

NO. 44020-2-II
Cowlitz Co. Cause NO. 12-1-00051-1

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

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE CAHUE

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The State did not commit prosecutorial misconduct when it reasonably interpreted the term belief and asked the jury use their heads, hearts, and gut to determine if they had an abiding belief in the truth of the charge.
2. Under *State v. Curtiss*, 161 Wn.App 673, 250 P.3d 496 (Div 2, 2011), it is not prosecutorial misconduct to encourage the jury to use their heads and gut to determine if a defendant is guilty.
3. Should the court determine it was misconduct, it was not flagrant or ill-intentioned as to overcome the lack of objection by defense counsel.
4. The Defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object the State's reasonable interpretation of the word belief.
5. The Defendant failed to preserve the issue of imposition of financial obligations under RAP 2.5(a) as he did not raise the matter to the trial court.
6. The record supported the trial court's finding the defendant had the ability to pay his legal financial obligations.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether it was flagrant and ill-intentioned prosecutorial misconduct for the State to request to the jury to use their heads, hearts, and guts to determine whether they had an abiding belief in the truth of the charge.
2. If such a comment was error, whether an objection by defense counsel would have changed the outcome of the case?
3. Whether the comment was error such that failure to object was ineffective assistance of counsel?

4. Whether the court should accept review of imposition of legal financial obligation under RAP 2.3(a), when defendant did not raise the issue to the trial court?
5. Whether a 24 year-old defendant's statements that he worked in the past and intended to own his own home after incarceration and wanted to do good was sufficient evidence to support the court's finding ability to pay future financial obligations?

III. STATEMENT OF THE CASE

Statement of Trial Proceedings

The State charged Enrique Cahue with Assault in the second degree for recklessly inflicting substantial bodily harm upon Andrew Elkins and Assault in the fourth degree against William Zimmerman. CP 1-2. On October 13, 2011, Mr. Elkins was at Las Rocas bar with friends William "Billy" Zimmerman, Marley Meyers and Casey Eggbert. RP 11-12.¹ The Defendant, who Mr. Elkins did not know prior to that night, joined the group sometime during the night. RP 13, 45. Mr. Elkins and Mr. Zimmerman only had two drinks the entire evening and were not showing signs of intoxication. RP 12, 34, 43, 92. At the end of the evening, Cahue was drunk and stumbling around with Marly over his

¹ The Report of Proceedings consists of two consecutively numbered volumes spanning the trial dates from September 19, 20, 21, 2012. These two volumes will be referred herein at RP followed by the page number(s). There was also a third volume of supplemental proceedings, including proceedings from May 30, 2012, August 15, 2012, and sentencing on September 24, 2012. The State only refers to sentencing in this volume. This volume will be referred herein as RP 9/24/13 followed by the page number(s).

shoulder. RP 14, 46, 49. This caused Elkins and Zimmerman concern given Cahue's unsteadiness. RP 14-15, 49. Both men told Cahue he "should probably put her down so that nobody got hurt." RP 14, 49. Cahue was immediately belligerent with the men. RP 14, 49-50. He began hopping around the middle of the street, took his shirt off, came towards Elkins and Zimmerman and kept trying to get them to fight him. RP 15, 50, 53. Elkins and Zimmerman tried to talk Cahue out of fighting. RP 16-17. Neither man hit Cahue. RP 20-21, 58.

Cahue started the fight by swinging his fist at Zimmerman, grazing him in the face. RP 17-18, 54. Attempting to avoid a fight, Elkins pushed Zimmerman away from Cahue. RP 55. Elkins and Zimmerman were facing each other with Elkins' back to Cahue. RP 20, 55, 83. Cahue came up behind Elkins and hit him in the mouth. RP 20, 55, 83. The punch knocked out Elkins front tooth and split his lip. RP 21-22. Cahue fled and Elkins called the police. RP 23-25. 55, 51-62. Mr. Elkins and Mr. Zimmerman identified the defendant from a photo lineup. RP 27, 62-63, 95-97.

