

NO. 46597-3-II
Cowlitz Co. Cause NO. 13-1-01260-7

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD WISNER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. DID THE TRIAL COURT CORRECTLY EXERCISE ITS DISCRETION TO ADMIT A SURVEILLANCE VIDEO AND STILL PHOTOS FROM THE SURVEILLANCE VIDEO WHEN A WITNESS AUTHENTICATED THE VIDEO AND PHOTOS?
2. MUST THE APPELLANT PROVE BOTH DEFICIENT PERFORMANCE ON THE PART OF HIS TRIAL ATTORNEY AND ITS PREJUDICIAL EFFECT TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL?
3. DID THE APPELLANT WAIVE HIS RIGHT TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WHEN HE FAILED TO OBJECT TO THEIR IMPOSITION AT TIME OF SENTENCING?

II. SHORT ANSWERS

1. YES. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION TO ADMIT A SURVEILLANCE VIDEO AND STILL PHOTOS FROM THE SURVEILLANCE VIDEO WHEN A WITNESS AUTHENTICATED THE VIDEO AND PHOTOS.
2. YES. THE APPELLANT MUST PROVE BOTH DEFICIENT PERFORMANCE ON THE PART OF HIS TRIAL ATTORNEY AND ITS PREJUDICIAL EFFECT TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.
3. YES. THE APPELLANT WAIVED HIS RIGHT TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WHEN HE FAILED TO OBJECT TO THEIR IMPOSITION AT TIME OF SENTENCING.

III. FACTS

On July 30, 2014, the State filed an amended information charging the appellant with two counts of identity theft in the first degree. RP 64. Count one charged the appellant with committing the crime on April 4, 2013, and count two charged the appellant with committing the crime on April 6, 2013. CP 62-63. The appellant's case was tried before a jury starting the same date. Commissioner Dennis Maher presided over the appellant's jury trial. RP 60. Witnesses testified to the facts below.

Dwayne Hinkle works for a federal government agency, General Services Administration, and resides in Bonney Lake, Pierce County, Washington State. RP 187. In March 2013, Mr. Hinkle went to Cowlitz County to buy a motorcycle. Mr. Hinkle wrote a check for the down payment and provided a copy of his driver's license. RP 189-202. Aside from this transaction, Mr. Hinkle had no other connections to Cowlitz County. RP 188. At the time, Mr. Hinkle had a checking and a saving account with Chase Bank. RP 187-188. Mr. Hinkle does not know the appellant and the appellant does not have Mr. Hinkle's permission to access his Chase Bank accounts. RP 188.

In April 2013, Mallory Wooden worked as a bank teller for Chase Bank. She had been working in that capacity for about one year. RP 81. Her assigned teller number was 5 and her assigned teller window was in

the Chase Bank branch located in the Triangle Mall in City of Longview, County of Cowlitz, State of Washington. RP 81 and 119-120. Her job was to process customer transactions at her teller window. RP 81. Her assigned teller number allowed her to access her computer, at her assigned teller window, to process customer transactions and document her work. RP 82-83.

When a customer wants to deposit a check and get cash back, a teller starts by asking for the customer's identification to access the customer's account and runs the negotiated check and the deposit slip through a scanner. The scanner displays an image of the check on the teller's computer screen and prints a spray line on the back of the check documenting the teller number, branch number, and date. The scanner is a round device that circulates the check around as the check is scanned and printed with the spray line. After the scanner processes the check, the teller puts the deposit slip and check in the teller's box, counts the cash in front of the customer, and gives the customer a cash receipt. RP 82-83, 103-113, and 132.

On April 4, 2013, Ms. Wooden worked at her assigned teller window in the Triangle Mall Chase Bank branch. Sometime during her shift, a male, who she believed was Dwayne Hinkle, came to her window to deposit a check, Exhibit # 1, into Mr. Hinkle's Chase Bank checking

account. The check was made out to Dwayne Hinkle for \$8848.07 and accurately contained Mr. Hinkle's name and address. The back of the check, Exhibit # 2, had a signature purporting to be that of Mr. Hinkle. RP 83, 86, 97, 119, and 189-202.

