

NO. 42728-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS BLAZINA,

Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to release individual juror information.

2. The trial court's conclusion appellant has the ability to pay restitution and other legal financial obligations (LFOs) is unsupported by the record.

Issues Pertaining to Assignments of Error

1. After appellant's trial, two jurors told defense counsel the jury had reached its verdict not based on the strength of the State's evidence but, instead, based upon the assumption that the defendant's witnesses were lying and, therefore, the defendant must be guilty. Defense counsel moved under GR 31(j)¹ to have the individual juror information released so he could investigate whether juror misconduct occurred. The trial court denied his motion. Was this error?

¹ GR 31(j) provides:

Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or a member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

2. RCW 9.94A.753 and RCW 10.01.160 require the trial court to consider the defendant's present, past, and future ability to pay the amount ordered before imposing restitution and other LFOs. In this case, the trial court ordered appellant to pay \$47,145.69 in restitution and \$3,387.87 for other legal fees and costs. In so ordering, the trial court included generic, pre-formatted language in the Judgment and Sentence that concluded appellant had the ability or likely future ability to pay this amount. There is nothing in the record, however, indicating that the trial court ever took into account appellant's financial resources or likely future resources. Was this error?

B. STATEMENT OF THE CASE

1. Procedural History

On May 7, 2008, the Pierce County prosecutor charged appellant Nicholas Blazina with one count of second degree assault. CP 1-2. Due to Blazina's incarceration in Alabama, several years passed before the case was finally brought to trial in June 2011. RP 6.² On June 24, 2011, a jury found Blazina guilty

² The verbatim report of proceedings are referred to as follows: RP refers to the multivolume, consecutively paginated transcript and 1RP refers to the only other transcript (June 16, 2011).

as charged. CP 22. Blazina was sentenced to 20 months of incarceration and ordered to pay \$47,145.69 in restitution and \$3,387.87 in other LFOs. CP 30; CP ___ (“Order Setting Restitution and Disbursement”).³

2. Substantive Facts

On May 1, 2008, Blazina met with a group of friends to go out drinking at a local bar. RP 366. Blazina was dressed for an evening out, wearing a black muscle t-shirt that showed off his physic. RP 417, 434. Around 9:00 p.m., Blazina arrived at the Q Bar and Restaurant in Graham with his old high school buddy, Kevin Ellyson, and Ellyson’s girlfriend, Carrie Duncan. RP 155, 366. Also there, were his friends Brett Shin, Michael Jackson, and Jackson’s girlfriend Carley Broadway. RP 366-67, 388, 410.

Once at the bar, the friends all drank beers and mixed drinks together. RP 370, 376, 390, 391, 393, 412, 431. As the evening progressed, Duncan and Ellyson became drunk, and began to fight after Ellyson danced with another woman. RP 370, 391, 414, 416, 431-32. After a heated exchange between the two, a bouncer came over to the party’s table to make sure the argument de-

³ Attached as an appendix.

escalated. RP 414. Although Blazina was also drinking, his friends noted he was not out-of-control or confrontational but was, instead, happy. RP 376-77, 393, 435.

At approximately midnight, there was a commotion out on the dance floor when another person at the bar, Keith Ainsworth, was assaulted. RP 266-67, 298. Ainsworth had arrived at the bar between 7:00 and 9:00 p.m. with his own friends -- Daisy Baza, Richard Russel, and Debbie Rogers. RP 261, 294. They had a lot to drink.⁴ RP 265, 295, 287. As the party began to leave around midnight, they crossed the crowded dance floor, bumping into people as they made their way through. RP 297. Rogers was in front. RP 296. Ainsworth was further behind, with Russell and Daisy following him. RP 296, 298; 2RP 8.

Suddenly, someone punched Ainsworth squarely in the mouth. RP 298-99, 306. Ainsworth went limp and fell face first onto the floor where he lay bleeding from his nose and mouth. RP 299-300. Russel tried to grab the perpetrator, but he could not hold on and the man ran off. RP 299.

⁴ By the end of the evening, Ainsworth's blood alcohol level was 2.70. RP 256.

Meanwhile, hearing the scuffle out on the dance floor, Ellyson decided to leave the bar and return to his car. RP 377. He did not know where Blazina was at the time of the assault, but he eventually met Duncan and Blazina at the car afterward. RP 379-80.

