

NO. 45353-3-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRYAN WEAVER,

Appellant.

BRIEF OF RESPONDENT

**SEAN BRITTAIN
WSBA # 36804
Deputy Prosecutor
for Respondent**

**Hall of Justice
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I. ISSUE PRESENTED

1. Did the Trial Court Err by Admitting Evidence of the Appellant's Guilty Conscience?
2. In the alternative, if the Trial Court did err by admitting evidence of Mr. Weaver's guilty conscience, was it harmless error?
3. Did the Trial Court error when imposing legal financial obligations upon Mr. Weaver?

II. SHORT ANSWER

1. No.
2. Yes.
3. No.

III. PROCEDURAL HISTORY

On May 6, 2013, Bryan Allen Weaver was charged by information with Trafficking in Stolen Property in the First Degree and Theft in the Third Degree. CP 3-4. On August 6, 2013, Mr. Weaver proceeded to jury trial before the Honorable Gary Bashor. RP 3-89. At the morning of trial, the State moved to dismiss the charge of Theft in the Third Degree. RP 4. On August 7, 2013 the jury returned a verdict of guilty. CP 27. Mr. Weaver was subsequently sentenced to thirteen months in prison and assessed with \$2174.19 in legal financial obligations. CP 29-40. The instant appeal timely followed. CP 41.

IV. STATEMENT OF FACTS

On April 30, 2013, at approximately 3:40 p.m., Deborah Robinson was driving at the 4000 block of Ocean Beach Highway, Longview, WA. RP 15. This section of Ocean Beach Highway was near a vacant parking lot belonging to the Bud Clary car dealership. RP 15. Ms. Robinson observed a purple car circling around in the Bud Clary parking lot. RP 17. The car then came to a stop and two males exited. RP 18. Both males began looking at the ground at what appeared to be a manhole cover or metal grate. RP 18. One of the males got back into the driver's seat of the car and began backing the car up to the metal grate. The male was directing the driver as he backed up. RP 19. As the car came to a stop, the male who had been directing the driver picked up the metal grate and threw it into the trunk of the car. RP 19. The male got back into the car and drove away from the lot. RP 20. Ms. Robinson was able to get the make and license plate of the car and reported the theft to law enforcement. RP 20-21.

Cowlitz County Sheriff Deputy Danny O'Neill responded to Ms. Robinson's report of the theft. After taking her information, Deputy O'Neill contacted the owner of the purple car, Marlene Medina. RP 62. After speaking with Ms. Medina about the car's whereabouts, Deputy O'Neill contacted Kendra Rapp. Deputy O'Neill learned that Ms. Rapp's

boyfriend, Mr. Weaver, and his friend Louis Hardrock Younger, had also been using the car that day. RP 63-64.

About two hours after meeting with Ms. Rapp, Deputy O'Neill was able to interview Mr. Weaver about the theft and his use of the car. RP 65. Mr. Weaver told Deputy O'Neill that he was with Ms. Rapp and had been driving the car around looking for scrap metal to sell to GT Metals. RP 66. Mr. Weaver said that he had been at the Bud Clary parking lot and had been in contact with Mr. Younger. RP 66. According to Mr. Weaver, Mr. Younger had placed an unknown metal object into the trunk of the car and asked to be taken to GT Metals. RP 66-67. Mr. Weaver then drove to GT Metals and sold the scrap metal, including the item Mr. Younger had put into his car. RP 67.

On May 1, 2013, Cowlitz County Sheriff Deputy Brent Harris went to GT Metals. RP 35. Deputy Harris was able to confirm with the employees of GT Metals that Mr. Weaver had sold them metal on April 30, 2014. RP 36-37. The transaction took place within minutes of the theft Ms. Robinson had reported.