The male negotiating the check had a filled out deposit slip, Exhibit # 3, indicating his desire to deposit \$6,848.07 into Mr. Hinkle's checking account and have \$2,000 cash back. The deposit slip had a signature purporting to be that of Mr. Hinkle. All the writing on the deposit slip, minus the account number, was done by someone other than Ms. Wooden. Ms. Wooden wrote the account number on the deposit slip when she processed the transaction. RP 85 and 98-99.

The transaction went smoothly and there was nothing about the transaction that led Ms. Wooden to believe the individual was not Mr. Hinkle and the check was bad. She processed the check and gave the individual \$2,000 cash back. Had there been anything suspicious about the individual or check, she would have investigated further and not have given the individual the cash. RP 87, 96, 100-101, and 103-113. The back of the check, Exhibit # 2, had a printed spray line documenting Ms. Wooden had processed the check at her branch on April 4, 2013. RP 84 and 98. A cash receipt, Exhibit # 4, showed Ms. Wooden paid \$2,000 cash to the individual. RP 87 and 100. Ms. Wooden later learned the

check, Exhibit # 1, was bad. RP 87. At the time of trial, Ms. Wooden had no specific recollection of the above transaction, but her review of the above documents allowed her to identify her involvement and what she did pertaining to that transaction because the spray line documented her involvement and she recognized her handwriting on a document used to process that transaction. RP 96, 103-113, and 122-123.

A day prior to the jury trial and at the jury trial, Ms. Wooden reviewed a surveillance video, exhibit # 5. The surveillance video shows Ms. Wooden standing at her teller window in her Chase Bank branch and helping a large male customer. Video captures Ms. Wooden processing a transaction for the customer. The video shows the male customer handing Ms. Wooden what appears to be an identification and some documents, a check and a deposit slip can be reasonable inferred as the transaction involved a scanner and cash back. The video shows Ms. Wooden handing the identification back to the customer and the customer putting the identification into his wallet or pocket. Video shows a smooth transaction between the customer and Ms. Wooden. The transaction ended with Ms. Wooden counting and handing over money to the customer. Prior to giving the customer the cash, the video shows Ms. Wooden putting documents, a check and a deposit slip, through a scanner. The scanner can be seen circulating the documents around as Ms. Wooden looked at her

computer screen to access an account. After the check and deposit slip were scanned, the scanner spat out the documents and Ms. Wooden can be seen holding the documents and putting them into an orange bin that held all the paperwork for her transactions. After putting away the documents, Ms. Wooden can be seen counting money, handing the money over to the male customer, and handing the customer a document, a cash receipt can be reasonable inferred as Ms. Wooden just handed the individual money. RP 101 and 103-113. Still photos, Exhibits # 6 to # 10, were obtained from the surveillance video. RP 91.

At the time of trial, Ms. Wooden had no specific recollection of processing a transaction for the large male customer shown in the video, but her review of the surveillance video allowed her to identify herself from the video, her teller window, her Chase Bank branch, and her involvement relating to the transaction captured in the video. She was able to watch the video and explain what she did in the video prior to handing the customer the money. RP 96, 101-113, and 122-123. The documents that would have been involved in the transaction captured on video, with the customer getting cash back, include a customer identification, a check, a deposit slip, a cash receipt, a scanner, and cash back. RP 92-95 and 103-113.

The court, over the appellant's objection, admitted the still photos printed from the surveillance video. The appellant did not object to the admission of the surveillance video. The appellant objected to the admission of the photos on the basis of foundation as Ms. Wooden had no specific recollection of the event captured in the photos. RP 84-86, 90, 95, and 117.

