NO. 44438-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES BRADLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 12-1-03458-5

Response Brief

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2. Whether double jeopardy prohibitions were implicated where defendant's convictions for vehicle prowling and theft were factually and legally distinct.

3. Whether defendant's claim regarding legal financial obligations is neither ripe nor preserved for review.

B. STATEMENT OF THE CASE.

1. Procedure

On September 13, 2012, the State charged James Bradley, hereinafter referred to as, "defendant," with one count of assault in the second degree while armed with a deadly weapon, one count of felony harassment, one count of malicious mischief in the third degree, one count of theft in the third degree, and one count of vehicle prowling in the second degree. CP 1-3. Charges were later amended to drop the one count

of felony harassment and include one count of obstructing a law enforcement officer. CP 27-29.

Defendant's jury trial began on December 4, 2012. RP 166. On December 7, 2012, defendant was found guilty as charged. RP 473- 476. The court sentenced defendant to a standard sentence of 14 months in custody for second degree assault, consecutive to 12 months in custody for the deadly weapon enhancement, and two months of consecutive terms for each of the four gross misdemeanor convictions. CP 100, 108.

2. Facts

On September 12, 2012, Sage Sanchez went to 9th and Puget Sound in Tacoma, WA, where defendant was living, to give defendant $540 for the work he had done for Mr. Sanchez. RP 175-179. Mr. Sanchez hired defendant to fix up Mr. Sanchez's father's mobile home because he knew defendant had knowledge of construction and also to help him get back on his feet. RP 175-177. Although Mr. Sanchez told defendant that he would receive the rest of the approximately $75 owed to him as soon as it was deposited in direct deposit, defendant said, "I see how this is going to go," went into the house, and returned with a baseball bat. RP 186-188, 216-217. Defendant then said, "You're going to pay me, or I'm going to take out every cent or every dollar on this truck." He then repeatedly hit Mr. Sanchez's truck with the bat; leaving dents. RP 189, 218. Defendant

also chased Mr. Sanchez around the truck with the bat raised demanding that Mr. Sanchez pay him. RP 195, 233. Mr. Sanchez moved around the truck out of fear that he could die if he got hit by the bat. RP 200-201.

Scared, Mr. Sanchez crossed the street to the Gordhamer's house and asked Kimberly Gordhamer if he could enter the house to call the police. RP 276. Mrs. Gordhamer refused to let him in because she had never met him. RP 276, 363. Defendant followed Mr. Sanchez over to the Gordhamer's house demanding that Mr. Sanchez pay him, and chased him around their car two or three times with the bat raised in the air. RP 277-277.

When Mr. Sanchez said, "Fine. I'll pay you. Just, just stop. You need to stop." defendant walked back to Mr. Sanchez's truck and said that he was going to take the leaf blower as collateral. RP 217. Although defendant initially followed Mr. Sanchez who started running away, he turned around and went back to the truck. RP 236. Defendant took the leaf blower out of truck bed of Mr. Sanchez's truck and placed it on the porch of the house. RP 304. Defendant then reached into the truck, removed the keys from the ignition, went into the house, and dropped the keys on the couch. RP 233-234, 245, 257, 264. 286-287.

Police officers arrived after being notified by multiple neighbors who witnessed the incident. RP 233, 264, 313, 370. They searched the area for defendant, but left because they were unable to find him. RP 355.

Elizabeth Blankenship, who lived with defendant, received a text message from defendant asking her to let him know when the police left and stating that he was in the tool shed. RP 279. Blankenship notified police of this and officers returned to the residence. RP 355.

The police went to the tool shed, announced themselves, but got no reply. RP 346. Officers entered the tool shed and found defendant who was then taken into custody. RP 346-348.

Defendant did not testify at trial or present any witnesses.

C. ARGUMENT.

1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF THE DEADLY WEAPON SENTENCE ENHANCEMENT, OBSTRUCTING A LAW ENFORCEMENT OFFICER, AND THEFT IN THE THIRD DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

a. <u>The evidence was sufficient for the jury to find defendant guilty beyond a reasonable doubt of the deadly weapon sentence enhancement where he chased Mr. Sanchez while swinging an aluminum bat.</u>

A deadly weapon, for purposes of the deadly weapon enhancement statute, is defined as "an implement or instrument which has the capacity

to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825.