Casey Eggbert was present at the time of the assault. She was at her car, facing the other direction when she heard yelling. RP 82, 87. She didn't immediately look up, but when she did, she saw Cahue running

across the street to Elkins and Zimmerman. RP 82. Eggbert saw Cahue hit Elkins causing him to bleed. RP 83.

At trial, the Defendant called his friend Monte Morgan as a witness. RP 124, 204. Mr. Morgan testified he was drinking at the bar that night and was about a .08, .09 blood alcohol level. RP 131, 366. He said he was outside having a cigarette and saw what happened. RP 126. He said after Cahue gave Marley Meyers a hug and tried to put her on his shoulder, Meyers fell to the ground, and another guy shoved Cahue. RP 126-28, 137. Cahue did not retaliate or assault anyone, rather just left with his friend Derek. RP 129. Mr. Morgan stated Cahue was the only person assaulted and Morgan never saw anyone with blood on them. RP 143.

The Defendant also called his friends Derek Bainter and Kelsey Mustola-Diaz as a witnesses. RP 150-51, 164, 204. Mr. Bainter was also drinking that evening. RP 151, 156. He testified he heard some girls screaming. RP 152, 157. He went around the corner to see Cahue finish hugging Molly and then being pushed. RP 152, 157. Cahue did not retaliate or strike back and the two left together. RP 153. Ms. Mustola-Diaz also said she saw Cahue hug a girl, and they tripped. RP 165, 171. She looked away, heard shouting, and saw Cahue get shoved. RP 165. She never saw Cahue hit anyone. RP 173

The Defendant testified he drank three rum and cokes and two beers that night and was feeling buzzed. RP 180, 187-88. When he said goodbye to Marley at the end of the night, he picked her up and fell in the process. RP 181. Cahue testified Elkins came up to Cahue, told him to keep his hands off Marley, and then pushed him. RP 181-82. Cahue said he backed up and three girls came into the middle of things. RP 182. Cahue said Zimmerman was holding Elkins at bay, but Elkins pushed Zimmerman away. RP 212. Then Elkins pushed Cahue again, causing Cahue to fall over a girl behind him. RP 182. Cahue said he never hit anyone and just left. RP 182-83.

At a pre-trial hearing and in the presence of the defendant, defense counsel indicated Cahue's defense was self-defense. RP 184-85. Upon direct exam Cahue admitted the claim of self-defense was not true. RP 185. Cahue admitted that even though he'd met with defense counsel several times, he never mentioned being pushed until the day of pre-trial outside the courtroom. RP 202. Additionally, Cahue admitted he hadn't met with defense counsel as much as he should have and didn't disclose his witnesses until well after the assault. RP 213-215.

During closing argument, the State presented two questions: Who do you believe and what makes common sense? RP 219. The prosecutor systematically reviewed each witness' account, compared and contrasted

them to each other and the physical evidence. RP 219-232. At the end of the closing, the prosecution argued credibility and common sense pointed towards those individuals who were not intoxicated, who were injured, reported it immediately, documented the assault, went to the doctor, and testified. RP 232. The State then talked about the burden of proof. RP 232. The prosecutor stated:

[w]hen you're thinking of beyond a reasonable doubt – beyond a reasonable doubt means that you have an abiding belief in the truth of the charge. What does your head, what does your heart, what does your gut say?

It's not beyond a shadow of a doubt, it's not having a video of it that counts. If you believe Bill and Andrew, you have enough evidence to find beyond a reasonable doubt.

RP 232. The Defendant did not object to this argument.

The court instructed the jury:

The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 61, see WPIC 4.01.

It also instructed the jury that: “[t]he lawyers’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP 58, see WPIC 1.02. The instruction went further in telling the jury, “[y]ou must not let your emotions overcome your rational thought process. You must reach your decision based upon the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.” CP 59, see WPIC 1.02.