In April 2013, Shauna Sager worked as an assistant branch manager for Chase Bank at its Fred Meyer branch location on Ocean Beach Highway, Cowlitz County, Washington State. Her assigned duties at the time included handling front teller, opening new accounts, and assisting with maintenance. RP 128 and 144. On April 6, 2013, Ms. Sager worked at her branch and sometime during her shift, a male, who she believed was Dwayne Hinkle, came to her window to deposit a check, Exhibit # 11, into Mr. Hinkle's Chase Bank checking account. The check was numbered 0794, made out to Dwayne Hinkle for \$7255.09, and accurately contained Mr. Hinkle's name and address. The back of the check, Exhibit # 12, had a signature purporting to be that of Mr. Hinkle. RP 129, 131, 138, and 189-202.

The male negotiating the check had a deposit slip, Exhibit # 13, indicating his desire to deposit \$4,7550.09 into Mr. Hinkle's checking account and have \$2,500 cash back. The deposit slip had a signature

purporting to be that of Mr. Hinkle. RP 133-136 and 142. When the male was not allowed to get \$2,500 cash back from the checking account, he elected to deposit the entire check into Mr. Hinkle's checking account. The change necessitated Ms. Sager to make changes to the deposit slip and have the individual initial the changes. Aside from the changes made to the deposit slip by Ms. Sager, all other writing on the deposit slip was made by someone other than Ms. Sager. When the individual was unable to get money from the checking account, he elected to withdraw \$2,500 from Mr. Hinkle's Chase Bank savings account. RP 133-136 and 142. To process the withdrawal of the money, Ms. Sager filled out a withdraw slip and had the individual sign the withdraw slip. Ms. Sager proceeded to give the individual \$2,500 and a cash receipt. RP 136 and 143. The transaction went smoothly. RP 139-140 and 143. At the time of trial, Ms. Sager had no specific recollection of the transaction involving check # 0794 and the \$2,500 cash, but her review of the above documents and a recognition of her handwriting on some of the documents allowed her to identify her involvement and what she did pertaining to that transaction. RP 131-132. There was no surveillance video of the transaction involving Ms. Sager and check # 0794. RP 128-144.

On April 8, 2013, Mr. Hinkle noticed the first deposit into his account and contacted Chase Bank immediately. The bank verified the

signatures involved in the first deposited check were not Mr. Hinkle and closed his account. A day or two later, Mr. Hinkle noticed the second deposit into his account. The checks for both deposits, Exhibit # 1 and Exhibit # 11, accurately had Mr. Hinkle's name and address, but were not signed or negotiated by Mr. Hinkle. The person who negotiated those deposited checks did not have Mr. Hinkle's permission to access his checking and saving account on April 4, 2013, and April 6, 2013. RP 189-202. Mr. Hinkle proceeded to file a police report with the Longview Police Department regarding the two unauthorized transactions. RP 189.

Several months after March 2013, Detective Sahim with the Longview Police Department contacted Kelly Kilkenny for help in identifying an individual in a photo, Exhibit # 6. Exhibit # 6 is a still photo from the surveillance video, Exhibit # 5. Ms. Kilkenny is a community corrections officer for Washington State who supervises adult offenders. Ms. Kilkenny did not take part in Detective Sahim's investigation and did not know the nature of the investigation, the location where the photo was taken, the date the photo was taken, and the type of business involved in the photo. RP 149-150, 156-157, 159-160, and 166.

Ms. Kilkenny identified the subject in Exhibit # 6 being the appellant. Ms. Kilkenny is certain the subject in the photo is the appellant. RP 157-161 and 167-168. Ms. Kilkenny started supervising the appellant

in October 2011 and knows the appellant quite well based on her numerous contacts with him. She is familiar with the appellant's appearance, size, voice, and mannerism. RP 149-151. Ms. Kilkenny had the appellant fill out an intake form, Exhibit # 18, when she first came to supervise the appellant. RP 152-153 and 174-175. Ms. Kilkenny later provided a copy of the appellant's intake form to Detective Sahim for handwriting analysis. RP 162.