Later that evening, Cowlitz County Sheriff Deputy Marc Johnson went to 106 Alter Street, Longview, WA, to arrest Mr. Weaver and Mr. Younger. RP 50. Deputy Johnson, along with two other law enforcement officers, first went to Mr. Younger's residence, which was a motor home

across the street from Mr. Weaver's residence. RP 51. Mr. Younger was ultimately arrested. RP 53. Deputy Johnson then went across the street to Mr. Weaver's residence. RP 53. Kendra Rapp and her mother, Cheryl Rapp, answered the door. RP 54. Cheryl Rapp allowed Deputy Johnson to enter the residence and look for Mr. Weaver. RP 54. Deputy Johnson was directed by Cheryl Rapp to look for Mr. Weaver in the backyard of the residence. RP 55. Mr. Weaver was not located in the backyard. RP 55. Deputy Johnson was allowed to search the residence. Mr. Weaver was ultimately located on the floor in a child's bedroom under some blankets. RP 55-56. When Mr. Weaver was contacted, he claimed that he had been asleep. RP 56. Mr. Weaver was placed under arrest. RP 57.

V. ARGUMENT

A. **The Trial Court did not abuse its discretion by admitting evidence of Mr. Weaver's guilty conscience.**

Mr. Weaver argues the trial court abused its discretion by admitting evidence that Mr. Weaver hid beneath blankets when Deputy Johnson had arrived to his house to arrest him. On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. *State v. Baldwin*, 109 Wn. App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Neal*,

144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). Evidence of a defendant's guilty conscience 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.*" *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (quoting *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)) (*emphasis added*).

Here, Mr. Weaver was well aware that he was a suspect in the theft and subsequent sale of the victim's property. Deputy O'Neill contacted Mr. Weaver's girlfriend shortly after the theft was reported. RP 64. Approximately two hours later, Deputy O'Neill was able to interview Mr. Weaver about the theft. RP 65. During the course of that interview, Deputy O'Neill specifically informed Mr. Weaver that he was a suspect in the theft. RP 82.

The very next evening, Deputy Johnson and two other law enforcement officers went to arrest Mr. Weaver and Mr. Younger, who resided in a motor home across the street from Mr. Weaver's residence. RP 51. The officers arrived in the late evening and in multiple patrol cars. RP 51. After Mr. Younger was arrested, Deputy Johnson then went across the street to contact Mr. Weaver. RP 53. Deputy Johnson was directed by

Cheryl Rapp to look for Mr. Weaver in the backyard. RP 55. Mr. Weaver was not located in the backyard. RP 55. Deputy Johnson was then permitted to search the residence for Mr. Weaver. RP 55. Ultimately, Mr. Weaver was located under some blankets in a child's bedroom. RP 56.

The probative value of the above-stated evidence outweighs any prejudicial value it may hold. One day after being told he was a suspect in the theft and subsequent sale of property, Mr. Weaver was deliberately attempting to avoid the officers. His accomplice, Mr. Younger, had just been arrested across the street from his own residence, late at night, and by multiple law enforcement officers. According to Cheryl Rapp, he had been in the backyard prior to the officers arriving at the residence. He then goes into a child's bedroom and lays under multiple blankets. When the officers contact him, he told them that he had been sleeping, which is a direct contradiction from what Cheryl Rapp had said. Had Mr. Weaver actually been sleeping in that child's bedroom, one can infer that she would have directed the officers to that room. The trial court properly admitted the evidence of Mr. Weaver's guilty conscience.

B. In the alternative, even if the Trial Court abused its discretion by admitting evidence of Mr. Weaver's guilty conscience, it was harmless error.

Even if this Court should find the trial court erred by admitting the statements, such error was harmless in light of the other evidence against

the appellant. When the trial court commits an evidentiary error, such an error only justifies reversal if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is without prejudice, or harmless, where the evidence is of minor significance compared with the overwhelming evidence as a whole. *State v. Yates*, 161 Wn.2d 714, 766, 168 P.3d 359 (2007).

Here, Mr. Weaver provides no substantive argument supporting his contention that this evidence was prejudicial. Instead, Mr. Weaver simply states that the evidence was prejudicial and speculates how this evidence influenced the jury. What Mr. Weaver hopes to detract from is the overwhelming evidence of his guilt.