Although aluminum baseball bats are not listed as a deadly weapon per se, the court has recognized that they may be used as a deadly weapon. *See e.g.* ***In re Pers. Restraint of Tran***, 154 Wn.2d 323, 111 P.3d 1168 (2005) (use of a baseball bat led to charges of first degree assault with a deadly weapon). However, the State must prove that the weapon had the capacity to cause the victim's death and was used in a way that was likely to produce or could have easily produced death. ***State v. Zumwalt***, 79 Wn. App. 124, 129-130, 901 P.2d 319 (1995). Relevant factors include the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied, and the injuries inflicted. ***State v. Winings***, 126 Wn. App. 75, 88, 107 P.3d 141 (2005).

Here, multiple witnesses testified that defendant chased Mr. Sanchez with an aluminum baseball bat. RP 188, 195, 233, 253-255, 276-277. As a result, the State presented ample evidence to find defendant guilty of the deadly weapon sentence enhancement. The witnesses also testified that as defendant chased Mr. Sanchez with the bat, he swung it multiples times hard enough to dent Mr. Sanchez's truck. RP 189, 193, 218. Although Mr. Sanchez avoided serious injuries and/or death by fleeing and using the truck as a barrier, he was at times only two or three feet apart from defendant. RP 189, 193, 218, 221. Mr. Sanchez testified that he was afraid he would die if he got hit by the bat. RP 198, 201. Thus,

the State proved that the aluminum bat had the capacity to cause Mr. Sanchez's death and was used in a way that was likely to produce or could have easily produced death.

Defendant claims that the State failed to prove that he used the baseball bat in a manner likely to produce death for purposes of the deadly weapon sentence enhancement because he only used the aluminum bat as a tool to demand Mr. Sanchez into making payment. *See* Brief of Appellant at 11. This claim fails as the record shows that defendant did more than damage the truck. Defendant used the aluminum bat in a manner that was likely to produce death and not simply as a tool to gain payment because he stopped damaging the truck and chased Mr. Sanchez across the street and around the neighbor's car. RP 233, 254-255, 276-277. If defendant wanted to intimidate Mr. Sanchez into making payment by damaging the truck, he would have stayed at the truck and kept damaging it as opposed to chasing Mr. Sanchez. Defendant's claim that the evidence was insufficient because he never got close enough to swing the bat at Mr. Sanchez also fails because Mr. Sanchez maintained this distance by running away and using the truck as a barrier to avoid being hit.

Because several witnesses testified that defendant chased Mr. Sanchez with an aluminum baseball bat, the State presented sufficient evidence for the deadly weapon sentence enhancement, and this Court affirm defendant's conviction.

b. The State presented sufficient evidence for a rational trier of fact to find defendant guilty of obstructing a law enforcement officer where defendant hid in the shed, told Mrs. Blankenship to let him know when the police were gone, and refused to comply with officer's orders to exit.

A person is guilty of obstructing a law enforcement officer when he or she willfully hinders, delays, or obstructs a law enforcement officer in the discharge of his official powers or duties. RCW 9A.76.020(1). The essential elements of obstructing a law enforcement officer are: (1) that the action or inaction in fact hinders, delays, or obstructs; (2) that the hindrance, delay, or obstruction be of a public servant in the midst of discharging his official powers or duties; (3) knowledge by the defendant that the public servant is discharging his duties; and (4) that the action or inaction be done knowingly by the obstructor..." ***State v. Contreras***, 92 Wn. App. 307, 315-316, 966 P.2d 915 (1998). "Intent to hinder, delay, or obstruct is not a statutory element of the crime." ***State v. Hudson***, 56 Wn. App. 490, 496, 784 P.2d 533 (1990).

In this case, the court instructed the jury that in order to convict defendant of obstructing a law enforcement officer, the State had to prove each of the following elements:

1. That on or about the 12th day of Sept, 2012, the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;
2. That the defendant knew that the law enforcement officer was discharging official duties at the time; and
3. That any of these acts occurred in the State of Washington.

CP 70 (Instruction 20).

Here, the State presented ample evidence that defendant willfully obstructed law enforcement officers in the discharge of their official duties. The record shows that defendant intentionally hid from the police while they were looking for him and refused to comply with their orders to exit the toolshed.