Prior to trial, Ms. Kilkenny last saw the appellant in March 2013. RP 152. In March 2013, the appellant resided in Bellevue, WA, and indicated he wanted to live at 2615 Ocean Beach Highway, Longview, WA. RP 155-156. The appellant was heavier in March 2013 than he was at trial. RP 155 and 173. After March 2013, Ms. Kilkenny did not have contact with the appellant and did not know his whereabouts. RP 156 and 161-162.

At trial, Ms. Kilkenny identified the appellant in court, from the surveillance video, Exhibit # 5, and from the still photos of the surveillance video, Exhibits # 7 to # 10. RP 167. Ms. Kilkenny did not know where the events of the surveillance video took place and what type of business it involved. RP 162-163.

On July 1, 2013, Longview Police Officer, James Kelly, came into contact with the appellant at his residence located at 2615 Ocean Beach

Highway, Longview, WA. RP 155-156 and 177-178. Officer Kelly's contact with the appellant was unrelated to Detective Sahim's investigation. RP 179. The appellant was heavier and had more facial hair than at trial. At trial, the appellant had lost quite a bit of weight and shaved his head. RP 179. On July 1, 2013, the appellant's appearance was similar to his booking photo on July 1, 2013, Exhibit # 17, and his booking photo on September 18, 2013, Exhibit # 16. RP 180-183.

Andrew Szymanski is a forensic scientist in the questioned documents section of the Washington state patrol crime laboratory. RP 204. His duties are to examine documents that contain handwriting, hand-printing, signatures, inks, paper, printing processes to determine if documents are genuine or not, to detect alterations or additions, and to determine and identify the authorship of the documents. RP 204. Mr. Szymanski is a certified forensic document examiner. RP 205

When comparing writing samples between a known sample and a questioned sample, Mr. Szymanski looks at characteristics such as letter formations, connecting strokes, size of writing, spacing, letter proportions, and slants of the writing. RP 207 and 214-221. Similarities between the samples are marked in green and dissimilarities between the samples are marked in red. RP 211-214. One of the goal of a hand writing analysis is

to exclude a suspect as being the potential author of an unknown document. RP 208.

Mr. Szymanski examined several documents from the investigation of the appellant to his known writing sample, the appellant's intake form, Exhibit # 18. RP 208. Prior to his examination, Mr. Szymanski was not informed that some of the documents contained writings from multiple people, Ms. Wooden and Ms. Sager, and had no other information concerning the investigation. RP 209-211. Mr. Szymanski's task was to compare the appellant's known writing sample, Exhibit # 18, to several unknown documents. The unknown documents included Exhibit # 2, back of first check, Exhibit # 3, the deposit slip for first check, Exhibit # 12, the back of second check, Exhibit # 13, the deposit slip for second check, and Exhibit # 14, the withdraw slip for second check. RP 211-214.

In analyzing the documents, Mr. Szymanski identified three dissimilarities from the unknown samples with the appellant's known sample. With regards to Exhibit # 3, deposit slip for first check, he identified the portion written by Ms. Wooden as being dissimilar to the appellant's known writing sample. RP 234-238. With regards to Exhibit # 13, the deposit slip for second check, he identified the portion written by Ms. Sager as being dissimilar to the appellant's known writing sample. RP 239-242. With regards to Exhibit # 14, the withdraw slip for second

check, he identified the portion written by Ms. Sager as being dissimilar to the appellant's known writing sample. RP 231-232. Aside from these three dissimilarities that are attributable to Ms. Wooden and Ms. Sager, there was no other fundamental differences between the appellant's known sample and the unknown samples to indicate non-authorship. RP 234 and 259-262.

