

No. 46597-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD WISNER,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

Before their admission, photographs and video recordings must be authenticated. In seeking to have timestamped video and photographs from surveillance cameras at a bank admitted, the State called a bank teller who had previously worked at the bank. She had no personal recollection of the transaction depicted, no knowledge of how the surveillance system worked or whether it accurately recorded the date and time, no knowledge of how the photos or video presented were created, and no knowledge of how they had come into the State's possession. Nevertheless, the court admitted the pictures and video, which purportedly corresponded to a fraudulent transaction on April 4, 2013. Later, a witness identified the defendant as the customer in the admitted pictures and video. Because the teller did not establish that the video and pictures corresponded to the fraudulent transaction and their erroneous admission was prejudicial, this Court should reverse the defendant's conviction for identity theft in the first degree. Alternatively, this Court should reverse the trial court's imposition of legal financial obligations for failure to conduct an inquiry into the defendant's ability to pay.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the rules of evidence, the trial court erred in admitting photographs, exhibits 6-10.

2. In violation of the rules of evidence, the trial court erred in admitting a CD containing video recordings, exhibit 5, and in allowing the video to be played for the jury.

3. In violation of the rules of evidence, the trial court erred in allowing a witness to testify as to the timestamped date and time in the video.

4. In violation of the Sixth Amendment, the defendant was deprived of his right to effective assistance of counsel.

5. Without inquiring as to the defendant's ability to pay, the trial court erred in imposing legal financial obligations.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To lay proper foundation for admitting a photograph or video recording, a witness must be able to give some indication as to when, where, and under what circumstances the photograph or video recording was taken, and that it accurately portrays the subject illustrated. Here, timestamped video and photos were offered by the State to show that the defendant participated in a fraudulent transaction on April 4, 2013 at a bank. A bank teller, though able to indicate that she was in the video and

photos, and that they depicted the bank she had worked at for about a year, was unable to say whether the video or photos actually depicted the transaction at issue, or the date and time. She had no memory of the incident. She was unfamiliar with the bank's surveillance system and had had no knowledge of the process by which the video or photos had been created. Did the trial court err in admitting the photos and video? Did the court err in allowing the bank teller to testify as to the timestamps on the evidence?

2. Absent a valid strategic purpose, defense counsel should object to evidence that is inadmissible and harmful to his or her client. Mr. Wisner's defense counsel vigorously challenged the admission of photographs which were derived from a surveillance video, arguing the State had not laid adequate foundation to establish authenticity. Still, counsel did not object when the State moved to admit the video recording itself. Assuming counsel did not adequately preserve the error, was the defendant deprived of his right to effective assistance of counsel when counsel objected to the admission of the photos, but did not specifically object to admission of the video from which these photos were derived?

3. Before imposing legal financial obligations, the sentencing court must make an inquiry as to the defendant's ability to pay. As the Washington Supreme Court recently held, appellate courts may exercise

their discretion and address a trial court's failure to conduct this inquiry for the first time on appeal. Cries for reform of broken legal financial systems demand that appellate courts exercise this discretion. While imposing legal financial obligations against the defendant, the sentencing court did not inquire on the record as to the defendant's ability to pay. Following our Supreme Court's lead, should this Court exercise its discretion and remand for a proper determination as to the defendant's ability to pay legal financial obligations?

#### **D. STATEMENT OF THE CASE**

The State charged Ronald Wisner with two counts of first degree identity theft.<sup>1</sup> CP 62-63. Concerning the first count, the State alleged that on April 4, 2013, Mr. Wisner, representing himself as Duane Hinkle,<sup>2</sup>

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<sup>1</sup> The identify theft statute provides:

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020(1), (2).

<sup>2</sup> The transcripts spell Mr. Hinkle's first name as "Dwayne."

deposited a check and received about \$2000 in cash at a Chase Bank in Cowlitz County. CP 62; RP 320. Concerning count two, the State alleged that Mr. Wisner, again using Mr. Hinkle's name, conducted a similar fraudulent transaction on April 6, 2013 at a different Chase Bank in Cowlitz County. CP 63; RP 321-22.

The State's case centered on surveillance video that the prosecutor represented as showing a fraudulent transaction on April 4, 2013. Ex. 5.<sup>3</sup> The video shows a large man wearing glasses and a cap conduct a transaction with a bank teller. Ex. 5.<sup>4</sup>

Around June 2013, Detective Sahim, who was investigating the case, obtained information from another detective which led him to suspect Ronald Wisner. CP 117. In late September 2013, Detective Sahim contacted Department of Corrections (DOC) Officer Kelly Kilkenny, who supervised Mr. Wisner and was familiar with him, though she had not seen him in person in about six months. CP 116-17. The detective e-mailed Officer Kilkenny three still photos from a surveillance video. CP 117. Rather than just ask Officer Kilkenny if she could identify

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<sup>3</sup> Exhibit 5 is a CD with 10 video files. To play the video files, download and install the "Evidence Reviewer" program, available for download at: <http://www.marchnetworks.com/services/evidence-reviewers.aspx>. Parts of "Clip 1" and "Clip 2," both videos taken at the same time from different cameras, purportedly on April 4, 2013, were played for the jury. RP 102-18.