Ms. Robinson was an eye witness to the theft. She observed two males drive into the Bud Clary parking lot and stop near the metal grate. The male passenger exited the car and picked up the metal grate while the driver backed the car. The passenger then put the metal grate into the trunk and got back into the car. The driver then sped away. Within minutes of this theft occurring, Mr. Weaver is selling metal to GT Metals, which is located near the location of the theft. After a subsequent investigation, it is determined that Mr. Weaver was driving the same car that Ms. Robinson saw at the scene of the theft. Finally, Mr. Weaver admitted to being in the Bud Clary parking lot, having a piece of metal

placed in his car, and selling the metal at GT Metals. Given the overwhelming evidence presented to the jury, any error cannot be said to have prejudiced him significantly.

C. The trial court did not err by imposing legal financial obligations upon Mr. Weaver.

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue sua sponte. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by* *426 *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012). In fact, in regards to the imposition of legal financial obligations being raised for the first time on appeal, this Court has previously declined to review such claims. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (“Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.”)

Additionally, “[n]either RCW 10.01.160 ‘nor the constitution requires a trial court to enter formal specific findings regarding a defendant’s ability to pay [discretionary] court costs.’” *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (quoting *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). “The State’s burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one.” *Lundy*, 176 Wn. App. at 106. A showing of indigency is the defendant’s burden. *Id.* at 108.

Here, this Court should not review the trial court’s imposition of the legal financial obligations because Mr. Weaver did not object at the time of sentencing. RP 143-147. If the Court does to choose to address this issue for the first time on appeal, Mr. Weaver’s argument overlooks some facts that would support the trial court’s imposition of the legal financial obligation. First, after the verdict was entered, the State requested the trial to remand Mr. Weaver into custody. Mr. Weaver informed the court that he was able to secure a rider for the \$3,000 bond that he had previously posted. RP 137-38. At the time of sentencing, at Mr. Weaver’s request, the trial court made a finding that Mr. Weaver qualified for Work Ethic Camp. RP 146-47; CP 35.

Mr. Weaver was able to post bond and secure an extension of that bond. Therefore, it is logical to conclude that he has some financial resources. Additionally, with the imposition of Work Ethic Camp, Mr. Weaver would presumably engage in life-building programs that would allow for future financial possibilities. RCW 72.09.400; RCW 72.09.410. Finally, the boilerplate language contained in Mr. Weaver's judgment and sentence contains a section in which the trial court can make a finding that Mr. Weaver would be unable to pay his legal financial obligations. CP 31. Despite Mr. Weaver's contention, the trial court is able to make such findings when evidence supports them. Instead, based upon the above-stated information, the trial court properly found that Mr. Weaver would be able to pay his legal financial obligations.

VI. CONCLUSION

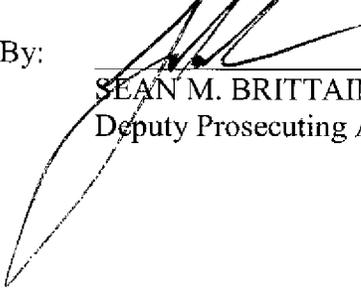
Based on the preceding argument, the State respectfully requests the Court to affirm the trial court's admission of evidence that showed the Mr. Weaver's consciousness of guilt. The trial court properly exercised its discretion. In the alternative, any error in admitting such evidence was harmless. The Court should not review Mr. Weaver's legal financial obligation claim because he did not object at the time of trial. If the Court chooses to consider his argument for the first time on appeal, the Court

should find that the trial court had enough information to support its imposition of the legal financial obligations. As such, Mr. Weaver's conviction should stand.

Respectfully submitted this 9th day of May, 2014.

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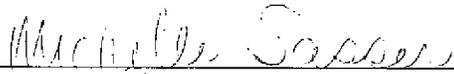
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 7th 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 09, 2014 - 8:43 AM

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