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Court of Appeals  
Division III  
State of Washington  
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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,	)	NO. 35442-3-III
Respondent,	)	
	)	
vs.	)	
	)	
MICHELLE DIANNE BROOKS,	)	
Appellant.	)	Douglas County Superior
	)	Court No. 141001677

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RESPONDENT'S BRIEF

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A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by Defendant.

B. STATEMENT OF THE CASE

Ms. Brooks brings this appeal after having been convicted at bench trial of theft in the first degree for stealing from the City of Rock Island during her employment as the City Clerk. The facts surrounding Ms. Brooks' conviction are more fully set forth in the Verdict and Decision of the Court at Clerk's Papers (CP) 112. The essence of the allegations are that Ms. Brooks used her position as the City Clerk and her knowledge and access to the city's financial management system to intentionally obtain pay and benefits to which she knew she was not entitled.

1. Imposition of discretionary legal financial obligations.

Defendant's appellant counsel addresses only issues surrounding the imposition of discretionary legal financial obligations (LFOs).

In addition to the statement of facts presented by appellate counsel as they relate to the imposition of discretionary LFOs, the

following information should be considered. Defendant was attending college to better her career. RP 316, 320. The court learned defendant was working at the college library. RP 320. When discussing defendant's ability to pay, the court, counsel and defendant had the following discussion at RP 323:

Mr. Crowley: Judge, the – other than restitution, let's see, on the restitution, would \$50.00 a month be satisfactory?

Court: If she can afford to pay that, that will work. You can afford to pay that, Ms. Brooks?

Defendant: I'll just make it a priority.

Court: Well, if you can't afford to pay it I need to know because it's something we have to set, okay?

Defendant: 25 a month would be easier ....

Court: \$25.00 a month it'll be for a while. Now, the problem is the interest eats you up, so as soon as we can get that increased, the better off you'll be.

## 2. Statement of additional grounds.

In her statement of additional grounds (SAG) Ms. Brooks raises three issues: 1) violation of her Sixth Amendment right to confrontation; 2) ineffective assistance of counsel for numerous

reasons, and 3) failure of the State to reveal potentially exculpatory information about one of the State's witnesses.

a. Sixth Amendment claims.

Defendant claims she was denied her right to confront the person who generated the financial spread sheet otherwise known as the audit trail because the State failed to call that person at trial. The spreadsheet in question was admitted by the court under the business record exception to the hearsay rule after hearing from a witness with knowledge on how the spreadsheet was generated. RP 27-30. Defendant also testified about her knowledge of the audit trail and the information contained therein. RP 276.

b. Ineffective assistance claims.

Defendant cites several instances of her attorney's conduct constituting ineffective assistance as follows:

1. Failed to attend majority of hearings;
2. Failure to request a jury trial;
3. Violated RPC 1.4, 1.5, 1.15A(F), 1.16(D), 1.3, 1.5(F), 1.15A(C), ELC 14.1.-14.4;
4. Failed to present witnesses;
5. Procrastination led to lack of speedy trial; and
6. Failed to disclose his troubles with WSBA.

As to the failure to attend hearings, the record in the form of clerk's minutes reflects several instances where defense counsel had other attorneys cover pre-trial hearings or where pre-trial hearings were continued to a later date because defense counsel did not show up at the appointed time. See for e.g. Criminal Minute Sheets at CP 24, 52, 70, 72, 79, 81, 88, 90, 97, 98, and 100. Defendant has not arranged for transcripts of any of those hearings.

As to the failure to request a jury for trial, the clerk's notes on the minute sheet at CP 107 reflects the following:

Defense stated they would waive jury trial. Court reviewed waiver with defendant. Defendant waived jury trial. State had no input. Court waived jury trial. Jury trial is stricken. Bench trial will start tomorrow morning at 9 a.m.

Defendant has not arranged for a transcript of that hearing.

As to the remainder of defendant's claims, those are issues that are outside of the record and are not supplemented by any affidavits or declarations.

- c. Failure of state to disclose exculpatory evidence concerning a witness.

Defendant alleges additional theft of public funds from her employer prior to and subsequent to her employment, and accuses state's witness Bonnie Langford of being a suspect in those thefts;

and that this prejudicial information was not disclosed by the State or addressed by her attorney. This accusation is outside of the case record and is unsupported by any declarations or affidavit.

C. ARGUMENT

1. Discretionary Legal Financial Obligations.

RCW 10.01.160(3) states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

At the time of sentencing the court was aware of the following information: defendant had not claimed she was indigent, had retained the services of private counsel, was finishing college, and worked at the college library. Further when the court expressly inquired of the defendant about her ability to pay restitution, defendant responded she could pay and would make it her priority.