Officer Granlund of the Tacoma Police Department testified that he found defendant hiding in a toolshed, and that defendant's refusal to comply with orders to come out delayed him in the discharge of his duties. RP 345. He also testified that he had to drive around looking for defendant for ten minutes before he was notified that defendant was in the toolshed because he couldn't initially find him at the scene of the incident. RP 354-355.

It was only because defendant sent Mrs. Blankenship text messages asking her to let him know when the officers were gone and that he was in the toolshed, that officers were able to locate defendant. RP 280.

Officer Granlund also testified that when he announced himself and ordered defendant to come out with his hands up, defendant did not respond, so he had to open the door to find him and take him into custody. RP 346-347, 348.

Clearly, the officers were hindered, delayed, and obstructed in the discharge of their duties to investigate the reported incident because they had to look for him as he hid, drive around the neighborhood, come back, and enter the shed themselves when he refused to come out. Defendant clearly knew they were officers because he referred to them as such in his text message.

Defendant does not challenge any of the elements of the crime. Instead, he claims that his actions were insufficient to constitute obstruction because he had a constitutionally protected right to refuse the warrantless entry. *See* Brief of Appellant at 17. This claim fails because the constitutionally protected right to refuse a warrantless entry does not apply to toolsheds on other people's property. There is no legal authority to suggest that the right to refuse a warrantless entry applies to anything other than a person's home.

As the record shows that defendant knowingly hid from police officers in the toolshed and refused to comply with their orders to exit, the State presented sufficient evidence that he obstructed law enforcement officers in the discharge of their official duties. As such, this Court should dismiss him claim and affirm his conviction.

c. The State presented sufficient for a rational trier of fact to find defendant guilty of theft in the third degree where defendant took Mr. Sanchez's keys and leaf blower from Mr. Sanchez's truck, and brought them to his house.

A person is guilty of theft in the third degree if she or she "wrongfully obtain or exerts unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." RCW 9A.56.020(1).

Here, the court instructed the jury that in order to convict defendant of theft in the third degree, the State had to prove each of the following elements:

1. That on or about the 12th day of Sept, 2012, the defendant wrongfully obtained property of another or the value thereof,
2. That the defendant intended to deprive the other person of the property, and
3. That this act occurred in the State of Washington

CP 66 (Instruction 16).

Here, the State presented sufficient evidence that defendant committed theft in the third degree because multiple witnesses testified that defendant took Mr. Sanchez's keys and leaf blower from his truck and brought them to the house at which he was staying. Witnesses testified that defendant reached into Mr. Sanchez's truck, removed the keys from the ignition, and took them into the house at which he was staying. RP

233-234, 257, 275. Elizabeth Blankenship testified that after defendant brought the keys into the house, he dropped them on the couch. RP 287-288. Witnesses also testified that defendant reached in the back of Mr. Sanchez's truck, took the leaf blower, and placed it on the porch of the house. RP 217, 304, 307, 314, 317. Mr. Sanchez testified that he did not give defendant permission to go into the truck or take the leaf blower. RP 202-203. As the record shows that defendant took Mr. Sanchez's property without his permission, the evidence was sufficient to find him guilty beyond a reasonable doubt of theft in the third degree.

i. There is no requirement that a defendant retain the stolen property for a substantial period of time.

Defendant claims that there was insufficient evidence of his intent to deprive Mr. Sanchez of the stolen property because he did not retain possession of the property for a substantial period of time. *See* Brief of Appellant at 19. Defendant's claim fails as there is no requirement that a defendant maintain possession of a stolen item for a substantial period of time.

Defendant relies solely on ***State v. Walker*** in support of his argument. ***State v. Walker***, 75 Wn. App. 101, 879 P.2d 957 (1994). While defendant argues that ***Walker*** adds a durational element to the crime of

theft, this is a misrepresentation of ***Walker***. In ***Walker***, the court held that the statutes for taking a motor vehicle without permission (joyriding) and theft in the first degree were not concurrent. *Id.* at 108. In reaching the holding, the court discussed the duration differences between the statutes stating that "the joyriding statute proscribes the initial unauthorized use of an automobile, while the theft statute *proscribes* the continued or permanent unauthorized use of an automobile." *Id.* at 108 (emphasis added). The court neither implicitly nor explicitly added a durational element to the crime of theft. It merely articulated the well-established notion that theft forbids the continued or permanent unauthorized use of another's property. While proof that an item has been taken for a substantial period of time may help to establish the intent to deprive element of theft, it is not required under ***Walker***, or any other legal authority, as an element of the crime of theft.