The jury returned a verdict of guilty as to the Assault in the second degree, but not guilty of Assault in the fourth degree. CP 3.

Statement of Sentencing Proceedings

As part of his allocution at sentencing, the Defendant told the court he was working in the past and missed court and now just wanted to get his life back on track. RP 9/24/13 at 8. He also stated he knew his length of sentence and was planning on owning his own home and just wanted to get out and do good. RP 9/24/13 at 9. The court was aware the Defendant

was previously convicted of five prior felonies, four as an adult. CP 4. The court imposed 19 months in prison on 24 year-old Mr. Cahue. RP 9/24/13 at 9, CP 3. The court imposed a total amount of costs of \$2,388.69, but did not discuss these costs on the record. RP 9/24/13 at 9, CP 6. The judgment and sentence states the court considered the amount of legal financial obligations and found the defendant had the ability or likely future ability to pay the obligations. CP 5. It set a payment schedule of \$25.00 per month. CP 5. The Defendant did not object to the imposition of financial obligations, the amount or payment schedule. RP 9/24/13 at 9-11.

IV. ARGUMENT

1. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

The Defendant alleges the State committed prosecutorial misconduct by urging the jury to use all their faculties to determine an abiding belief in the truth of the charge. The State did not commit misconduct, and if anything increased its burden of proof under a reasonable doubt standard.

When a defendant alleges prosecutorial misconduct, it is the defendant's burden to establish the impropriety of the comments as well as their prejudicial effect. *State v. Anderson*, 153 Wn.App. 417, 427, 220

P.3d 1273 (Div 2, 2009); *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005) citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews alleged improper remarks in the “context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Anderson*, at 427, citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). If the statements are improper and an objection was made, the court considers whether there was a substantial likelihood the statements affected the jury. *Id.* If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.* Moreover, the failure to object to a prosecutor’s statement “suggests that it was of little moment in the trial.” *State v. Curtiss*, 161 Wn.App. 673, 699, 250 P.3d 496 (Div 2, 2011) citing *State v. Rogers*, 70 Wn.App. 626, 631, 855 P.2d 294 (1993) rev. denied 123 Wn.2d 1004, 868 P.2d 871 (1994).

a. The prosecutor’s comment was not improper.

The State’s reasonable interpretation of belief was not improper burden shifting or a lessening of the jury’s responsibility. The State is afforded great latitude in making arguments to the jury and reasonable inferences from the evidence. *Id.* citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). An argument commenting on the quantity and

quality of the defendant's evidence does not automatically result in burden shifting. *Id.* Moreover, the Washington Supreme Court holds an explanation of a definition commonly held does not automatically result in burden shifting or diminishing responsibility. *See State v. Gregory*, 158 Wn.2d 759, 861-62, 860, 147 P.3d 1201 (2006) (explaining a concept of mercy to exclude a religious context did not amount to an argument of diminished sense of responsibility).

If one were to look up the definition of "belief" available to most jurors, Merriam Webster's dictionary defines "belief" as

- 1) a state or habit of mind in which trust or confidence is placed in some person or thing
- 2) something believed; *especially* : a tenet or body of tenets held by a group
- 3) conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence

MERRIAM WEBSTER DICTIONARY, *belief* (visited May 20, 2013) <http://www.merriam-webster.com/dictionary/belief>.

Dictionary.com defines belief as:

- 1) something believed; an opinion or conviction: *a belief that the earth is flat.*
- 2) confidence in the truth or existence of something not immediately susceptible to rigorous proof: *a statement unworthy of belief.*
- 3) confidence; faith; trust: *a child's belief in his parents.*
- 4) a religious tenet or tenets; religious creed or faith: *the Christian belief.*

DICTIONARY.COM, *belief* (visited May 20, 2013)

<<http://dictionary.reference.com/browse/belief?s=t&path=?>>

The Defendant cites to *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), for the quotation that a prosecutor must seek conviction based upon probative evidence and sound reason. *See* Def. Brf. at 5. Yet nowhere in either definition is belief based upon “probative evidence and sound reason.” *See* Def. Brf. at 6. The State is not saying belief should not be based upon probative evidence and sound reason. However, when approaching a jury that has a understanding of belief based upon common dictionaries as defined in terms of conviction, confidence, and religious faith, it is not misconduct to encourage a jury to use all their faculties to reach such confidence. In reality, the State did not lighten its burden of proof, it made it more difficult.

