

No. 47028-4-II

---

---

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

STATE OF WASHINGTON, RESPONDENT

V.

KARENA EIDSMOE, APPELLANT

---

Appeal from the Superior Court of Mason County  
The Honorable Toni. A. Sheldon, Judge

No. 13-1-00521-2

---

**BRIEF OF RESPONDENT**

---

MICHAEL DORCY  
Mason County Prosecuting Attorney

By  
TIM HIGGS  
Deputy Prosecuting Attorney  
WSBA #25919

521 N. Fourth Street  
PO Box 639  
Shelton, WA 98584  
PH: (360) 427-9670 ext. 417

**TABLE OF CONTENTS**

	Page
A. <u>STATE'S COUNTERSTATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u> .....	1
B. <u>FACTS AND STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
1. Eidsmoe alleges ineffective assistance of counsel because her trial attorney did not object to the admission of a trespass order and a photograph of Eidsmoe as business records even though the State had not provided a sufficient basis for their admission as business records. The State contends that Eidsmoe's claim should fail because she cannot show prejudice and because her attorney's decision not to object can be explained as a legitimate trial tactic.....	2
2. Eidsmoe contends that the trial court erred by calculating her offender score as seven even though the State failed to prove her prior convictions. In response, the State contends that Eidsmoe's prior convictions were proved at sentencing because the evidence before the court included a risk assessment that listed Eidsmoe's prior convictions, was signed by a DOC officer under penalty of perjury, and was uncontroverted.....	6
3. At sentencing, the trial court imposed LFOs against Eidsmoe, who did not object. For the first time on appeal, Eidsmoe now contends that the trial court erred by imposing LFOs against her because the trial court did not conduct an individualized inquiry into her present or future ability to pay. The State contends that because Eidsmoe did not preserve this issue for appellate review, this Court should decline review.....	9
D. <u>CONCLUSION</u> .....	12

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b><u>State Cases</u></b>	
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013).....	4
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	11
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	10, 11, 13
<i>State v. Cobos</i> , 182 Wn.2d 12, 338 P.3d 283 (2014).....	9
<i>State v. Duncan</i> , 180 Wn. App. 245, 327 P.3d 699 (2014).....	11
<i>State v. Foster</i> , 140 Wn. App. 266, 166 P.3d 726 (2007).....	4, 6
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	3, 4, 6
<i>State v. Harris</i> , 102 Wn. App. 275, 6 P.3d 1218 (2000).....	8
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	7, 8, 9
<i>State v. Jones</i> , 182 Wn.2d 1, 338 P.3d 278 (2014).....	7, 9
<i>State v. Nason</i> , 168 Wn.2d 936, 233 P.3d 848 (2010).....	11
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	4

State’s Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

*State v. Weaver*,  
171 Wn. 2d 256, 251 P.3d 876 (2011).....8

*State v. Ziegler*,  
114 Wn.2d 533, 789 P.2d 79 (1990).....4

**Federal Cases**

*Strickland v. Washington*,  
466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).....3, 4, 6

**Statutes**

RCW 10.01.160(3) .....10

RCW 10.01.160(4) .....11, 13

RCW 5.45.020 .....5

RCW 9.94A.525(1).....7

RCW 9.94A.530(2).....9

**Rules**

RAP 2.5 .....10

State’s Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Eidsmoe alleges ineffective assistance of counsel because her trial attorney did not object to the admission of a trespass order and a photograph of Eidsmoe as business records even though the State had not provided a sufficient basis for their admission as business records. The State contends that Eidsmoe's claim should fail because she cannot show prejudice and because her attorney's decision not to object can be explained as a legitimate trial tactic.
2. Eidsmoe contends that the trial court erred by calculating her offender score as seven even though the State failed to prove her prior convictions. In response, the State contends that Eidsmoe's prior convictions were proved at sentencing because the evidence before the court included a risk assessment that listed Eidsmoe's prior convictions, was signed by a DOC officer under penalty of perjury, and was uncontroverted.
3. At sentencing, the trial court imposed LFOs against Eidsmoe, who did not object. For the first time on appeal, Eidsmoe now contends that the trial court erred by imposing LFOs against her because the trial court did not conduct an individualized inquiry into her present or future ability to pay. The State contends that because Eidsmoe did not preserve this issue for appellate review, this Court should decline review.