<sup>4</sup> This is on "Clip 1."

the man in the photos, he told her that he was investigating Mr. Wisner and asked if she could identify Mr. Wisner as the man in the photos. CP 117. She did. CP 117.

At trial, the State presented documentary, photographic, and video evidence purportedly related to the transaction on April 4, 2013. Ex. 1-10. The State sought to admit this evidence through the testimony of its first witness, a bank teller who had worked at the bank for about a year and had been working there in April 2013. The teller had no personal recollection of events on April 4, 2013, was unaware of how the bank maintained documentary and surveillance records, and did not know how the State had obtained them. RP 84, 92, 94, 104, 116, 121, 124, 126-27. She testified that prior to trial, the prosecutor had shown her the video and told her that it depicted the transaction at issue. RP 93. Nevertheless, over Mr. Wisner's objections, the trial court admitted the documents and photos, and permitted the teller to testify that the timestamp on the video said April 4, 2013. RP 84-86, 90, 95, 117.

Next, in relation to the second count, the State called the manager of the bank that had processed the transaction on April 6, 2013. RP 127-30. The State did not present photographic or video evidence related to this transaction.

After the bank manager's testimony, the State called Officer Kilkenny. She identified the customer in the photos and video previously admitted as Mr. Wisner. RP 164.

Finally, the State called Andrew Szymanski, a handwriting expert. RP 204, 206-07. He examined the handwriting on the checks, deposit slips, and an intake form Mr. Wisner had provided to Officer Kilkenny. RP 211-13. He could neither identify nor exclude Mr. Wisner as the author of the checks and deposit slips. RP 242.

In his defense, Mr. Wisner called two witnesses, Sherry Lindblad and Steven Pittman. RP 263, 280. Both were familiar with how Mr. Wisner looked around the date in question. RP 264-65, 281-82. Both testified that the man in the photos was not Mr. Wisner. RP 269, 283. Both opined that the man in the photos was larger than Mr. Wisner. RP 268-69, 283. Mr. Pittman testified that the man in the photos also did not appear to have a tattoo around his left ring finger. RP 285-86. Mr. Wisner has a wedding tattoo band on that finger. RP 283.

The jury found Mr. Wisner guilty of the first count of identity theft in the first degree. RP 366. The jury, however, acquitted Mr. Wisner of the second count. RP 366. At sentencing, the court did not inquire as to Mr. Wisner's ability to pay legal financial obligations. RP 371-81. Still,

the court imposed them. CP 103. Mr. Wisner, who maintained his innocence at sentencing, appeals. RP 376-77; CP 114.

## **E. ARGUMENT**

### **1. The State failed to authenticate the photographic and video evidence. Their erroneous admission requires reversal.**

#### **a. Before admission, the proponent of a photograph or video recording must first lay the proper foundation to establish authenticity.**

Authentication requires “evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). The standard for authenticating photographs or videos recordings are the same. Saldivar v. Momah, 145 Wn. App. 365, 399, 186 P.3d 1117 (2008). To lay proper foundation for admitting a photograph or video recording, a witness must be able to give some indication as to when, where, and under what circumstances the photograph or video recording was taken and that it accurately portrays the subject illustrated. State v. Tatum, 58 Wn.2d 73, 75, 360 P.2d 754 (1961); Saldivar, 145 Wn. App. at 399. This does not require testimony from a witness who was present for the picture’s creation. State v. Sapp, 182 Wn. App. 910, 916, 332 P.3d 1058 (2014). Evidence about the process used to create a photo or video may be used to authenticate a video or photo. Tatum, 58 Wn.2d at 75 (photo authenticated where witness identified location in photo and another

witness testified about the store's practice of photographing customers); ER 901(b)(9) ("Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" conforms with the authentication requirement under ER 901(a)).

**b. The State failed to establish that the video recording or photographs depicted a fraudulent transaction on April 4, 2013.**

Over Mr. Wisner's objections for lack of foundation, the State successfully had five still photographs admitted. RP 95; Ex. 6-10. Later, the State also played the video from which these photos were derived over Mr. Wisner's objection. RP 102; Ex. 5. Also over Mr. Wisner's objection, Ms. Wooden was permitted to testify as to the date and time on the video. RP 117.

The State's theory was that the photos and video depicted Mr. Wisner conducting a fraudulent transaction as Mr. Hinkle on April 4, 2013. The photos are stills purportedly taken from a surveillance video. The still photos appear to actually be screen captures taken with a computer program used to run the surveillance video because the frame around the pictures shows the computer program. Ex. 6-10.<sup>5</sup> The program lists a timestamp in a blue bar in a frame above the still pictures. Ex. 6-10.