In *Glasmann*, the central issue was the State’s use of a visual presentation in closing where the State modified images with captions thus presenting the jury with multiple images of evidence not admitted at trial. *Id.* at 705-06. The secondary issue was the prosecutor’s argument the jury could only acquit Glasmann if they found Glasmann told the truth. *Id.* at 701.

The Court found the pervasive and often referred to images in closing amounted to the expression of a personal opinion by the prosecutor of Glasmann's guilt. *Id.* at 707. In looking at issues in the case, the court emphasized that Glasmann's case came down to whether he was guilty of the greater crimes the State argued or lesser crimes sought by defense. *Id.* at 709-10. The Court found under the totality of the record, the opinion argument combined with the improper burden shifting argument was flagrant and ill-intentioned misconduct. *Id.*

The facts of *Glasmann* are **nothing** like the present case. Here the Defendant's sole argument is when the State asked the jury to use all their faculties to determine guilt, it undermined the jury's commitment to take appropriate care and amounted to an unfair trial. There is no argument the state presented evidence not admitted during trial, or expressed their opinion as to guilt. The Supreme Court's decision in *Glasmann* provides a roadmap for improper evidence and opinion considerations, but is not a guiding light in the present case.

However, there is a case directly addressing when a prosecutor urges a jury to use their heart and gut to determine guilt. In *State v. Curtiss*, 161 Wn.App. 673, 699, 250 P.3d 496 (Div 2, 2011), the prosecution charged Curtiss with first degree murder. The Defendant alleged the State committed multiple acts of prosecutorial misconduct

during closing argument when it analogized the burden of proof to putting a puzzle together and urged the jury to trust its gut and to search for and speak the truth. *Id.* at 698. The Defendant did not object to either argument.

The first argument by the State analogized the reasonable doubt standard to putting together a puzzle. *Id.* at 700. The State told the jury that at some point when putting a puzzle together, even if there are missing pieces, a person could say with some certainty, beyond a reasonable doubt what the puzzle shows. *Id.* The court found the analogy used did not shift the burden of proof, but described the relationship between circumstantial evidence, direct evidence, and the burden of proof. Additionally, the court found the arguments were not flagrant or ill-intentioned, and the defendant failed to show prejudice in light of the jury instruction that lawyers' statements are not evidence and to disregard any argument not supported by the evidence or the law. *Id.*

The second argument challenged by Curtiss is remarkably similar to that challenged by Cahue. During closing argument, the Prosecutor in *Curtiss* stated:

This trial is a search for the truth and a search for justice, and the evidence in this case is overwhelming. [Curtiss] is guilty of Murder in the First Degree as an accomplice. Consider all the evidence as a whole. Do you know in your gut—do you know in your heart that Renee Curtiss is guilty

as an accomplice to murder? The answer is yes.

We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

Id. at 701.

Division Two held that urging the jury to render a just verdict supported by the evidence was not misconduct. *Id.* Moreover, while the State's gut and heart arguments were arguably overly simplistic, they were not misconduct. *Id.* at 702. The court rejected the defendant's argument that appealing to the heart and gut were emotional appeals. *Id.* The court again pointed out the jury instructions told the jury to reach a decision "based on the facts proved to you and the law given to you, not on sympathy, prejudice, or personal preference." *Id.* The court assumed the jury followed the instructions. *Id.* Lastly, Curtiss could not show prejudice stemming from the argument and failed to show the alleged errors to which she did not object could not be cured with an instruction. *Id.*

