the Anacortes police wanted to talk to Whitmore "about something they were doing" merely explained why the police traveled to Whitmore's grandmother's house, and later arrested him. These circumstances were not discussed in the closing arguments of either party. 2 RP at 186. Even if found to be erroneous, such a limited explanation is not, within

reasonable probabilities, likely to have caused the jury to abandon the trial court's clear instructions on speculation and emotion, and it is not likely to have resulted in a materially different outcome.

B. THE COURT DID NOT VIOLATE MANDATE TO CONSIDER DEFENDANT'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

1. *Issue was not preserved for appeal*

In this case, Whitmore asked for waiver of some legal financial obligations based on his financial circumstances. 1 RP (Sentencing) at 3-4. Whitmore's recommendation was followed in part by the sentencing court. 1 RP (Sentencing) at 4-5. Whitmore did not object to the obligations imposed, and did not object to the manner of the court's inquiry. Thus, this issue was not preserved for appeal. RAP 2.5(a). This Court may exercise its discretion to refuse to consider the merits of unpreserved claims of error. *Id.*; State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680, 681 (2015) (affirming the Court of Appeals' exercise of discretion under RAP 2.5, but reaching the merits of an unpreserved claim using its own RAP 2.5 discretion). However, this court may also choose to reach unpreserved claims or waive application of the Rules of Appellate Procedure altogether when required "to serve the ends of justice." RAP 1.2(c).

2. *Standard and Scope of Review*

A trial court's determination concerning a defendant's resources and ability to pay are reviewed under the clearly erroneous standard. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). A decision on whether to impose fees is reviewed for abuse of discretion. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). RCW 10.01.160(3) requires a sentencing court to "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." However, this inquiry is only required for discretionary LFOs. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate according to the current sentencing scheme and without the court's discretion by legislative design.). Trial courts are not required to enter formal, specific findings. *Id.* 176 Wn.App. at 105.

3. *Sentencing court did in fact consider individual circumstances of the Defendant*

If this court reaches the merits on this issue, Whitmore's sentence should be affirmed. In this case, the trial court sentenced Whitmore on February 2, 2015, without the benefit of State v. Blazina, 182 Wn.2d 827,

830, 344 P.3d 680, 681 (March 12, 2015). Yet, the record does show individual consideration by the court.

On the second day of trial (January 28, 2015), Whitmore took the witness stand and presented testimony on the subject of his employment history. Whitmore testified that at the time of his arrest he had been employed in the construction industry, specifically “framing, roofing, siding, shingle work, sheetrock.” 2 RP at 136. Whitmore further testified that he had worked on “quite a few construction sites” (2 RP at 140) and that he had been working in some form or another in construction for about 19 years. 2 RP at 141. Whitmore stated that on the day of his arrest he had been “rebuilding one of my mother’s rentals.” 2RP at 142.

Sentencing took place soon after trial and was conducted by the same judge. At sentencing, counsel for Whitmore requested that a discretionary \$1,000 VUCSA fine be waived “given Mr. Whitmore has been found to be indigent. And we would make the same request with respect to the Crime Lab fee.” 1 RP (Sentencing) at 4. The court asked Whitmore “is there anything you wish to say?” Whitmore responded “no, ma’am.” 1 RP (Sentencing) at 4. The court took Whitmore’s indigency into account, waiving the VUCSA fine, but imposing certain other legal financial obligations. Whitmore was sentenced to total confinement of 60

days. 1 RP (Sentencing) at 4. Whitmore was 28 years old at the time of sentencing. 2 RP at 141.

Based on the actions of the court at sentencing, partially granting Whitmore's request to waive fines and fees, and based on the amount of information already known to the sentencing court about Whitmore's employment history, the State asks this court to find that the court sufficiently "took account of the financial resources of the defendant and the burden that payment of costs will impose" and therefore affirm Whitmore's sentence.

Because the holding of Blazina only requires an individualized inquiry with regard to discretionary obligations, even if the sentencing court's inquiry was not sufficient, the issues on resentencing should be limited to an evaluation of the Defendant's present and future ability to pay discretionary legal financial obligations.

#### **IV. CONCLUSION**

Based on the foregoing, the State respectfully requests that this court find that the trial court's challenged evidentiary rulings were not an abuse of discretion and affirm Whitmore's conviction. Further, the State requests that this court decline to review discretionary legal financial obligations. If this court determines review of discretionary legal financial

obligations in this case is necessary, the State requests that this court affirm the sentencing court's determination.

Respectfully submitted this 15<sup>th</sup> day of January, 2016.

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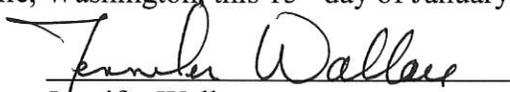
DECLARATION OF SERVICE

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 15<sup>th</sup> day of January, 2016, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Eric J. Nielsen  
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Signed in Coupeville, Washington, this 15<sup>th</sup> day of January, 2016.

  
Jennifer Wallace