As witnesses testified that defendant took Mr. Sanchez's keys and leaf blower and secured them in his house, the State presented sufficient evidence for a rational trier of fact to find defendant guilty of theft.

ii. **The State was not required to give a Petrich instruction when the thefts were part of a continuing course of conduct.**

Only a unanimous jury can return a "guilty" verdict in a criminal case. ***State v. Camarillo***, 115 Wn.2d 60, 794 P.2d 850 (1990). Where the evidence shows multiple acts occurred that could constitute the charged offense, the State must either elect which act it relies upon or the jury must be instructed that it must unanimously agree upon which act it found. ***State v. Petrich***, 101 Wn.2d 566, 572, 683 P.2d 173 (2009). Constitutional error resulting in a new trial occurs where no unanimity instruction is given unless the error is shown to be harmless beyond a reasonable doubt. ***State v. Bobenhouse***, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); ***Camarillo***, 115 Wn.2d at 64.

However, no election or unanimity instruction is needed if the defendant's acts were part of a continuing course of conduct. ***State v. Handran***, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Appellate courts must "review the facts in a commonsense manner to decide whether criminal conduct constitutes one continuing act." ***State v. Fiallo-Lopez***, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). A continuing course of conduct exists when a defendant's actions promote one objective and occur at the

same time and place. ***Petrich***, 101 Wn.2d at 571; ***State v. Love***, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In determining whether multiple acts were part of a continuing course of conduct, the reviewing court considers (1) the time separating the acts, and (2) whether the acts involved the same parties, location, and ultimate purpose. ***State v. Brown***, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

Here, defendant claims that the court erred by failing to give a unanimity instruction where the State presented evidence of two different acts constituting theft. *See* Brief of Appellant at 22. Defendant's claim fails as no unanimity instruction was required because the acts were part of a continuing course of conduct.

Here, no unanimity instruction was required because the acts underlying the theft convictions were part of a continuing course of conduct. The thefts of the leaf blower and keys were part of a continuing course of conduct because they occurred within a limited time frame and involved the same party, location, and ultimate purpose. The record shows that there was little time between when defendant stole the keys and the leaf blower because it all occurred during the same incident. Further, the acts involved the same party, location, and ultimate purpose because both thefts involved Mr. Sanchez's property, around his truck, for the purpose of getting value from Mr. Sanchez. Clearly, the two thefts were part of a

continuing course of conduct, so it was unnecessary for the trial court to give a Petrich instruction. As such, this Court should dismiss defendant's claim and affirm his conviction.

2. DOUBLE JEOPARDY IS NOT IMPLICATED BECAUSE THE FACTS AND LEGAL ISSUES UNDERLYING THE THEFT AND VEHICLE PROWLING CONVICTIONS ARE DISTINCT.

Article I, section 9 of the Washington Constitution, the double jeopardy clause, guarantees that, "[n]o person shall... be twice put in jeopardy for the same offense." It mirrors the protections offered by the federal constitutional protection against double jeopardy. *See* ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (holding Article I, section 9 of the Washington Constitution should be given the same interpretation as the United States Supreme Court gives to the Fifth Amendment). "Double jeopardy principles protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime." ***State v. Westling***, 145 Wn.2d 607, 610, 540 P.3d 669 (2002). "Where a defendant's act supports charges under two criminal statutes, a court weighing double jeopardy challenge must determine whether, in the light of legislative intent, the charged crimes constitute the same offense." ***State v. Nysta***, 168 Wn. App. 30, 44, 275

P.3d 1162 (2012). "To determine if a defendant has been punished multiple times for the same offense, this court has traditionally applied the 'same evidence test'." ***State v. Adel***, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (quoting ***State v. Calle***, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). This test mirrors the federal same elements standard adopted in ***Blockburger v. United States***, 284 U.S. S. Ct. 180, 76 L. Ed. 306 (1932). *Id.* (citing ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Under this test, two convictions constitute the "same offense" for the purposes of double jeopardy if they are the same in law and in fact. ***Calle***, 125 Wn.2d at 777. Thus, if each conviction includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and the convictions may stand. ***Adel***, 136 Wn.2d at 633.