B. FACTS AND STATEMENT OF THE CASE

On December 5, 2013, Karena Eidsmoe and Robert Nagel entered the Walmart store in Shelton, Washington. RP 24-25, 43, 62, 74-75.

Walmart had previously issued a trespass notice to Eidsmoe barring her

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

from entering any Walmart property, and that order was still in effect. RP 45-45; Trial Exhibits 2, 4. While Eidsmoe was in the store, she purchased some merchandise, but she also stole a greeting card, some batteries, and a glow toy. RP 30, 34, 44, 48, 50, 53, 58-59, 62, 63, 67.

Store security personnel were surveilling Eidsmoe as she stole the merchandise. RP 33, 43-44, 48, 67. When she attempted to leave the store without paying for the stolen merchandise, a police officer detained her and returned her to the store. RP 25-26, 29. Eidsmoe resisted arrest. RP 27, 31-32, 39. After store personnel identified Eidsmoe, they located a copy of the trespass order. RP 45. The State charged Eidsmoe with one count of burglary in the second degree and one count of resisting arrest. CP 19-20. The jury returned guilty verdicts on both counts. CP 16-18.

C. ARGUMENT

1. Eidsmoe alleges ineffective assistance of counsel because her trial attorney did not object to the admission of a trespass order and a photograph of Eidsmoe as business records even though the State had not provided a sufficient basis for their admission as business records. The State contends that Eidsmoe's claim should fail because she cannot show prejudice and because her attorney's decision not to object can be explained as a legitimate trial tactic.

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

At trial, to prove that Eidsmoe's entry into Walmart was unlawful, the State offered into evidence a copy of the trespass notice that Walmart had previously provided to Eidsmoe, along with a copy of a photograph of Eidsmoe, which showed that Eidsmoe was in fact the person to whom Walmart had provided the trespass notice. RP 45-46; Trial Exhibits 2, 4. Eidsmoe's trial counsel did not object when the State offered these exhibits into evidence; instead, when the trial court asked counsel whether he had any objection, counsel stated: "I have no basis to object, Your Honor." RP 46 (lines 4 and 25). On appeal, Eidsmoe contends that her trial counsel was ineffective for not offering an objection. Br. of Appellant at 7-11.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Eidsmoe must show that but for the deficient performance, there is a reasonable probability that the outcome would

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

A reviewing court should give great deference to trial counsel's performance and begin its analysis with a strong presumption that counsel's performance was reasonable. *Grier* at 33. A claim that trial counsel was ineffective does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Id.* at 42 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Eidsmoe's argument assumes that Exhibits 2 and 4 were not admissible under any circumstances and that, if her attorney would have voiced an objection, the State could not have provided a solid foundation for the admission of these exhibits as business records. "Business records are admissible, even if they contain hearsay, when they are created in the ordinary course of business and there is no evident motive to falsify." *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 859-60, 292 P.3d 779 (2013) (citing *State v. Ziegler*, 114 Wn.2d 533, 537-38, 789 P.2d 79

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

(1990); RCW 5.45.020). The elements of the business record hearsay exception are statutory, as follows:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

Here, the State did not present evidence of all of the elements of the business records hearsay exception, but defense counsel invited this omission by stating, "I have no basis to object, Your Honor[,]" when the prosecutor offered these business records into evidence. RP 46 (lines 4 and 25). Presumably, defense counsel had the benefit of discovery and had opportunity to question the witnesses, including his own client, and was well aware of the evidence available to support each of the elements of the business record exception. Hence, counsel stated, "I have no basis to object, Your Honor." RP (lines 4 and 25).

Although had Eidsmoe's counsel objected it is likely that the objection would have, for the moment, been sustained, there is no evidence in the record to suggest that the State would have been unable to readily present sufficient evidence to then overcome the objection.

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

Knowing that the exhibits were ultimately admissible, Eidsmoe had nothing to gain by prompting the State to enhance the evidentiary weight of the exhibits by providing additional evidence, by way of foundation evidence, to bolster their reliability.