The present case involves nearly the exact same language as that in *Curtiss*. The State presented the jury with two central questions throughout the closing: "Who do you believe and what makes common sense?" RP 216, 219. After comparing and contrasting the evidence

presented by both sides and eliminating any issue of self-defense, the prosecutor comes back to the two central questions. RP 219-232. At the end of its closing, the State argued it produced evidence sufficient to prove the case beyond a reasonable doubt, citing to the abiding belief in the truth of the charge language from WPIC 4.01. RP 232. The State asks the jury to use all their faculties available to them to determine if they have an abiding belief in the truth of the charge ...their heads, hearts, and guts. RP 232. The abiding belief language of WPIC 4.01 fits perfectly with the question of “who do you believe.” This is remarkably similar to the argument in *Curtiss*, where the State asked the jury if they knew in their hearts and gut the defendant was guilty. *Id.* at 701. Just as the statements in *Curtiss* were not misconduct, the State’s argument here was proper.

b. The Defendant fails to show prejudice or incurable error.

Should the court consider the argument improper, the court next considers whether there was a substantial likelihood the statements affected the jury. *State v. Anderson*, 153 Wn.App. 417, 427, 220 P.3d 1273 (Div 2, 2009). If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *Id.*

The present case is exactly like *Curtiss* and the defendant cannot show prejudice because the trial court instructed the jury using WPIC 1.02. This instruction provided the jury with a framework for the State's argument. It told them the lawyer's remarks were not evidence, to only consider them as far as the law supports them, and not to let emotions overcome rational thought. CP 58, WPIC 1.02. Since the courts of appeals presume the jury follows the instructions, the defendant cannot show prejudice. *Curtiss*, 161 Wn.App. 673, 702, *State v. Kirkman*, 159 Wn.2d 918, 928, 937, 155 P.3d 125 (2007). Lastly Cahue, just like *Curtiss*, fails to show that any potential errors could not be cured with an additional instruction. *Id.*

2. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT.

The defendant argues that his trial counsel's failure to object to the State's reasonable argument of using head, heart, and gut to determine an abiding belief in the charge was ineffective. Should the court find the argument was proper, there is no need to consider the ineffective assistance argument. Should the court consider the argument of ineffective assistance, the Defendant's argument fails as the cases he cites of *Hodge v. Hurley*, 426 F.3d 368, 386 ftnt 25 (6th Cir 2005), and

Glasmann do not stand for the positions he cites and are contradicted by *State v. Curtiss*, 161 Wn.App. 673, 250 P.3d 496 (Div 2, 2011).

The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302, 1306 (1978) citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, this test places a weighty burden on the defendant to prove two things: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). Moreover, counsel is

presumed effective. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The defendant fails to prove ineffective assistance of counsel under both prongs because he fails to show another attorney would have objected and asked for an instruction, and fails to show how, but for the error, the result would be different. Under the first prong, the Defendant argues the failure to object to improper closing arguments is objectively unreasonable. *See* Def. Brf. at 8. To support this claim, the Defendant cites to a footnote in a Sixth Circuit case involving flagrant prosecutorial misconduct. *See* Def. Brf. at 8. In actuality the footnote does not state the failure to object is objectively unreasonable, but how an attorney worried about interrupting closing argument should approach making such an objection. *Hodge v. Hurley*, 426 F.3d 368, 386 fnt 25 (6th Cir. 2005).

The Defendant's argument under the first prong also relied upon *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). *See* Def. Brf. at 8-9. However, the citation does not support the argument as *State v. Glasmann* never considered or addressed whether Glasmann's attorney was ineffective, because it determined there was reversible prosecutorial misconduct. *Glasmann*, at 714.

The Defendant makes assertions under the first prong for ineffective assistance that trial counsel should have known it was

prosecutorial misconduct and therefore should have objected. However, under the prosecutorial misconduct argument in section one and *State v. Curtiss*, 151 Wn. App. 673, 250 P.3d 496 (Div 2, 2011), this argument is fails.