Despite the limitation with having sufficient comparable writing in the unknown samples to compare to the known sample, Mr. Szymanski found there are indicators that the appellant is the author of the unknown samples because only fundamental similarities existed between the appellant's known sample and unknown samples to indicate common authorship. RP 234 and 259-262. The similarities include upper E, upper I, upper N, letter a, letter d, number 2, number 3, number 7, number 8, signatures, spacing, letter proportion, and letter formation. RP 214-226, 228, 233 and 235. All the unknown samples appear to be done by one person. RP 234. The appellant could not be identified or excluded as the writer, but there were indications he wrote the unknown samples. RP 256-257. The characteristics that indicate the appellant as the author, while few, have significant characteristics in agreement between the appellant's known sample and unknown samples. RP 258.

At trial, the appellant called Sherry Lindblad and Steven Pittman to testify on his behalf. Ms. Lindblad and Mr. Pittman testified that it was not the defendant in the surveillance video and still photos. RP 262-292.

On July 31, 2014, the jury found the appellant guilty of the first count of identity theft in the first degree and not guilty of the second count of identity theft in the first degree. RP 366. On August 14, 2014, the court sentenced the appellant and imposed legal financial obligations. The court did not inquire into his ability to pay his legal financial obligations prior to its imposition of the financial obligations. The appellant did not object to the imposition of the financial obligations. RP 371-381. The appellant now appeals his conviction and imposition of his financial obligation. RP 376-377 and CP 114.

IV. ARGUMENTS

1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION TO ADMIT THE SURVEILLANCE VIDEO AND STILL PHOTOS FROM THE SURVEILLANCE VIDEO BECAUSE A WITNESS AUTHENTICATED THE VIDEO AND PHOTOS.**

Appellate courts review “a trial court’s decision to admit or exclude evidence for abuse of discretion. Diaz v. State, 175 Wash.2d 457, 462, 285 P.3d 873 (2012). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Under ER 901, a party may

authenticate a recording through, ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’ State v. Sapp, 182 Wash.App. 910, 914 (2014).

For authentication purposes, courts treat video tape recordings like photographs, which Washington courts have a policy of liberally admitting. State v. Newman, 4 Wn.App. 588, 593 (1971). To lay a proper foundation for admitting a video tape recording, some witness, not necessarily the photographer, must be able (1) to show when, where, and under what circumstances the video tape recording was taken; and (2) to testify that the video accurately portrays the subject illustrated. State v. Tatum, 58 Wn.2d 73, 75 (1961). If these two criteria are met, the video tape recording is admissible at the trial court’s discretion. Newman, 4 Wn.App. at 593.

In the Tatum case, the defendant and victim resided at the same place. The victim received monthly welfare checks from the State of Washington. In February 1960, the victim did not receive his check. The victim’s February check was endorsed and cashed at a store by someone other than the victim. Tatum, 58 Wash.2d at 74.

At trial, Caroline Pentecost, an employee of the store, testified that although she could not specifically recall processing the victim’s February check, her initials appeared on the face of the check. Ms. Pentecost

further testified that whenever a check was presented to her for payment at the store, the store manager had instructed her to initial it and then insert it into a Regiscope machine. The Regiscope machine then photographed both the check and person facing the machine. Id. at 74. Ms. Pentecost also testified that she looked at the Regiscope photo and recognized the background in the photo as being that of the store. Another witness, Phillip Dale, testified to the Regiscope process. Id. at 74-75. The trial court admitted, over the defendant's objection, both the negative and printed film from the Regiscope machine into evidence. Id. at 74.

On appeal, the court noted that, “[w]hat quantum of authentication do courts require before a photograph may be admissible in evidence? It is simply this - that some witness (not necessarily the photographer) be able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portray the subject or subjects illustrated. See 9 A. L. R. (2d) 899. The photograph need only be sufficiently accurate to be helpful to the court and the jury.” Id. at 75.