Thus, the State contends that Eidsmoe's claim of ineffective assistance of counsel should fail for two reasons. First, Eidsmoe's claim should fail because Eidsmoe cannot show that there is any reasonable probability that the outcome of the trial would have been different had his counsel objected to the admission of Exhibits 2 and 4. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). And second, Eidsmoe's claim should fail because trial counsel's decision to forego an objection is explainable as a legitimate trial tactic. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

2. Eidsmoe contends that the trial court erred by calculating her offender score as seven even though the State failed to prove her prior convictions. In response, the State contends that Eidsmoe's prior convictions were proved at sentencing because the evidence before the court included a risk assessment that listed Eidsmoe's prior convictions, was signed by a DOC officer under penalty of perjury, and was uncontroverted.

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

The trial court sentenced Eidsmoe based upon an offender score calculation of seven. CP 6. On appeal, Eidsmoe avers that there was insufficient proof of her offender score and that the trial court, therefore, erred when calculating her offender score. Br. of Appellant at 11-13. Eidsmore did not preserve this issue with an objection at the time of sentencing, but she may nevertheless raise this issue for the first time on appeal. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014).

Sentencing courts are required to calculate a defendant's offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). The State bears the burden of proving the defendant's criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The only evidence the sentencing court may rely upon is that which the defendant has admitted or acknowledged, or that which is proved in a trial or at the time of sentencing. *Id.* Bare assertions unsupported by evidence do not meet this standard. *Id.*

At sentencing in the instant case, the prosecutor gave an oral summary of Eidsmoe's prior convictions. RP 167. The prosecutor did not provide certified copies of the judgments and sentences or otherwise corroborate the oral summary with proof. *Id.* But among the facts

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

considered by the trial court were two risk assessments authored by the Department of Corrections. RP 170; CP 54-59. Both of the risk assessments were signed under penalty of perjury by a corrections officer, and both documents contained an itemized list of Eidsmoe's prior criminal history. CP 54-59.

"The CCO preparing the presentence investigation report is a neutral and independent participant in the sentencing process; he or she acts not as an agent of the State of Washington but on behalf of the independent judiciary." *State v. Harris*, 102 Wn. App. 275, 287, 6 P.3d 1218, 1225 (2000) *aff'd sub nom. State v. Sanchez*, 146 Wn. 2d 339, 46 P.3d 774 (2002), *as amended* (May 13, 2002). Still more, the correction officer's assertion of Eidsmoe's conviction history as reported in the risk assessments was more than a mere bare assertion, these were assertions made under penalty of perjury. CP 54-59.

Eidsmoe did not object to the risk assessments considered by the trial court. The mere failure to object does not constitute an acknowledgement. *State v. Hunley*, 175 Wn. 2d 901, 914, 287 P.3d 584 (2012); *State v. Weaver*, 171 Wn. 2d 256, 259-60, 251 P.3d 876 (2011). However, the fact remains in the instant case that there is competent evidence offered by a neutral party, under penalty of perjury, to prove and

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

corroborate Eidsmoe's criminal conviction history, and there is no evidence in contradiction of the evidence considered by the trial court. Thus, the State contends that Eidsmoe's conviction history was proved by a preponderance of the evidence as required by RCW 9.94A.530(2) and *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012).

In summary, the State contends that the risk assessment reports are sufficient evidence to support the trial court's offender score calculation, both because the reports are uncontroverted in the record and because they were prepared and signed by a neutral witness, under penalty of perjury. Therefore, the State asks that this Court affirm the trial court's judgment and sentence, to include the offender score calculation. If, however, this Court finds that the evidence is insufficient to sustain the trial court on this issue, then the State contends that the proper remedy would be to remand to the trial court for the parties to present additional evidence as necessary to calculate the correct offender score. RCW 9.94A.530(2); *State v. Jones*, 182 Wn.2d 1, 10-11, 338 P.3d 278 (2014) ; *State v. Cobos*, 182 Wn.2d 12, 14-15, 338 P.3d 283 (2014).

3. At sentencing, the trial court imposed LFOs against Eidsmoe, who did not object. For the first time on appeal, Eidsmoe now contends that the trial court erred by imposing LFOs against her because the trial court did not conduct an individualized

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

inquiry into her present or future ability to pay. The State contends that because Eidsmoe did not preserve this issue for appellate review, this Court should decline review.