In the present case, defendant argues that double jeopardy was violated because his theft and vehicle prowling convictions constitute the same offense. *See* Brief of Appellant at 23. Defendant's claim fails because, as charged, theft and vehicle prowling were neither legally nor factually identical.

Double jeopardy is not implicated because the theft in the third degree and vehicle prowling are not legally identical. A person commits the crime of vehicle prowling in the second degree when that person enters

or remains unlawfully in a vehicle with the intent to commit a crime against a person or property therein. RCW 9A.52.100(1). A defendant is guilty of theft in the third degree when he or she wrongfully obtains or exerts unauthorized control over the property of another, or value thereof, with intent to deprive that person of such property. RCW 9A.56.050(1); RCW 9A.56.020(1).

Hence, each statute requires that the State prove completely different elements. Vehicle prowling requires that "a person enter or remain unlawfully in a vehicle" while theft in the third degree requires that "a person wrongfully obtains or exerts unauthorized control over the property of another..." RCW 9A.52.100(1); RCW 9A.56.050(1); RCW 9A.56.020(1). The statutes further differ in that vehicle prowling requires "the intent to commit a crime against a person or property," while theft specifically requires "the intent to *deprive* that person of such property." *Id.* (emphasis added). As the statutes are clearly distinguishable on their face, double jeopardy was not violated.

Moreover, double jeopardy is not implicated because the facts underlying each conviction are different. The facts supporting each conviction rested on completely different acts. While defendant's conviction for vehicle prowling was based on his act of entering the vehicle to steal the keys, the theft conviction was based on the two

separate acts of actually taking the keys and the leaf blower. While the fact that defendant entered the vehicle was sufficient for the vehicle prowling conviction, it would have been insufficient for the theft convictions which required that he actually took the property.

As each offense contains an element not included in the other and proving one offense does not necessarily prove the other, it follows that defendant's convictions did not violate the double jeopardy prohibition. Therefore, this Court should affirm his convictions.

3. DEFENDANT'S CLAIM THAT THE COURT IMPROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS IS NOT PROPERLY BEFORE THE COURT BECAUSE THE ISSUE IS NEITHER RIPE NOR PROPERLY PRESERVED FOR REVIEW.

Pursuant to RCW 10.01.160, the court may require a convicted defendant to pay court costs and other assessments associated with bringing the case to trial. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Within the statute are the following safeguards:

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

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

RCW 10.01.160(1)(2).

Pursuant to RCW 10.73.160, the appellate court may impose appellate costs, including fees for appointed counsel, upon a convicted indigent defendant. RCW 10.73.160 also includes the following safeguards:

> "A defendant who is not in contumacious default may petition the court at any time for remission of the costs or any unpaid portion. If payment will impose manifest hardship on the defendant or the defendant's immediate family, the court *may* remit all or part of the amount due, or modify the method of payment under RCW 10.01.170."

RCW 10.73.160(4) (emphasis added).

The court does not always have discretion regarding the imposition of legal financial obligations (LFOS). Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim penalty assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). Additionally, no consideration of a defendant's financial circumstances, ability to pay, or indigency is required before

imposing appellate costs. ***State v. Blank***, 131 Wn.2d 230, 238, 930 P.2d 1213 (1997)(emphasis added).

a. Defendant failed to preserve the issue for appellate review by not objecting to the imposition of costs at either of his sentencing hearings.

Arguments not raised in the trial court are generally not considered on appeal. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); RAP 2.5(a). For the first time on appeal, defendant raises the issue of his ability to pay his LFOs. Defendant did not object to the imposition of LFOs at either of his sentencing hearings. RP 495-504. Because defendant did not object at any time to the imposition of LFOs or the court's finding that he had the ability to pay, the issue is not preserved for appellate review. As defendant did not properly preserve this issue for appellate review, this Court should refuse to review his claim.

b. Defendant does not demonstrate this claim may be reviewed under RAP 2.5(a).

There are only three circumstances in which the appellate court must review an issue raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a). Defendant does not demonstrate that his claim that this challenge to the

imposition of LFOs falls under any of the provisions of RAP 2.5(a). *See* Brief of Appellant at 30.

Instead, defendant relies on ***Bertrand*** to support his claim that challenges to the finding of a defendant's ability to pay LFOs may be raised for the first time on appeal. ***State v. Bertrand***, 165 Wn. App. 393, 395, 267 P.3d 511 (2011).

In ***Bertrand***, defendant appealed the trial court's imposition of LFOs as well as an enhanced sentence following her conviction for delivering a controlled substance. *Id.* The trial court imposed $4,304 in LF's, and on appeal, defendant argued that there was no evidence in the record to support the trial court's finding that she had the present or future ability to pay her LFOs. *Id.* at 403. The court held that the trial court's finding that defendant had the ability to pay her LFOs was clearly erroneous because there was no evidence in the record to support that finding, and "in light of Bertrand's disability, her ability to pay LFO's... is arguably in question." *Id.* The court affirmed the enhanced sentence, reversed the trial court's finding that defendant has the present or future ability to pay LFO's, and remanded to strike the finding from the judgment and sentence. *Id.* at 405. Because the defendant could apply for remission of her LFO's when the State initiates collections, the court did not completely address the ripeness of defendant's challenge. *Id.*

Hence, the court in ***Bertrand*** did not state that the issue of improper imposition of LFOs falls under any of the conditions of RAP 2.5(a) or articulate its reason to review the trial court's finding when the issue was not preserved. ***Bertrand***, 165 Wn. App. at 404. As defendant fails to show that he may raise his claim for the first time on appeal, this court should dismiss defendant's claim.

c. The issue regarding defendant's ability to pay legal financial obligations is not ripe for review.

The time to challenge LFOs on the basis of a defendant's ability to pay is when the State seeks to collect the obligation. ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009), (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-11, 818 P.2d 1116) (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because, until that time, the determination of whether the defendant has or will have the ability to pay is speculative. *Id.*

Defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy

those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

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

In this case, defendant challenges the court's imposition of LFOs by claiming it erred when it found the defendant had the present or future ability to pay costs. However, the State has not yet sought enforcement of the cost. Therefore, the determination as to whether the trial court erred is not ripe for appellate review.

Defendant's arguments to the contrary rely heavily on ***Bertrand***. However, because of the factual differences, ***Bertrand*** does not apply to this case. First, while Bertrand was disabled, there is nothing in the record here to suggest that defendant is disabled in any way. ***Bertrand***, 165 Wn. App. at 404. The record contains evidence that defendant is very much able-bodied: defendant chased Mr. Sanchez around two vehicles while

smashing in a truck with an aluminum bat, and he did so in a misguided attempt to collect payment for physical labor he had already completed. RP 218, 233, 255-256, 307, 36. Defendant's future ability to pay LFOs is further demonstrated by the record which shows that he had knowledge of "construction and fixing things" and utilized those skills to earn an hourly income of $15 an hour by working on Mr. Sanchez's mobile home. RP 174-177. Finally, the trial court only imposed $1,500 in discretionary LFO's while the trial court in ***Bertrand*** imposed $4,304. CP 98; ***Bertrand***, 165 Wn. App. at 403.

As defendant's challenge to the court costs is premature and relies on inapplicable case law, this Court should disregard this claim, and affirm his convictions.

D. CONCLUSION.

The State presented sufficient evidence for a rational trier of fact to find defendant guilty of his convictions where witnesses testified that defendant chased Mr. Sanchez while swinging an aluminum baseball bat, hid in the toolshed from police officers and refused to comply with their orders, and took Mr. Sanchez's keys and leaf blower. Further, double

jeopardy was not implicated where theft and vehicle prowling are factually and legally distinct. Finally, defendant's challenge to court costs is improperly before the Court as he failed to object below and the issue is not ripe for review. Therefore, this Court should affirm his convictions.

DATED: September 30, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Robin Sand
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-30-2013
Date Signature

PIERCE COUNTY PROSECUTOR

September 30, 2013 - 3:31 PM

Transmittal Letter

Document Uploaded: 444381-Respondent's Brief.pdf

Case Name: State v. Bradley

Court of Appeals Case Number: 44438-1

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: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

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