Carley Broadway also heard the commotion on the dance floor. RP 418. She did not know where Blazina or her boyfriend (Jackson) were at the time. RP 418-19. She left the bar and got a ride with a girlfriend. RP 419-20. Broadway did not see the others until they met up at her apartment later that evening. RP 419-20.

Jackson and Blazina were talking at a table when the scuffle on the dance floor took place. RP 393-94. Jackson was worried that Ellyson might have been involved in the ruckus. RP 408. He and Blazina left the bar in a hurry because Blazina had prior warrants and they did not want to get into trouble. RP 401, 408. Brett Shin also left the bar with Michael and Blazina. RP 435-36. Eventually, Jackson and Blazina went to Ellyson's car where they met Ellyson and Duncan. RP 395-97.

Meanwhile, police and medical personnel arrived. RP 154-56. Ainsworth was taken to the hospital where he was later diagnosed with a fractured jaw, lacerated tongue, and several

broken teeth. RP 256-257, 273-76. Before he left for the hospital, Ainsworth told police he had no memory of what had happened. RP 163.

Police spoke with, and took statements from, Baza, Russell, and Chadwick Klein. RP156-57. Klein had been running the sound system for the band that night and was standing very close to Ainsworth when the assault occurred. 2RP 25-28. He had observed that Ainsworth had been having a casual conversation with the perpetrator for about three minutes before the attack. 2RP 31-32. Klein said that there was nothing leading up to the assault and that it appeared unprovoked. 2RP 28, 31. Contrarily, Baza and Russell said the perpetrator was unknown to them and had only said a few words when the punch came out of the blue. RP 298, 307; 2RP 8, 23. Baza told police the perpetrator was wearing a black vest and had red hair. RP 158-59; 2RP 8, 13. Klein reported that the man wore a grayish vest. RP 158-59; 2RP 29.

Blazina's name was not mentioned until Duncan called the bar the next day. RP 336. Duncan told a very different story about what happened at the bar than did all the others in her party. RP180-250. She claimed that she did not drink anything that night. RP 181. She also denied ever having an argument with Ellyson.

RP 226. Instead, Duncan claimed Ellyson became rude and obnoxious toward her and was escorted out of the bar by bouncers. RP 186, 217. Duncan also claimed everyone except she and Blazina had left by the end of the evening. RP 188. Duncan said that as she and Blazina were leaving, she saw Blazina walk past and punch a man for no reason. RP 189-90, 231-32.

Duncan said that she went out to the car and Blazina forced her to drive him away in Ellyson's car by threatening her and not allowing her to leave the car. RP 192-94. Duncan said she drove a few blocks away and then ordered Blazina out of the car at an intersection. RP 194. Yet, Duncan failed to contact police until the next day when she called the bar and asked to have the police contact her. RP 195. When police contacted her, Duncan identified Blazina as the person who assaulted Ainsworth. RP 196-97.

Police put together a montage with Blazina's picture. RP 322. Duncan, of course, identified Blazina. RP 329. Russel also identified him, but Russel was not particularly confident in his identification. RP 302, 306, 311. Neither Baza nor Ainsworth identified Blazina from the montage. RP 327.

At trial, the jury heard testimony from the witnesses mentioned above and Blazina chose not to testify. RP 424. After deliberating for some time, the jury -- faced with the conflicting testimony -- sent a note to the trial court indicating they could not reach a verdict. CP 4. The trial court asked them to continue deliberating the following morning. CP 4. The jury eventually reached a guilty verdict. CP 22.

Upon leaving the courtroom, two of the jurors told defense counsel the jury had reached its verdict, not based upon the strength of the State's evidence but upon the assumption that the defendant's witnesses were lying to protect the defendant. CP 23. Defense counsel made a motion to disclose juror information so he could investigate potential juror misconduct. CP 23. The trial court denied this motion, ruling there was not good cause to reveal such information. RP 511. This appeal follows. CP 40-41.

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED BLAZINA'S MOTION TO DISCLOSE JUROR INFORMATION.

