

NO. 42728-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS BLAZINA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 08-1-02197-3

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. When information inherent in the verdict cannot demonstrate juror misconduct, did the trial court abuse its discretion when it denied the defendant's motion to release individual juror information?..... 1

 2. Did the trial court abuse its discretion in ordering the defendant to pay costs when the issue is neither preserved for appeal nor ripe for review? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts..... 2

C. ARGUMENT..... 4

 1. WHEN INFORMATION INHERENT IN THE VERDICT CANNOT DEMONSTRATE JUROR MISCONDUCT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO RELEASE JUROR INFORMATION..... 4

 2. THE TRIAL COURT DID NOT ERR IN ORDERING THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE ISSUE IS NEITHER PRESERVED FOR APPEAL NOR RIPE FOR REVIEW..... 7

D. CONCLUSION..... 12

Table of Authorities

State Cases

| | |
|---|----------|
| <i>Breckenridge v. Valley General Hosp.</i> , 150 Wn.2d 197, 75 P.3d 944 (2003)..... | 4-5 |
| <i>State v. Baldwin</i> , 63 Wn. App. 303, 309, 818 P.2d 1116 (1991)..... | 7, 8, 10 |
| <i>State v. Bertrand</i> , 165 Wn. App. 393, 405, 267 P.3d 511 (2011)..... | 9 |
| <i>State v. Brewster</i> , 152 Wn. App. 856, 862, 218 P.3d 249 (2009)..... | 5 |
| <i>State v. Curry</i> , 62 Wn. App. 676, 680, 814 P.2d 1252 (1991)..... | 7 |
| <i>State v. Havens</i> , 70 Wn. App. 251, 256, 852 P.2d 1120 (1993)..... | 5, 6 |
| <i>State v. Jackman</i> , 113 Wn.2d 772, 777, 783 P.2d 580 (1989)..... | 5, 6 |
| <i>State v. Johnson</i> , 124, Wn.2d. 57, 77, 873 P.2d 514 (1994)..... | 5 |
| <i>State v. Ng</i> , 110 Wn.2d 32, 43, 750 P.2d 632 (1988)..... | 5 |
| <i>State v. Smits</i> , 152 Wn. App. 514, 216 P.3d 1097 (2009)..... | 10 |
| <i>State v. Strode</i> , 167 Wn.2d 222, 239, 217 P.3d 310 (2009)..... | 4 |
| <i>State v. Woodward</i> , 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003).... | 11 |

Federal Cases and Other Jurisdictions

| | |
|--|----|
| <i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976)..... | 11 |
|--|----|

Statutes

| | |
|---------------------------|-------|
| RCW 10.01.160 | 8, 10 |
| RCW 10.01.160(1)(2) | 8, 10 |
| RCW 10.01.160(3)..... | 10 |
| RCW 36.18.020(h)..... | 8 |

| | |
|-----------------------|----|
| RCW 43.43.754 | 8 |
| RCW 7.68.035 | 8 |
| RCW 9.94A.030..... | 8 |
| RCW 9.94A.753(4)..... | 10 |
| RCW 9.94A.753(5)..... | 8 |

Rules and Regulations

| | |
|------------------|------|
| GR 31 | 4 |
| GR 31(j) | 4, 6 |
| RAP 2.5(a) | 7 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When information inherent in the verdict cannot demonstrate juror misconduct, did the trial court abuse its discretion when it denied the defendant's motion to release individual juror information?

2. Did the trial court abuse its discretion in ordering the defendant to pay costs when the issue is neither preserved for appeal nor ripe for review?

B. STATEMENT OF THE CASE.

1. Procedure

On May 7, 2008, the Pierce County Prosecuting Attorney's Office (State) charged Nicholas Blazina, defendant, with one count of second degree assault. CP 1. This case was not brought to trial until June 2011 due to the defendant's incarceration in Alabama. RP 6.

This case was assigned for trial to the Honorable Judge Edmund Murphy, and trial began on June 14, 2011. RP 142. After hearing all of the evidence, a jury found the defendant guilty as charged on October 4, 2011. RP 499. The defendant was sentenced to 20 months in custody with 371 days of credit for time served prior to sentencing. CP 33. He was also ordered to pay \$47,145.69 in restitution as well as \$3,387.87 in other legal

financial obligations (LFOs). CP 31. This appeal was timely filed on November 1, 2011. CP 42-43.