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<sup>5</sup> This appears to have been the same program used to play the video.

These exhibits were admitted through the testimony of Mallory Wooden, a teller who had worked at a Chase bank for about one year, including during April 2013. RP 81. She testified that the prosecutor had shown her what she was told was surveillance video of a fraudulent transaction on April 4, 2013. RP 90, 93. Although she was able to identify herself and the place as Chase bank, she admitted she had no independent recollection of this transaction and was otherwise basing her testimony on what the prosecutor had told her. RP 92-94. She also had not been responsible for turning any of the evidence in the case over to the State. RP 94. And she did not testify as to how the surveillance system worked or how the screen captures from the video were made. Nevertheless, the court admitted the exhibits. RP 95, 115.

Ms. Wooden's testimony was inadequate to authenticate the photos and video. She had no personal knowledge that they depicted a transaction from **April 4, 2013**. ER 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Moreover, the pictures themselves do not establish that this was the transaction at issue. Cf. United States v. Brannon, 616 F.2d 413, 416 (9th Cir. 1980) (photos admissible where it was undisputed that photos accurately depicted events in the bank during the robbery). And other evidence did not establish that

this was the transaction at issue. Thus, because Ms. Wooden worked at the Chase bank for about a year, the video and pictures could be from any time she worked there. Unless the photos and videos showed the transaction at issue, they were irrelevant.

The photos, actually screenshots from a computer program, have timestamps. Ex. 6-10. However, Ms. Wooden did not testify about the process used to create the video or photos. Cf. Tatum, 58 Wn.2d 75 (in authenticating photo, court heard testimony from witness about how store photographed customers); United States v. Taylor, 530 F.2d 639, 641-42 (5th Cir. 1976) (photos from bank camera properly authenticated where witnesses testified as to process and how photos were created). She did not testify that the time and date in photos or video were accurate. In fact, she later testified that she was not responsible for the surveillance system and could not say if the video was accurate. RP 116, 124-25. She also did not testify about the chain of custody. Cf. State v. Early, 36 Wn. App. 215, 222-23, 674 P.2d 179 (1983) (videotape properly authenticated by testimony of officer who took tape into possession). The first time Ms. Wooden had seen the photos and video was the day before the trial started. RP 124. Thus, the photos and video were never established to be an accurate portrayal of what they were offered to be, a depiction of a

fraudulent transaction on April 4, 2013. The State simply assumed they were.

This case is similar to a case from Maryland, Washington v. State, 406 Md. 642, 961 A.2d 1110 (2008). There, the defendant was prosecuted for crimes related to a shooting outside a bar. Washington, 961 A.2d at 1111. The State presented a video recording, along with still photos from the recording, made by surveillance cameras inside and outside the bar. Washington, 961 A.2d at 1112. The owner testified that a technician had transferred surveillance footage to a CD and then to a tape. Washington, 961 A.2d at 1112. The Maryland Court of Appeals, noting there was no testimony as to the process used, the manner of operation of the cameras, or the chain of custody, held that the State had failed to authenticate the video and pictures:

The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath. Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray. The State did not do so here.

Washington, 961 A.2d at 1117.

Similarly, here, there was no testimony about how the surveillance system worked, how the footage was transferred to a CD (exhibit 5), how an unknown person created the still photos from the footage, or even how the evidence came into the State's hands. The State also failed to establish that the date and times on the photos and video were accurate. See State v. Bashaw, 169 Wn.2d 133, 142-43, 234 P.3d 195 (2010) (State failed to make prima facie showing that rolling wheel made accurate ground measurements) overruled on other grounds by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012). This Court should hold that the trial court abused its discretion in admitting the photos and video, and in permitting Ms. Wooden to testify about the timestamps.

**c. The error was prejudicial**

Evidentiary error is prejudicial if there is a reasonable probability that, had the error not occurred, the outcome of the trial would have been materially affected. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Neal, 144 Wn.2d at 611.

Here, the photos and video were a central part of the trial. Much of the testimony was premised upon it. They were used to link Mr. Wisner to

the fraudulent transaction. Without their admission, Officer Kilkenny would not have been able to identify Mr. Wisner as a customer in the Chase bank on April 4, 2013. The only other evidence that arguably linked Mr. Wisner to the transaction was the opinion of the handwriting expert. But this expert could neither identify nor exclude Mr. Wisner as the author of the checks and deposit slips. RP 242.

Moreover, the jury acquitted Mr. Wisner of the second count of identity theft in the first degree. The main difference between the State's evidence between the two charges was that there was no video or photographic evidence offered in support of the second count. Thus, if the jury did not have photos or video in connection with the first count, it is likely the jury would have acquitted Mr. Wisner of both charges. This Court should reverse.

**d. If the challenge to the photos did not preserve the challenge to the video, counsel provided ineffective assistance by not objecting to admission of the video.**

Defense counsel made clear objections to the photos which were derived from the surveillance video. RP 95. He also objected to the video being played for Ms. