NO. 45568-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

OSCAR RAUL MORENO VARGAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz, Trial Judge

No. 13-1-02336-1

BRIEF FOR RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State provide sufficient evidence to convict defendant of voyeurism when it showed he fled from a women's restroom with his pants down after the female victim heard him making sexual noises in the neighboring stall and saw him peer into her stall while she was using the facilities?

2. Although the issue is not ripe for review and was not properly preserved at trial, did the trial court properly exercise its discretion in ordering legal financial obligations when defendant's future ability to pay was established through the court's review of his uncontroverted work history, general employability, and financial position?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant Oscar Raul Moreno Vargas ("defendant") was charged with one count of voyeurism and one count of malicious mischief in the second degree. CP 1-2. After the State rested its case-in-chief, defendant motioned to dismiss the malicious mischief charge. 2RP 175.[1] The trial court granted the motion. 2RP 182.

[1] The verbatim report of proceedings volumes 1 through 4 will be referred to by their volume number followed by the page number (#RP #).

The jury found defendant guilty of voyeurism. 3RP 278. The standard range sentence was 0-90 days. 4RP 88. The judge imposed a 90-day sentence, credit for time served. 4RP 289-90. At the time of sentencing, defendant was being held on an immigration hold. 4RP 290.

The judge also imposed legal financial obligations (LFOs). 4RP 289-90. The LFOs included: $200 in court costs, $500 crime victim penalty assessment, $100 DNA lab fee, and $1,500 for Department of Assigned Counsel. *Id.* A Pre-Sentence Investigation detailing defendant's financial situation was reviewed prior to sentencing. CP 84-98, 4RP 288. Defendant signed the Judgment and Sentence without objecting to the imposition of LFOs in paragraph 2.5. CP 67. Defense counsel neither objected to the LFOs based on defendant's inability to pay nor supplemented the record before the court at the hearing with any evidence of such a disability. 4RP 287-92.[2]

2. Facts

On June 9, 2013, at approximately 7:00 PM, Albertsons supervisor Melissa Geffre entered a Milton store restroom to check cleanliness. 1RP 46-49. Geffre decided to use the facilities. 1RP 49. The stall closest to the door was occupied, so she used the other stall. 1RP 49. There was a gap

[2] Defense counsel's only statement of objection was: "I guess when it comes to DAC, Your Honor, I should let the Court know that I was his second attorney. I didn't have it all that long. He was a very easy client to work with even despite the language barriers; so as far as this one goes compared to a regular trial, it would be -- I'd recommend $1,000 for that." 4RP 290.

between the wall and the partition separating the two stalls big enough for fingers or a hand to go through. 1RP 54.

Geffre testified, "I noticed the person that was standing in the first bathroom stall was facing the toilet like a man would go pee in the toilet[.]" 1RP 49. As Geffre was using the restroom, the shoes in the stall next to her began to move toward the partition. 1RP 53. She also, "heard some type of rubbing noise or some type of noise like that . . . heard heavy breathing and a rubbing noise." 1RP 55-56. Geffre heard no sounds of urinating or defecating from the other stall. 1RP 56-57.

Geffre leaned back toward the wall and could see eyes looking at her through the gap in the partition. 1RP 56. Geffre exclaimed "What are you doing?" then she jumped up. 1RP 56. Geffre testified she saw the man's penis and bare butt as he ran out of the restroom. 1RP 57-58. Geffre reported the suspect was wearing an orange shirt and brown or tan shoes. 1RP 60. In court, she identified defendant as the man she saw. 1RP 48.

Matthew Casmier was a patron at the Milton Albertsons on June 9, 2013. 2RP 156. He testified that he heard a loud noise coming from the restroom, a loud bang, then saw a man, who he identified as defendant, running from the bathroom and out of the store. 2RP 157. The man grasped the waistband of his pants as he ran. 2RP 157.

Defendant ran out of the store, in the direction of a McDonalds, and Casmier followed in his vehicle 2RP 159. Casmier went into the restroom in McDonalds and saw a pair of feet under the stall door. 2RP

160. He heard no sounds of urinating or defecating, and the feet were not positioned in a way that suggested the toilet was being used. 2RP 160.

Geffre called 911 after defendant ran out of the Albertsons. 1RP 61. Milton Police were dispatched to the Albertsons, but were updated that the suspect was fleeing north along Meridian toward the McDonalds. 1RP 104. As an officer approached, witness Casmier flagged him down and said he observed the suspect fleeing from Albertsons. 1RP 108. Casmier directed police to the McDonalds restroom. *Id.*

The officer knocked on the locked stall door in McDonalds, identifying himself as police, but got no response. 1RP 111-112. After learning management did not have a key, an employee began climbing underneath the stall door, but he quickly saw there was someone in the stall and stopped. 1RP 112-113. Police knocked again, and defendant responded "just a minute" before coming out of the stall. 1RP 113. Defendant's shirt was inside out and backwards when he exited the stall. 1RP 114.

Police brought Geffre and Casmier from the Albertsons to the McDonalds where they both identified defendant as the man they saw earlier. 1RP 62, 2RP 161-162.

Defendant was placed in the patrol car, and was the first person in the back of the car that day. 1RP 124. When the car arrived at the Pierce

County Jail, the officer observed fresh spit on the floor. 1RP 124. The patrol car was out of commission for thirty minutes while it was decontaminated. 1RP 125.

Milton police viewed and obtained a copy of video surveillance from the Albertsons. 1RP 120; Ex. 23. The officer testified that when he viewed the video[3] on the day of the crime, it showed defendant entering the women's bathroom at 6:57 PM, Geffre entering about two minutes later, and defendant running out of the women's bathroom while pulling his pants up at 7:10 PM. 1RP 122.

Defendant testified he had to use the restroom to address an onsent of "diarrhea." 2RP 188. He claimed he did not see the sign outside the restroom. 2RP 208. However, he admitted to understanding the words "men" and "women" as well as the symbols typically used on restroom signs. 2RP 205-206.

Defendant asserted he went into the restroom to use the facilities, yet admitted he did not immediately exit once he was through. He testified he was finished using the toilet and standing when he peered into Geffre's stall. 2RP 214. Defendant admitted to looking through the gap in the partition; he claims it was to see if he had gone into the wrong restroom. 2RP 189.

[3] When the officer originally watched the video it was continuous, but at trial there were interrupting blue screens where the feed lost picture. 1RP 124

Defendant testified that he became scared and panicked when Geffre saw him peering into her stall, so he ran away. 2RP 190. He ran until he went into the McDonalds to use the restroom and calm down. 2RP 191. Defendant denied hearing the officer knock more than once and denied turning his shirt inside out. 2RP 221-222, 209.

C. ARGUMENT.

1. THE STATE PROVIDED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF VOYEURISM BECAUSE IT PROVED HE FLED FROM A WOMEN'S BATHROOM WITH HIS PANTS DOWN AFTER THE FEMALE VICTIM HEARD HIM MAKE SEXUAL NOISES IN THE NEIGHBORING STALL AND SAW HIM PEER INTO HER STALL WHILE SHE WAS USING THE FACILITIES.

For the court to find there was sufficient evidence on appeal it must determine that, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Further, an insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. ***State v. Thereoff***, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); ***Salinas***, 119 Wn.2d at 201.

The State bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. ***State v. Teal***, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); ***State v. McCullum***, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, the written record is an inadequate basis on which to decide issues based on witness credibility. When the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Jury instruction number four defined the necessary elements the State must prove to convict the defendant:

> A person commits the crime of voyeurism when, *for the purposes of arousing or gratifying the sexual desires* of any person, the person *knowingly views* a second person without the second person's knowledge or consent, and while the second person is being viewed, the second person is in a place where he or she would have a reasonable expectation of privacy or the intimate areas of a second person without the second person's knowledge and consent and under circumstances where the second person had a reasonable expectation of privacy, whether in a public or private place.

CP 46 (instruction no. 4) (emphasis added); *see also,* CP 52 (instruction no. 10)[4]; RCW 9A.44.115. Jury instruction number seven elaborated that to "view" means: "intentionally looking upon another person for more than a brief period of time, in other than a casual or cursory manner." CP 49 (instruction no. 7); RCW 9A.44.115(1)(e). Defendant admitted his actions were intentional. 2RP 199-200. The issue on appeal is whether defendant looked in a manner other than casual or cursory and for the purpose of sexual gratification.

a. The evidence is sufficient to prove defendant "viewed" Geffre in more than a casual or cursory manner.

The evidence adduced at trial supports that defendant did not look at Geffre in a casual or cursory manner. Considering the layout of the restroom stalls, to peer through the gap in the partition would require a person to press his face against the rear wall of the restroom. This required effort implies that the glance was not merely casual, but rather an effort by defendant to view Geffre in the stall next to him. There was also adequate time for Geffre to see the defendant's eyes and question what he was doing before the defendant attempted to flee the scene. 1RP 56.

The court in ***State v. Fleming*** dealt with similar facts and concluded the evidence was sufficient. The court said the victim, "had

[4] Jury instruction number ten further requires proof that the events occurred on or about June 9, 2013 and in the State of Washington. CP 52. Both of these elements were adequately proved and are not disputed on appeal. 1RP 46-48; 1 RP 100-02; 2RP 187.

enough time to see [the defendant] looking at her, to yell at him, to tell him she had a cell phone, and to run out of the stall. He in turn had enough time to stare and stick his tongue out at her." ***State v. Fleming***, 137 Wn. App. 645, 648, 154 P.3d 304 (2007). Although the defendant in ***Fleming*** viewed his victim by peering over the stall partition, the distinction between that and peering through a gap in the partition is meaningless; the means by which a defendant obtains the necessary vantage to view another for sexual gratification is immaterial.

Additionally, evidence of a defendant fleeing is admissible if it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." ***State v. McDaniel***, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (quoting ***State v. Nichols***, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). This means that from evidence of a defendant fleeing, a jury may infer a consciousness of guilt. Defendant manifested his guilty conscience by running out of the Albertsons, continuing to run down the street, hiding in the McDonalds restroom, not responding when police knocked on the stall door, and turning his shirt inside out in a desperate attempt to alter his appearance. The jury could have inferred this to be evidence of defendant's guilt, because a person who truly made a mistake or glanced in a casual or cursory manner would be very unlikely to react as defendant did.

b. The evidence is sufficient to prove defendant viewed Geffre for the purpose of his sexual gratification.

There was sufficient evidence adduced at trial to support that defendant's viewing of Geffre was for the purpose of sexual gratification. Geffre testified that she heard heavy breathing and a rubbing noise from the stall the defendant occupied. 1RP 56. The defendant made no explanation of these sounds in his testimony. Then, when the defendant fled the stall, his pants were down and Geffre saw his penis and bare butt. 1RP 58. Defendant admitted he had finished using the restroom when Geffre first entered--ten minutes prior to his exit--thus there was no explanation for his state of undress.

The court in ***State v. Diaz-Flores*** found that a jury's determination of purpose from circumstantial evidence was proper as the evidence showed the defendant's purpose was sexual gratification. The circumstantial evidence presented in that case was: "[The defendant's] hands were in his 'crotch area', and . . . that [the defendant's] zipper was down and it appeared that he had an erection." ***State v. Diaz-Flores***, 148 Wn. App. 911, 919-20, 201 P.3d 1073 (2009). This is analogous to this case where defendant was heard heavily breathing and producing a rubbing noise and seen with his pants and underwear down. This is sufficient for the jury to find defendant acted with the purpose of sexual gratification. Evidence that defendant acted with a sexual purpose goes to further show that his glance was not merely casual or cursory.

Defendant attempts to relitigate a defense of mistake due to a bout of diarrhea he had on the day of the crime. However, this defense was already rejected by the jury when they convicted defendant of voyeurism, and the appellate court is not a venue to relitigate the merits of defendant's mistake defense. It was rational for the jury to reject this defense because it was unsupported by other testimony and only explained his presence in the women's bathroom and not him peering into Geffre's stall. First, Geffre testified that she heard no sounds of urinating or defecating from the defendant's stall. 1RP 56-57. Second, defendant's only explanation for not leaving once he finished was that he wanted to know which bathroom he was in before exiting. 2RP 214-15. However, the video surveillance showed defendant was in the bathroom with Geffre for ten minutes. 1RP 122. Surely, if defendant was truly worried about the other person in the bathroom seeing him, he could have left from his stall--the one closest to the door--without detection in a span of ten minutes.

The jury was able to assess defendant's credibility when he chose to testify. Jury instruction number one stated: "You are the sole judges of the credibility of each witness." CP 42. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. ***Camarillo***, 115 Wn.2d at 71. Defendant's testimony contained statements which contradicted those made by other witnesses. For example, defendant stated he did not turn his shirt inside out, but the arresting officer testified that defendant's shirt was inside out when he handcuffed him. 2RP 209, 1RP 114.

Defendant also claimed the officer only knocked on the door and announced his presence once, whereas the officer testified that he knocked and announced himself twice. 2RP 222, 1RP 113. Defendant also failed to explain the heavy breathing and rubbing noises coming from his stall or his state of undress when he fled the restroom. These inconsistencies and omissions could have allowed the jury to reasonably find the defendant's excuses lacked credibility.

2. THE DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED BECAUSE IT IS NOT RIPE FOR REVIEW, WAS NOT PRESERVED FOR APPEAL, AND FAILS ON ITS MERITS.

Trial courts may require a defendant to pay costs associated with bringing a case to trial pursuant to RCW 10.01.160. There are two limitations in the statute to protect defendants:

> (3) 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.*
> (4) 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 (emphasis added).

a. The Court should decline to review the issue of legal financial obligations because the issue is not ripe for review.