That the court set a repayment amount that would not cover the accrued interest is not a bar to imposing costs and setting a monthly repayment amount. The legislature has set in place a safety valve that allows the defendant to avoid the harshness of an interest that accrues at 12 percent per annum; the defendant has

the right to ask the court at any time after sentencing for remission of the discretionary LFOs (RCW 10.01.160(4)), and to reduce or waive the interest (RCW 10.82.090(2)). Further, while the repayment plan “constitutes a condition or requirement of a sentence” that subjects the defendant to potential noncompliance penalties (RCW 9.94A.760(10)), there are statutory safeguards in place that prevent a court at the time of collection from imposing penalties if the defendant is unable to pay (RCW 9.94A.6333).

Where the court was aware that defendant was currently employed, was finishing college, and was told by defendant she could make the payments after the court told her it needed to know if she could not pay, the court did not err when it imposed the discretionary LFOs.

3. Statement of Additional Grounds

a. No Sixth Amendment violation.

Defendant’s confrontation right was not violated because the audit trail documents were properly admitted under the business records exception to the hearsay rule. ER 803(a); (RCW 5.45.020); State v. Kreck, 86 Wash.2d 112, 121, 542 P.2d 782

(1975), *State v. Walker*, 83 Wash.App. 89, 97, 920 P.3d 605 (1996).

RCW 5.45.020 provides:

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.

Determining whether evidence is admissible is within the discretion of the trial court and will be reversed only upon a showing of manifest abuse of discretion. *State v. Bourgeois*, 133 Wash.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Magers*, 164 Wash.2d 174, 181, 189 P.3d 126 (2008).

In this instance the court heard the testimony of Mr. Chad Greif (RP starting at 14), describing the financial software system used by the City to keep track of finances, expenditures, and payroll. Mr. Greif described how the information is collected, that it was maintained in the regular course of business, and that he

viewed the audit trail document in real time when it was generated by city personnel. RP 29.

Here the trial court did not abuse its discretion to admit the business record where the information supplied by Mr. Greif satisfied the business record exception to the hearsay rule.

- b. Ineffective assistance claims outside of the record can only be reviewed in a personal restraint petition.

Ms. Brooks' claims involve matters largely outside the record and are therefore reviewable only in a personal restraint petition. *State v. McFarland*, 127 Wash.2d 322, 338, 899 P.2d 1251 (1995). The record contains no declarations regarding her alleged conversations with counsel. Nor does the fact that there were several continuances or that her attorney sent stand-in attorneys to other hearings reveal the nature of the reasons why the hearings were continued sufficient to address her speedy trial complaint. Also that her attorney was disbarred is insufficient standing alone to support Ms. Brooks' conclusory statement that he was deficient in his representation of her as well.

There is one issue raised by defendant that could be addressed because there is an adequate record available, and that

is her claim her attorney failed to request a jury. The clerk's minutes reflect that the jury trial was waived on the eve of trial. CP 107. That fragment of the record reflects that defendant affirmatively waived her right to a jury trial, and that the trial court discussed the waiver with her before striking the jury. Whether the relinquishment of the jury trial right was made knowingly, intelligently, and voluntarily can only really be addressed upon an examination of the record. See *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 240, 165 P.3d 391 (2007).

However, this court should decline to reach the merits of this issue because defendant has failed to supply the available record. A party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. *State v. Jackson*, 36 Wash.App. 510, 516, 676 P.2d 517, *aff'd*, 102 Wash.2d 689, 689 P.2d 76 (1984); RAP 9.2(b). Absence of the necessary record precludes review. *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993).

c. Withholding evidence claim outside of record.

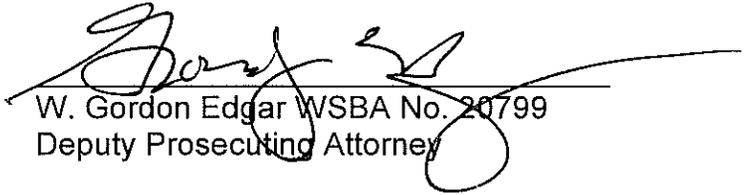
Defendant's claim that the state withheld prejudicial information on a state's witness, and that her attorney failed to

obtain this information, is outside of the record and is reviewable only in a personal restraint petition.

D. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to dismiss this appeal.

Respectfully submitted this  
16<sup>th</sup> day of April, 2018



W. Gordon Edgar WSBA No. 20799  
Deputy Prosecuting Attorney

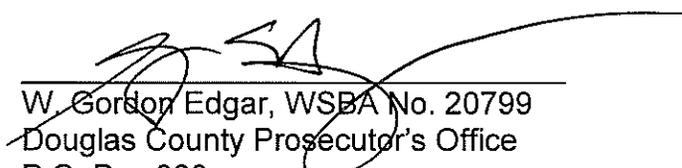
IN THE COURT OF APPEALS, DIVISION III  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, ) Court of Appeals no. 35442-3  
Respondent, ) Douglas County No. 141001677  
)  
v. )  
) PROOF OF SERVICE (RAP 18.5(b))  
MICHELLE DIANE BROOKS, )  
Appellant. )

I, W. Gordon Edgar, do hereby certify under penalty of perjury that on April 17, 2018, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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**Transmittal Information**

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