2. Facts

Around 9 p.m. on May 1, 2008, the defendant arrived with Kevin Ellyson and Carrie Duncan at Qz Restaurant and Lounge in Graham, WA to meet with his friends Michael Jackson, Brett Shin, and Carley Broadway. RP 181-184; RP 212- 214; RP 369.

Around the same time, an unrelated group of people arrived at the bar. RP 263. This group included the victim, Keith Ainsworth, and his friends Debbie Rogers, Richard Russell, Daisy Baza, and Dan Backer. RP 260. Both groups consumed food and alcohol as the night progressed. RP 265.

Later that night, Ellyson was ejected from the bar following an argument between him and his girlfriend, Duncan. RP 186. He went to his car and fell asleep in the backseat. RP 192.

Around midnight, as people from both groups were leaving the bar, the defendant assaulted the victim, Ainsworth, without provocation as the two crossed paths on the dance floor. RP 190; RP 298. Ainsworth immediately fell to the ground where he lay bleeding and unconscious. *Id.* Russell attempted to grab the defendant, but could not because a bouncer, mistaking Russell for the defendant, put him in a headlock. *Id.* By the

time the bouncer realized he had the wrong person, the defendant had fled the bar. *Id.*

Duncan witnessed the assault occur 15 feet in front of her. RP 189. Duncan, who drove Ellyson and the defendant to the bar, went to Ellyson's vehicle to escape the commotion and got into the driver's seat. *Id.* Ellyson was still sleeping in the backseat. RP 192. Shortly thereafter, the defendant got into the passenger seat of the vehicle. RP 193. The defendant demanded that Duncan drive off before the police arrived. *Id.* He even put the car in reverse despite Duncan's orders for him to get out of the car. *Id.* Duncan stopped in the middle of an intersection and convinced the defendant to get out of the car after driving half a block away from the bar. RP 194.

Meanwhile, police and medical personnel arrived at the bar. RP 154; RP 156. The police took statements from Baza, Chadwick Klein, and Joseph VanPevenage. RP 156-157. Klein, who ran the sound system with VanPevenage, witnessed the defendant assault the victim three feet in front of Klein. 6/16/2011 RP 28. Klein and Baza told the police that the assault was completely unprovoked. RP 28; RP 9.

Duncan provided the police with a statement the next day. RP 196. Duncan and Russell later identified the defendant in a photomontage generated by the police. RP 366.

The victim was taken to Madigan Hospital where he was treated for a fractured jaw, lacerated tongue, and four broken teeth. RP 274-275.

He regained consciousness three days later at Harborview Medical Center. RP 275. He had no recollection about the night. RP 260. As a result of the assault, he was out of work for a month and underwent six or seven surgeries. RP 276.

C. ARGUMENT.

1. WHEN INFORMATION INHERENT IN THE VERDICT CANNOT DEMONSTRATE JUROR MISCONDUCT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO RELEASE JUROR INFORMATION.

General Rule 31 is a procedural rule that facilitates juror privacy and was adopted in acknowledgement of the importance of juror privacy. *State v. Strode*, 167 Wn.2d 222, 239, 217 P.3d 310 (2009). GR 31(j) states,

“[i]ndividual 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 member of the public, may petition the trial court for access to individual juror information under the control of the 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.”

GR 31(j) (emphasis added)

The courts require the parties to present a strong showing of jury misconduct to overcome the public policy favoring certain and stable verdicts. *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 75 P.3d

944 (2003). A trial court's decision whether to grant juror access is reviewed for an abuse of discretion. *State v. Brewster*, 152 Wn. App. 856, 862, 218 P.3d 249 (2009).

When considering allegations of jury misconduct, courts must only evaluate facts relating to allegations, and cannot consider facts inherent in the verdict. *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). The factors that inhere in the verdict are, "[t]he mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors have given to particular evidence, or the jurors intentions and beliefs." *Id.* In particular, the individual or group processes leading to a verdict inhere in the verdict. *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (a juror's post verdict description of the method used by the jury to reach its verdict could not be used to support a motion for new trial.)

Public policy forbids inquiries into the jury's private deliberations. *State v. Havens*, 70 Wn. App. 251, 256, 852 P.2d 1120 (1993). The jury is presumed to have followed the courts instructions. *State v. Johnson*, 124, Wn.2d. 57, 77, 873 P.2d 514 (1994).