Challenges to orders establishing legal financial obligations are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also,* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In the present case, there is nothing in the record showing that the State has attempted to enforce the LFOs. Therefore, the issue is not yet ripe for review.

b. The Court should decline to review the issue of legal financial obligations because the issue was not properly preserved for appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Defendant had an opportunity to object to the LFOs imposed and provide information of extraordinary circumstances that would make payment inappropriate in paragraph 2.5 of the Judgment and Sentence. CP 67. Defendant failed to object. Defendant also failed to object during the sentencing hearing held on November 8, 2013. 4RP 287-292. Counsel for

defendant did object to the imposition of $1,500 for DAC, but the reason cited was that the attorney was the second assigned to the case, not defendant's alleged financial hardship.[5] 4RP 290. Defendant failed to properly preserve the issue at the trial level because the only potential objection raised was not made on the same grounds which he asserts on appeal.

The appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also,* ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh***, 175 Wn.2d 607, 618, 290 P.3d 942 (2012). To fall under the exceptions provided in RAP 2.5(a), the defendant would need to claim there was a manifest error affecting a constitutional right. *See,* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). A constitutional error is manifest if the defendant can show actual prejudice. ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). This means there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (quoting ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). Further, if the record lacks facts

[5] Defense counsel's statement was: "I guess when it comes to DAC, Your Honor, I should let the Court know that I was his second attorney. I didn't have it all that long. He was a very easy client to work with even despite the language barriers; so as far as this one goes compared to a regular trial, it would be -- I'd recommend $1,000 for that." 4RP 290.

necessary to adjudicate the claimed error, "no actual prejudice is shown and the error is not manifest." ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. *Id.* Defendant has failed to provide evidence of prejudice required for a manifest constitutional error. Therefore, this court should not grant review for the LFO issue raised for the first time on appeal.

c. Assuming the issue is ripe and was properly preserved, the trial court properly exercised its discretion in imposing the legal financial obligations.

If the court wishes to proceed despite the issue of ripeness and preservation, the LFOs should still be affirmed. The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. A decision by the trial court "is presumed to be correct and should be sustained absent an affirmative showing of error." ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); ***Sisouvanh***, 175 Wn.2d at 619. If the appellant fails to meet this burden, the trial decision stands. ***State v. Tracy***, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005) *aff'd,* 158 Wn.2d 683, 147 P.3d 559 (2006). Therefore, the defendant has the burden of showing the trial court judge improperly exercised her discretion by showing an affirmative error.

Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. ***State v. Bertrand***, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied,* 175 Wn.2d 1914, 287 P.3d 10 (2012). The court in ***Bertrand*** found that the trial court did not properly find the defendant had a present or future ability to pay because the record contained no evidence to support such a finding.[6] *Id.* However, in this case, evidence was adduced in the Pre-Sentence Investigation, and "when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied." ***State v. Lundy***, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

The Pre-Sentence Investigation (PSI) established an adequate factual basis of defendant's future ability to pay for the trial judge to use in properly exercising her discretion. The judge acknowledged receipt of the

[6] It should be noted that Division 2 declined to extend ***Bertrand,*** viewing it as factually distinct due to Bertrand's disability and the requirement that she begin payments within 60 days of sentencing. ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013).

PSI prior to the sentencing hearing. 4RP 288. The PSI established that defendant was not working at the time of his arrest because he recently quit a previous job to begin a new job.[7] CP 89. Defendant consistently held jobs, including a variety of "under-the-table" jobs. CP 89. Although he held no assets such as property, he had three bank accounts but did not disclose the balances. CP 89. The only physical problem defendant acknowledged was a stutter; he is physically able to work, as evidenced by his work history in manual labor. CP 93. This distinguishes this case from ***Bertrand*** where the defendant was physically incapable of working due to a disability. The PSI shows there was an adequate factual basis available to the judge. Based on the information provided in the PSI and defendant's failure to provide additional information of financial hardship, defendant has failed to prove the trial court abused its discretion.

[7] The defendant was scheduled to begin work as a commercial fisherman on June 20, 2013, but he was arrested on June 9, 2013. CP 89.

D. CONCLUSION.

There was sufficient evidence adduced at trial to persuade a reasonable jury that defendant committed the crime of voyeurism. Additionally, although the issue is not ripe and was not properly preserved, the trial court judge properly exercised her discretion in imposing the legal financial obligations.

DATED: August 1, 2014.

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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.

8.1.14
Date Signature

PIERCE COUNTY PROSECUTOR

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