Moreover, the Defendant's assertion under the second prong for ineffective assistance that the prosecutor's statement of "head, heart, and gut" increased the substantial likelihood the jurors would vote guilty based on improper factors comes from the misplaced citation to *Glasmann*. In *Glasmann*, the Supreme Court determined that prosecutor opinion evidence and improper burden shifting by making the defendant prove his story likely inflamed the jury and made a difference between a finding of guilt as to the lesser offenses offered by the Defense. *Glasmann*, at 709-712.

There is no such danger here. Even if the court believes the State's argument was improper, there is little danger the outcome would have been different due to the court's instruction to the jury in WPIC1.02. *See supra* at pg 15-16. In looking at the totality of the circumstances, this case came down to a question of identity - whether it was Cahue that hit Elkins. There State presented evidence Mr. Elkins was badly hurt, he reported the assault almost immediately, and three people identified Cahue as the person who hit Mr. Elkins. At trial, the Defendant denied hitting Mr.

Elkins at all. The Defendant admitted he was present at the scene, said he was pushed by Elkins, but did not reciprocate. This is not a case like *Glasmann* where the parties argued over the degree of culpability. The Defendant's whole argument for ineffective assistance rests on two cases that do not address the issue. Essentially, the Defendant made this case about identity and credibility. There is no reason to believe that the State's argument to consider the head, heart, and gut would have affected the outcome.

3. THE TRIAL COURT PROPERLY FOUND THE DEFENDANT HAD THE ABILITY TO PAY FUTURE FINANCIAL OBLIGATION.

a. The Defendant failed to preserve his right to appeal the imposition of legal financial obligations under RAP 2.5(a).

The Defendant argues under *State v. Bertrand*, 165 Wn.App. 393, 404, 267 P.2d 511 (Div 2, 2011), there was insufficient record to support the court's finding the Defendant had sufficient ability to pay future legal financial obligations (LFO's) and the finding should be vacated. However, the Defendant failed to raise this issue to the trial court at sentencing and did not object to the imposition of the LFO's. RP 9/24/13 at 9-11. Under Rule of Appellate procedure 2.5(a) the appellate court may refuse to

review any claim of error which was not raised in the trial court. WA RAP 2.5(a) (2012). Cahue does not distinguish which of the LFO's were mandatory and which were discretionary by the court. The State requests this court refuse review on this issue as it was not raised below and the Defendant has not perfected their argument.

b. There was sufficient evidence in the record to impose legal financial obligations.

Should the court accept review, a challenge to a trial court's findings of fact for ability to pay is reviewed under a clearly erroneous standard. *State v. Bertrand*, 165 Wn.App. 393, 403-04, 267 P.2d 511 (Div 2, 2011) *State v. Bertrand* requires a trial court to take into account the financial resources of the defendant and the nature of the burden imposed by LFO's. *Id.* at 404, citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). After the entry of findings, the reviewing court determines if there is an abuse in discretion in imposition. *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

At sentencing, the trial court knew the Defendant's prior criminal history included four prior adult felony convictions. CP 4. Additionally, the Defendant told the court that despite these convictions he held a job. RP 9/24/13 at 8. Moreover, the Defendant hoped to one day own his own home and "do good." This information combined with the Defendant's

relative youth of 24 years, would lead to a reasonable conclusion the Defendant was able to find work, had worked in the past, wanted to work in the future and intended to earn money enough to support him and buy a home. This information thus supports the trial court's finding present and future ability to pay and the finding was not clearly erroneous.

V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectively submitted this 23 day of May, 2013.

SUSAN I. BAUR
PROSECUTING ATTORNEY

By:


AMIE HUNTER, WSBA# 31375
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 24th/2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 24, 2013 - 10:44 AM

Transmittal Letter

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Court of Appeals Case Number: 44020-2

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