Individual juror information may be given to a party upon a showing of good cause. GR 31(j). In this case, defense counsel moved to have such information disclosed so he could investigate

potential juror misconduct. CP 23. As a showing of good cause, he informed the trial court that two jurors had told him “the jury reached its verdict not on the State’s evidence, but upon the assumption that the defendant’s witnesses were lying to help the defendant and therefore the defendant must be guilty.” CP 23. Defense counsel sought juror information so he could investigate whether the jury had disregarded the presumption of innocence and returned an illegal verdict. CP 23; RP 505-506.

The trial court denied Blazina’s motion to release individual juror information. RP 511. It found there was not good cause because the jurors’ comments simply revealed the jury’s thought process and, thus, inhered in the verdict. RP 511. This was error.

The jurors’ comments indicated that at least some of the jurors had reached their conclusion by disregarding the presumption of innocence and by easing the State’s burden. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Such a presumption means that in every criminal case the “defendant is presumed to be innocent throughout the trial and that the burden resides with the State to overcome that presumption by evidence that is convincing beyond a reasonable doubt....” State v.

Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) (Alexander C.J., concurrence, in part, with dissent).

Where the presumption of innocence is compromised and infects the verdict, a defendant is entitled to a new trial where the presumption of innocence will be correctly applied. See, State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (finding prosecutorial conduct that undermines the jury's ability to maintain a presumption of innocence merits a new trial); State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 81 (2010) (same). Whether it is a prosecutor who erodes the presumption of innocence through flagrant misconduct or a jury that erodes it by refusing to apply the presumption and hold the State to its burden, the result is the same – the defendant is denied a fair trial.

When asking for the release of juror information, Blazina was not yet asking for a new trial based on juror misconduct – he was merely requesting the opportunity to conduct a thorough investigation of the matter. He had good reason to investigate. The jurors' comments indicated that they had reached their decision to convict Blazina only by ignoring the presumption of innocence and by failing to hold the State to its burden. If true, this strikes at the heart of what it means to have a fair trial. Thus, the

defense should have been permitted to fully investigate whether juror misconduct occurred.

For the reasons stated above, this Court should find “good cause” supported the defense motion for the release of juror information for the limited purpose of permitting the defense to fully investigate whether juror misconduct occurred. Consequently, this Court should reverse the trial court’s order denying the motion, and remand so defense counsel may fully investigate the matter.

II. THE TRIAL COURT ERRED WHEN IT CONCLUDED BLAZINA HAD THE PRESENT OR FUTURE ABILITY TO PAY RESTITUTION AND OTHER LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding the defendant’s ability to pay LFOs and restitution, a sentencing court must consider the individual defendant’s financial resources and the burden of imposing such obligations on him. RCW 9.94A.753; RCW 10.01.160; State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

Here, the trial court ordered Blazina to pay \$47,145.69 in restitution and \$3387.87 in other LFOs. CP 30; Appendix. In the Judgment and Sentence the trial court entered the following generic

language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

CP 29. Blazina challenges this pre-formatted conclusion on the ground that the record reveals no such consideration took place.

Appellate courts review the trial court's decision on ability to pay under the clearly erroneous standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the nature of the burden imposed by requiring payment. Id.; see, State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error).

Such error may be raised for the first time on appeal. See, Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also, State v. Ford, 137 Wn.2d

472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

As in Bertrand, this record reveals no factual findings or analysis supporting the court's conclusion that Blazina had the present or future ability to pay the LFOs or the ordered restitution. CP 28-39; Appendix; RP 515-37. Indeed, this record suggests the opposite may very well be true given the large amount of fees and restitution ordered and Blazina's felony convictions and lengthy incarceration on this matter and others in Alabama (RP 516-525). Cf., Baldwin, 63 Wn. App. at 311 (statement in presentence report that Baldwin was employable supported this Court's conclusion that sentencing court properly considered burden of costs under RCW 10.01.160).

Accordingly, the portion of finding 2.5 quoted above was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405. Moreover, before restitution or other non-mandatory⁵ LFOs can be collected, there must be a properly supported, individualized judicial determination that Blazina's has the ability to pay. Id., at 405 n.16.

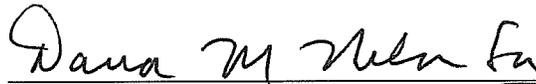
⁵ Blazina does not challenge the imposition of mandatory LFOs such as the DNA collection fee (RCW 43.43.7541) and the Victim Penalty Assessment (RCW 7.68.035).

