

No. 45353-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRYAN WEAVER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

BRIEF OF APPELLANT

WHITNEY RIVERA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
whitney@washapp.org

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when admitting testimony that Mr. Weaver was concealing himself when law enforcement went to Mr. Weaver's residence to arrest him.

2. At the sentencing hearing, the trial court imposed legal financial obligations without considering Mr. Weaver's financial resources and the nature of the burden that payment of costs would impose as required by RCW 10.01.160(3).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of flight or concealment is only admissible if it creates a reasonable and substantive inference that the defendant's actions were an instinctive or impulsive reaction to a consciousness of guilt or were a deliberate effort to evade arrest and prosecution for the crime charged. Did the trial court abuse its discretion when admitting evidence that Mr. Weaver was underneath blankets when law enforcement made contact and arrested him?

2. A sentencing court shall not order a defendant to pay legal financial obligations unless the defendant is or will be able to pay them. In determining the amount and method of payment of legal financial obligations, the court must take account of the financial resources of

the defendant and the nature of the burden that payment of costs will impose. Does the imposition of legal financial obligations constitute a sentencing error because the trial court failed to make any inquiry into Mr. Weaver's individual financial circumstances as required?

C. STATEMENT OF THE CASE

Over defense counsel's objection, the trial court admitted evidence that Mr. Weaver was underneath blankets in a bedroom at the time law enforcement arrested him for allegedly trafficking in stolen property. 8/6/13 RP 11-12. Defense counsel argued that this testimony was not relevant under ER 401 and that its prejudicial effect outweighed any probative value under ER 403. 8/6/13 RP 11. The trial court overruled the objection and stated that the testimony would be allowed without any additional analysis on the record. 8/6/13 RP 12.

Deputy Johnson, the police officer who arrested Mr. Weaver, testified at trial that he was initially unable to locate Mr. Weaver when he went to Mr. Weaver's residence. 8/6/13 RP 55. After looking in a number of areas, he observed some blankets moving in a child's bedroom and discovered Mr. Weaver underneath the blankets. 8/6/13 RP 56. Deputy Johnson testified that Mr. Weaver initially ignored law enforcement and went on with his "sleeping ruse". 8/6/13 RP 56-57.

During closing argument, the prosecuting attorney emphasized that Mr. Weaver was hiding in a child's bedroom pretending to be asleep when police came to arrest him. 8/7/13 RP 111-12.

The jury returned a verdict of guilty on the charge of trafficking in stolen property in the first degree and the trial court sentenced Mr. Weaver to thirteen months confinement. CP 34. The trial court imposed \$2,174.19 in legal financial obligations as part of Mr. Weaver's sentence. CP 32. The Judgement and Sentence contained boilerplate findings that Mr. Weaver had the ability or likely future ability to pay these legal financial obligations. CP 31. The trial court made no inquiry into Mr. Weaver's finances during the sentencing hearing before imposing these legal financial obligations. 9/5/13 RP 143-48.

D. ARGUMENT

1. The trial court's admission of testimony that Mr. Weaver was concealing himself when contacted by law enforcement was manifestly unreasonable.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an

evidentiary rule can be considered an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

a. Evidence of flight is only admissible where probative.

Analytically, flight is an admission by conduct. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). Evidence of flight is admissible if it creates “a reasonable and substantive inference that [the] 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.” *Id.* (citing *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1991)). Actual flight is not the only evidence in this category; evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime. *Id.*; *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); *U.S. v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977).

When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence. *State v. Jefferson*, 11 Wn. App. 566, 571, 524 P.2d 248 (1974) (citing *U.S. v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973)); *Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 9 L.Ed.2d 441

(1963) (“we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime”). While the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative or conjectural. *Bruton*, 66 Wn.2d at 112-13; *Freeburg*, 105 Wn. App. at 498.

The probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Freeburg*, 105 Wn. App. at 498.

b. Evidence here was not probative.

Here, the trial court conducted no analysis on the record regarding the admissibility of Mr. Weaver's presence under a blanket in a child's room. 8/6/13 RP 12. Defense counsel objected to the admission of this evidence on the grounds of relevance and prejudicial effect. 8/6/13 RP 11. The prosecuting attorney responded that it was

evidence of consciousness of guilt and therefore was relevant. 8/6/13 RP 11. The trial court's response was, "I'm going to – I'm going to overrule the objection, and I'll allow the testimony." 8/6/13 RP 12. During trial, Deputy Johnson testified that after being directed outside by members of Mr. Weaver's family, he was unable to locate Mr. Weaver. 8/6/13 RP 55. Deputy Johnson then informed the jury that he observed some blankets moving in a child's room and discovered Mr. Weaver underneath the blankets. 8/6/13 RP 56. When questioned regarding Mr. Weaver's response, Deputy Johnson stated that Mr. Weaver ignored law enforcement and went on with his "sleeping ruse". 8/6/13 RP 56-57.

The trial court erred in admitting this evidence because its probative value was not established by the necessary inferences. First, the evidence did not lead to the inference that Mr. Weaver's conduct in fact constituted concealment. Nothing in the record established that Mr. Weaver was aware that law enforcement officers were trying to contact him. Nothing about Mr. Weaver's behavior indicates that he was attempting to conceal himself from law enforcement or that he was pretending to be asleep rather than actually asleep. Thus, the first inference necessary to establish the probative value of this type of

evidence fails.

Similarly, the other three mandatory inferences cannot be drawn. The fact that Mr. Weaver appeared to be sleeping under a blanket does not lead to the inference that this behavior illustrated consciousness of guilt. It also cannot be inferred that this behavior demonstrates consciousness of guilt concerning the specific allegation that Mr. Weaver trafficked in stolen property. Lastly, there is no indication in the record that sleeping under the blanket evidenced actual guilt of the crime charged. Therefore, this testimony should not have been permitted because it was not sufficiently probative. Moreover, even if this testimony was marginally relevant, its prejudicial effect greatly outweighed its probative value. The trial court's admission of this evidence was manifestly unreasonable and thus constitutes an abuse of discretion.

c. Prejudicial error requires reversal.

In addition to Deputy Johnson's testimony that Mr. Weaver was effectuating a "sleeping ruse" when he was under the blankets, the prosecuting attorney also discussed this evidence in his closing argument. 8/6/13 RP 56-57; 8/7/13 RP 111-12. Specifically, the prosecutor argued:

You also heard from Deputy Johnson. He explained to you that the next day after this incident occurred he goes to arrest Bryan Weaver for this offense. And what happens when he goes to Bryan Weaver's house? He's first directed to go to the backyard. Bryan Weaver isn't there. He then goes back into the house, search the house again, and Mr. Weaver is located in a child's bedroom, underneath blankets, pretending to be asleep. He's hiding from the police officers at this time when they come to arrest him for this offense that he knows he's a suspect in.

8/7/13 RP 111-12. Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). Here, the admission of this improper evidence and the emphasis placed on it during closing argument had a reasonable probability of materially affecting the outcome of the trial and thus merits reversal.

2. The trial court's imposition of legal financial obligations without considering Mr. Weaver's ability to pay as required constitutes a sentencing error.¹

A trial court may impose costs “authorized by law” when sentencing an offender for a felony. RCW 9.94A.760. However, the sentencing court must consider an individual's financial circumstances and conclude that he has the ability or likely future ability to pay before imposing legal financial obligations (LFOs). RCW 10.01.160(3).

The sentencing court adopted boilerplate findings in the Judgment and Sentence addressing Mr. Weaver's ability to pay:

Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 31. The record here establishes that the court did not make any inquiry into Mr. Weaver's finances and thus did not make any

¹ On February 11, 2014 the Washington Supreme Court heard oral argument in *State v. Blazina*, Supreme Court No. 89028-5, which was consolidated with *State v. Colter*, Supreme Court No. 89109-5. The Supreme Court's opinion in *Blazina* will likely be dispositive here. In its ruling, this Court acknowledged that it had previously allowed an appellant to raise imposition of legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). However, this Court held that RAP 2.5(a) did not compel it to allow the issue to be raised in every case and declined to allow Mr. Blazina to raise imposition of LFOs for the first time on appeal. *Id.*

individualized determination regarding Mr. Weaver's financial circumstances before it imposed LFOs. 9/5/13 RP 143-48. The sentencing court imposed the following LFOs: \$500 victim penalty assessment, \$600 court costs (\$200 criminal filing fee, \$250 jury demand fee, \$150 incarceration fee), \$825 fee for a court appointed attorney, \$100 DNA collection fee, and \$149.19 in restitution.² CP 39-40. Because consideration of a defendant's financial resources is statutorily required as a condition precedent to imposing LFOs, the trial court's imposition of LFOs was erroneous and the validity of the order may be raised for the first time on appeal.

a. A defendant may raise the issue of imposition of legal financial obligations for the first time on appeal.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community

² Mr. Weaver does not challenge imposition of the following legal financial obligations: the \$500 victim penalty assessment pursuant to RCW 7.68.035; the \$100 DNA collection fee pursuant to RCW 43.43.7541; and \$149.19 in restitution pursuant to RCW 9.94A.753. The victim penalty assessment and DNA collection fee are statutorily mandated and courts are not required to consider defendant's past, present, or future ability to pay. *State v. Kusler*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013).

custody could be challenged for the first time on appeal). A defendant may challenge for the first time on appeal the imposition of a criminal penalty on the ground that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

RCW 10.01.160(3) provides:

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.

RCW 10.01.160(3). The word “shall” establishes that the requirement is mandatory. *State v. Claypool*, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Before imposing discretionary LFOs, the sentencing court has an affirmative duty to make an inquiry into the defendant's individual situation to determine his or her ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). Therefore, the trial court was without authority to impose LFOs as a condition of Mr. Weaver's sentence because it did not first take into account his financial resources and the burden of payments.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record

must minimally establish the sentencing judge did in fact consider the defendant's individualized financial circumstances and made an individualized determination that he or she has the ability or likely future ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166, (1992); *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). Here, the record does not establish that the trial court considered Mr. Weaver's financial resources at any point. The trial court's LFO order is not in compliance with RCW 10.01.160(3) and thus exceeds the trial court's authority.

The boilerplate finding in the Judgment and Sentence does not establish compliance with the requirements of RCW 10.01.160(3). CP 31. A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. *See, e.g., In re Dependency of K.N.J.*, 171 Wn.2d 568, 580-81, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); *Hardman v. Barnhart*, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and Sentence used in Mr. Weaver's case contained a pre-formatted conclusion that he had the ability to pay LFOs. CP 31. It does not allow the court to check a box if this finding applies and thus signifies no individualized judicial consideration. CP 31. Rather, there is a conclusion that the court has complied with RCW 10.01.160(3) that will be made every time the form is used regardless of what actually transpired and whether the trial court actually considered a defendant's financial resources. This type of finding cannot reliably establish that the trial court complied with RCW 10.01.160.

b. The challenge to the imposition of legal financial obligations is ripe for review.

This case involves a direct challenge to the legal validity of the LFO order on the ground that the trial court failed to comply with RCW 10.01.160(3). Thus it is distinguishable from the line of cases that establish that the time to challenge LFOs is after the State seeks to enforce them; these cases address challenges based on an assertion of financial hardship or procedural due process principles that arise in the

collection of LFOs.³

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Bahl*, 164 Wn.2d at 751. The legal validity of a LFO order based on non-compliance with RCW 10.01.160 is primarily a legal issue. The issue of whether the trial court failed to comply with the statute will not be changed by time or future circumstances. As such, it requires no further factual development. LFOs become enforceable at the time the judgment is rendered and begin to accrue interest immediately. RCW 10.82.090. The challenged action is final because the original sentencing order imposing LFOs is final. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing the debt in the first place does not change. Therefore, the imposition of LFOs is ripe for review.

³ See, e.g., *Lundy*, 176 Wn. App. at 109 (any challenge to the order requiring payment of legal financial obligations on hardship grounds is not ripe for review until the State attempts to collect); *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (defendant's constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991) (the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

c. Remand for resentencing is the proper remedy.

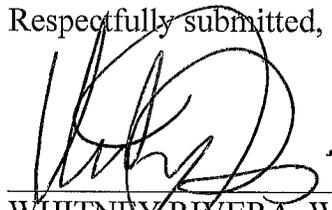
Because the imposition of LFOs without inquiring into Mr. Weaver's ability to pay constitutes a sentencing error, this Court should vacate the order imposing LFOs and remand for resentencing.

E. CONCLUSION

Because the admission of evidence regarding Mr. Weaver's presence under blankets in a bedroom when law enforcement made contact with him constituted an abuse of discretion and was prejudicial, this Court should reverse his conviction and remand for a new trial. Alternatively, the imposition of legal financial obligations without complying with the dictates of RCW 10.01.160(3) constitutes a sentencing error and this Court should remand for resentencing.

DATED this 10th day of March, 2014.

Respectfully submitted,



WHITNEY RIVERA, WSBA No. 38139
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

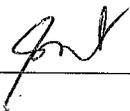
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 45353-3-II
)	
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)	
APPELLANT.)	

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KELSO, WA 98626-1739		
[baurs@co.cowlitz.wa.us]		
[X] BRYAN WEAVER	(X)	U.S. MAIL
106 ALTER ST	()	HAND DELIVERY
LONGVIEW, WA 98632	()	_____

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701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
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