The appellate court in Tatum found the testimonies of Ms. Pentecost and Mr. Dale were sufficient to authenticate and allow for the admission of the Regiscope photo and negative into evidence. Id. at 75. The court also noted that “the authentication supplied by the testimony

summarized about, of course, did not preclude [the defendant] from attempting to prove that the individual portrayed was someone other than the [defendant], that the photograph was inaccurate in one or more respects, that [defendant] was somewhere else at the moment the photograph was taken, or any other such defense. But these arguments go to the weight rather than to the admissibility of the exhibits in question.” Id. at 75-76.

In the Sapp case, photographic evidence figured prominently in the prosecution of the defendant for various sexual offenses. Sapp, 182 Wash.App. at 912. The Sheriff’s Office received a digital camera and memory card containing digital photographs and video recordings depicting the defendant repeatedly sexually abusing the child. Based on this evidence, the State charged the defendant with several sex offense. The defendant waived his right to a jury trial and proceeded to have a bench trial on the charges. Id. at 912.

As proof of the crimes, the State offered the photographs and video recordings pulled from the digital camera and memory card. The victim’s grandmother authenticated the evidence. The grandmother had known both the victim and the defendant for a number of years. Based on her personal knowledge, the grandmother identified the defendant and her grandchild as the people in the exhibits, the victim’s age at the time of the

incidents, and the location where the exhibits were recorded. The defendant argued that authentication required testimony from a witness with knowledge of the events depicted and not just the people, time, and places depicted. The trial court overruled the defendant's objections and found the defendant guilty on all counts. Id. at 912-913.

On appeal, the court held that an authenticating witness does not necessarily have to have been present at the recording of the exhibit in order to know when, where, and under what circumstances the recording was made. A witness with prior knowledge of the people and places depicted in the exhibit could still establish when the exhibit was created based on the age of the people in the exhibit or things depicted in the background. Id. at 914-15. The appellate court affirmed the defendant's convictions and held that Washington does not require photographs and other recordings to be authenticated by a witness present for their creation. The victim's grandmother adequately authenticated the photos and video recordings when she identified the individuals in the exhibits, the victim's approximate age, and the location depicted in the exhibits. Id. at 916-917.

Even when the grandmother was unable to identify the location depicted in some of the exhibits, the appellate court found that the trial court could still reasonably conclude that the matter in question was what

its proponent claimed pursuant to ER 901 because she was able to identify the people in the exhibits and the victim's age. Id. at 916-917.

Like the Tatum case and the Sapp case, there is sufficient evidence in this case to authenticate and admit the surveillance video and still photos from the surveillance video. In this case, the appellant did not object to the admission of the surveillance video. Even if he had, the trial court would have admitted the surveillance video because Ms. Wooden laid a proper foundation for the admission of the video.

Ms. Wooden's testimony regarding the video is similar, if not superior in nature, to the authenticating testimonies in the Tatum and Sapp cases. In Tatum, there was no surveillance video. The cashier was not able to recall the transaction and testified to the procedure and what she must have done to cash a check based off of her initials appearing on the front of a check. In Sapp, the authenticating witness has no personal knowledge of the events captured on video and photos. She knew the individuals in the video, age of victim and approximate time frame, and the locations of some of the photos.

In the present case, there was a surveillance video showing a transaction involving Ms. Wooden, her teller window, her bank branch, and her actions in processing a discernable transaction. While she did not specially recall the transaction depicted in the video, she watched the

video and was able to identify herself, her teller window, her Chase Bank branch, the scanner, her teller box, the nature of the transaction captured on video, and her involvement in the transaction. Ms. Wooden testified about the procedure and steps she must do to process a transaction that involves her giving cash back to a customer. The procedure involved asking for identification, putting a check and a deposit slip into a scanner, having the scanner scan the check and display an image of the check on her computer, accessing her computer to look at the scanned check and access the account, taking the check from the scanner and putting it in her teller box, counting money, handing money over to the customer, and giving the customer a cash receipt. The surveillance video captured these events and Ms. Wooden was able to identify and explain the events captured on the video, and what she did pertaining to each event. We also know this event happened during the course of her employment. The event captured by the surveillance video is of Ms. Wooden processing a check and giving a customer cash back. There is sufficient evidence to authenticate the video and the trial court did not abuse its discretion in admitting the video.