D. CONCLUSION

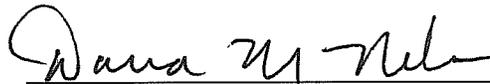
This Court should remand with an order to permit the defense to access individual juror information for the limited purpose of conducting an investigation into jury misconduct. Additionally, the Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 30th day of April, 2012.

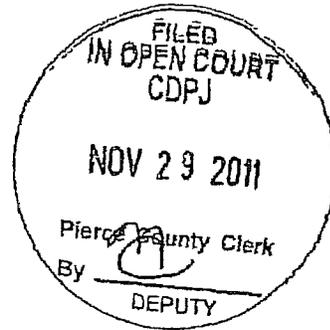
Respectfully submitted,
NIELSEN, BROMAN & KOCH, PLLC



JENNIFER L. DOBSON
WSBA No. 30487



DANA M. NELSON
WSBA No. 28239
Office ID No. 91051
Attorneys for Appellant



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-02197-3

vs.

NICHOLAS PETER BLAZINA,

ORDER SETTING RESTITUTION AND DISBURSEMENT

Defendant.

THIS MATTER having come on before the undersigned judge of the above entitled court and restitution having been ordered pursuant to a criminal conviction and RCW 9.94A.753 which provides in part that restitution be ordered for easily ascertainable damage for injury or loss of property and actual expenses incurred for treatment for injury to persons and lost wages resulting from injury, but that the amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime; and the files of the Prosecuting Attorney having reflected that the following persons or entities should receive restitution; Now, Therefore, IT IS HEREBY

ORDERED that restitution in the above entitled matter be, and the same is hereby set in the sum of \$47,145.69 and the Clerk of the above entitled Court is hereby directed to disburse said funds as they are received in the manner following:

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Keith Ainsworth \$3,217.82

Crime Victims Compensation, \$2,931.85
Claim# VL91149

Law Office of Bryan Davenport \$40,996.02
For Peltram Plumbing, LLC and
Monumental Life Insurance, Peltram \$1,137.90
File# E6-16-09 Monumental 9858.12

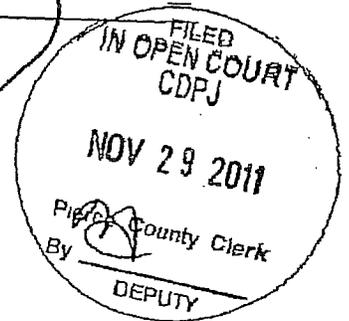
> Total 40,996.02

DONE IN OPEN COURT this 29 day of Nov., 2011.

JUDGE

Presented by:

Marcus Miller
MARCUS MILLER
Deputy Prosecuting Attorney
WSB # 27563



I, NICHOLAS PETER BLAZINA, Cause No. 08-1-02197-3 being fully advised I have a right to be brought before the Court for a full Restitution Hearing, and to have an attorney present to represent me, and that the Court will appoint an attorney if I cannot afford one, hereby waive ~~these rights~~ and agree to entry of this order.

Date

Nicholas Peter Blazina
Signature of Defendant

[Signature]
Signature Witness or Attorney for Defendant

mnc

NIELSEN, BROMAN & KOCH, PLLC

April 30, 2012 - 2:17 PM

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ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

1908 E. MADISON STREET
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 Fax (206) 623-2488
WWW.NWATTORNEY.NET

JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

OF COUNSEL
K. CAROLYN RAMAMURTI
REBECCA WOLD BOUCHEY

May 2, 2012

David C. Ponzoha
The Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

Re: COA No. 42728-1-II
State v. Nicholas Blazina

Dear Mr. Ponzoha:

Please except this explanation in lieu of proof of service of the opening brief on Mr. Blazina. We have been unable to locate him after diligent efforts. After the restitution hearing in his case in November 2011, the trial court here ordered him returned to Alabama to finish his sentence there. We have checked with the Department of Corrections in Alabama, and he has since been released. We also checked with the Department of Corrections here, and he is not in custody. We have no further leads at this time.

Sincerely,



Dana M. Nelson
Attorney for Appellant

Cc: Kathleen Proctor, Pierce County Prosecutor's Office

NIELSEN, BROMAN & KOCH, PLLC

May 02, 2012 - 1:36 PM

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