It appears from the record that at sentencing the trial court imposed discretionary legal financial obligations against Eidsmoe without first conducting an on-the-record, individualized inquiry into her ability to pay. RP 170-72. However, RCW 10.01.160(3) requires such an inquiry, and mere reference to boilerplate language in the judgment and sentence is inadequate to substitute for the required individualized inquiry. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Although the trial court did not engage in an on-the-record, individualized inquiry into Eidsmoe's ability to pay, Eidsmoe did not object to the court's imposition of LFOs. RP 170-74. There is no explanation of why Eidsmoe failed to object in the trial court. Nevertheless, under RAP 2.5 this Court may accept review even though Eidsmoe failed to preserve the issue. *Blazina* at 834-35.

But "[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) (footnote omitted). Instead, this Court retains discretion to deny review. *Blazina* at

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

832; *State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699, 701 (2014) *review granted*, (Wash. Aug. 5, 2015).

The State contends that this Court should decline to consider Eidsmoe's claim on this issue that she now raises for the first time on appeal. If Eidsmoe is truly unable to make payments on her LFOs, she has an available remedy, because if she is not in contumacious default she may petition the sentencing court for remission of the payment of all or part of the LFOs. RCW 10.01.160(4). Eidsmoe has protection from sanctions if she suffers a true hardship, because:

Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence; while the burden is on the offender to show that his nonpayment is not willful, "due process still imposes a duty on the court to inquire into the offender's ability to pay ... at 'the point of collection and when sanctions are sought for nonpayment.'" *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010) (citation omitted) (quoting *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997)).

*State v. Duncan*, 180 Wn. App. 245, 250-51, 327 P.3d 699, 701 (2014) *review granted*, (Wash. Aug. 5, 2015).

If, however, this Court accepts review on this issue, the State contends that because the trial court did not engage in an on-the-record, individualized inquiry into Eidsmoe's ability to pay LFOs, the proper remedy is to remand to the trial court for resentencing, where the trial court may then undergo the required inquiry. *Blazina* at 839.

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

D. CONCLUSION

Eidsmoe's trial counsel was not ineffective merely because he did not object when the State offered a trespass notice and photo of Eidsmoe into evidence. Presumably trial counsel was familiar with the exhibits and knew that the State could easily provide the required foundation if pressed to do so by an objection. Thus, Eidsmoe cannot show that the outcome of the trial would have been different had her attorney objected. And, trial counsel's decision not to object can be explained as a legitimate trial tactic, because Eidsmoe had nothing to gain by forcing the State to bolster the evidentiary weight of the evidence by providing detailed foundation in support of it.

There is no evidence that the trial court miscalculated Eidsmoe's offender score. Instead, Eidsmoe correctly points out that the prosecutor did not provide certified copies of judgments and sentences or other proof to support his oral recitation of Eidsmoe's criminal history. But the trial court also had the benefit of a DOC officer's sworn statement of Eidsmoe's criminal history. Although Eidsmoe's failure to object was not an acknowledgement, there nevertheless is no evidence to contradict the DOC officer's statement of Eidsmoe's criminal history. On these facts,

State's Response Brief  
Case No. 47028-4-II

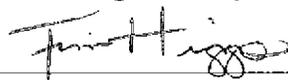
Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

Eidsmoe's criminal history was proved by a preponderance of the evidence.

Finally, the trial court did not engage in the required on-the-record, individualized inquiry into Eidsmoe's ability to pay legal financial obligations when the court imposed them at sentencing. But Eidsmoe did not object, and she therefore did not preserve this issue for appeal. Under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), this Court retains the authority to decline to accept review of this issue where it is raised for the first time on appeal. Under RCW 10.01.160(4), Eidsmoe has a statutory remedy to protect her from undue hardship. The State contends, therefore, asks that this Court deny review of this issue.

DATED: August 17, 2015.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney



---

Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

State's Response Brief  
Case No. 47028-4-II

Mason County Prosecutor  
PO Box 639  
Shelton, WA 98584  
360-427-9670 ext. 417

# MASON COUNTY PROSECUTOR

**August 17, 2015 - 1:15 PM**

## Transmittal Letter

Document Uploaded: 3-470284-Respondent's Brief.pdf

Case Name: State v. Karena Eidsmoe

Court of Appeals Case Number: 47028-4

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: [timh@co.mason.wa.us](mailto:timh@co.mason.wa.us)

A copy of this document has been emailed to the following addresses:

[ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)