Here, the defendant sought access to juror information to conduct interviews for the purpose of obtaining information that related to the verdict process. Before deliberations, the jurors were properly instructed

that they were the sole judges of the credibility of each witness (CP 8) and told about the presumption of the defendant's innocence (CP 10) as well as the burden of proof on the State (CP 10).

After the jury delivered its verdict, two jurors told defense counsel, while stepping out of an elevator, that they reached their verdict based on their belief that the witnesses were lying to protect the defendant. RP 506. The defendant filed a GR 31(j) motion to release juror's personal information, and the matter was heard by the court on September 9, 2011. CP 23; CP 24. After the judge heard both parties' arguments and analyzed GR 31(j), the motion was denied for a lack of good cause. CP 24. The judge stated that "...the information that has been presented to the Court would go... towards the mental processes by which the jurors reached their respective conclusions and would adhere in the verdict... therefore I don't find a showing of good cause has been made for the Court to release the personal information of the jurors." RP 510-511.

After addressing both parties' arguments and analyzing the statute and relevant case law, the trial court properly found that the defendant did not show good cause. The defendant did not demonstrate good cause because the juror's comments are information relating to the verdict process. This information inheres in the verdict and cannot be considered by the court pursuant to case law and public policy. *Jackman*, 113 Wn.2d at 777; *Havens*, 70 Wn. App. at 256.

2. THE TRIAL COURT DID NOT ERR IN ORDERING THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE ISSUE IS NEITHER PRESERVED FOR APPEAL NOR RIPE FOR REVIEW.

a. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In this case, the defendant does not claim any of the three circumstances listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. RP 256. Therefore, the defendant did not properly preserve this issue for appeal. For these reasons, the court should not consider this matter because the issue is not properly before the court.

b. The trial court did not err in ordering the defendant to pay legal financial obligations.

Different components of defendant's financial obligations require separate analysis. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); *State v. Curry*, 62 Wn. App. 676, 680, 814 P.2d 1252 (1991). While the sentencing court's determination of a defendant's resources and

ability to pay legal financial obligations is reviewed under the clearly erroneous standard, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. *Id.*

Pursuant to RCW 10.01.160, the court may require defendants to pay *court costs* and other assessments associated with bringing the case to trial. The statute also includes the following constitutional safeguards:

(1) A sentencing court may impose repayment of court costs only if it determines that the defendant is or will be able to pay, and

(2) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160(1)(2).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Here, the defendant argues that the trial court erred when it concluded that he had the present or future ability to pay restitution and

other LFOs. The defendant relies on *Bertrand* for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. Brief of Appellant 12, citing *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011). The Court in *Bertrand* found error in the trial court's finding that Bertrand had the present or future ability to pay LFOs because she was disabled and the record contained no evidence to support its finding.

This case is distinguishable from *Bertrand* because the record shows that the defendant has the present and future ability to pay his LFOs and does not show that the defendant is disabled. Among other things, the record shows that the defendant graduated from Fife High School in 2001 and is of average intelligence. RP 365; RP 521. The record also shows that the defendant received a football scholarship as well as certificates for completing a substance abuse program and tutoring in adult education classes. RP 521; RP 523. It is also in the record that the defendant is only 29 years old, has many friends and family, and has no children to support. RP 523-524. Furthermore, unlike *Bertrand* where the record showed that the defendant was disabled, there is nothing in the record here to suggest that the defendant cannot pay his LFOs.

The court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority which compels the court to impose LFOs, the court properly found that the defendant has the present and future ability to pay LFOs. There is ample evidence in the record for

the court to determine that the defendant has the ability to pay his LFOs. The record shows that the defendant is educated, demonstrates potential, and is supported by many friends and family. Therefore, with sufficient evidence in the record of the defendant's present and future ability to pay costs, the court properly balanced the defendant's ability to pay against burden of his obligations before it imposed LFOs.

c. The issue is not ripe for review.

The courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3).

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(1)(2). The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009), citing *Baldwin*, 63 Wn. App. at 310-11. The time to examine a defendant's ability to pay costs is when the government seeks to collect

the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Id.*

Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. *State v. Woodward*, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

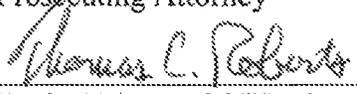
In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. The time to challenge the costs is at the time the State seeks to collect them because while the defendant may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

DATED: June 26, 2012

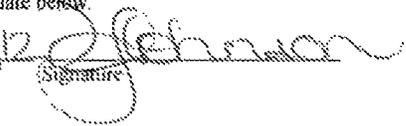
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