Similarly, the still photos from the surveillance video were properly admitted into evidence. The still photos are of the surveillance video which the appellant did not object to its admission and Ms. Wooden

is able to testify to her being in the photo, her teller window, her bank branch, and her servicing a customer in the course of her employment. There is sufficient evidence to authenticate the photos and the trial court did not abuse its discretion in admitting the photos.

2. THE APPELLANT'S TRIAL ATTORNEY WAS NOT DEFICIENT AND THE APPELLANT WAS NOT PREJUDICED BY HIS TRIAL ATTORNEY'S REPRESENTATION.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney's performance fell below an objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

Deference will be given to counsel's performance in order to “eliminate the distorting effects of hindsight” and the reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. Id. at 689

and State v. Lopez, 107 Wash.App. 270, 275 (2001). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wash.2d 61, 77-78 (1996), State v. Garrett, 124 Wash.2d 504, 520 (1994), and McFarland, 127 Wash.2d at 335.

In the present case, the appellant's counsel was not deficient and the appellant was not prejudiced by his attorney's representation. As indicated above, the trial court did not abuse its discretion in admitting the surveillance video and still photos from the surveillance video because there was sufficient evidence to authenticate the video and photos. Therefore, the appellant's attorney correctly did not object when the State asked to admit the surveillance video.

3. THE APPELLANT WAIVED HIS RIGHT TO OBJECT TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS WHEN HE FAILED TO OBJECT TO THEIR IMPOSITION AT TIME OF SENTENCING.

Appellant alleges that the trial court erred by finding that he has the ability either in the present or future to pay legal financial obligations, premised largely upon the court's alleged failure to consider his ability to pay at the time of sentencing under RCW 10.01.160(3). The appellant bears the burden of demonstrating he can raise this issue for the first time on appeal. "A defendant who makes no objection to the imposition of

discretionary LFOs at sentencing is not automatically entitled to review.”

State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” State v. Kuster, 175 Wn.App. 420, 425, 306 P.3d 1022 (2013) (citing State v. Guzman Nunez, 160 Wn.App. 150, 157, 248 P.3d 103 (2011) (citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. State v. Kirkpatrick, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), overruled in part on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

RAP 2.5(a) gives three exceptions that allow an appeal as a matter of right. Like in Blazina, the appellant does not argue an exception to RAP 2.5. However, the Washington Supreme Court holds that the exception found in State v. Ford does not apply because “[u]npreserved LFO errors do not command review as a matter of right under Ford and its progeny.”

Here, the appellant did not object to the imposition of legal financial obligations at sentencing, therefore, the court should exercise its discretion and decline to reach the merits.

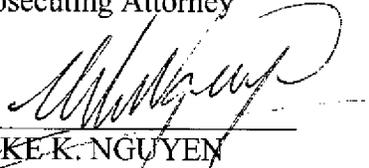
V. CONCLUSION

The appellant's conviction should be affirmed because the trial court did not abuse its discretion in admitting the surveillance video and still photos from the surveillance video, and the appellant waived his right to object to the imposition of legal financial obligations.

Respectfully submitted this 24 day of July 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:


MIKE K. NGUYEN
WSBA # 31641
Deputy Prosecuting Attorney
Representing Respondent

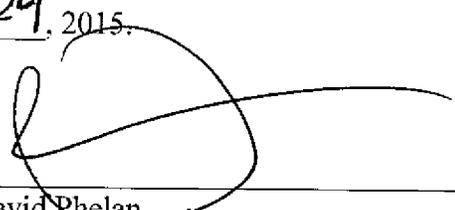
CERTIFICATE OF SERVICE

David Phelan, 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 July 24, 2015.



David Phelan

COWLITZ COUNTY PROSECUTOR

July 24, 2015 - 3:48 PM

Transmittal Letter

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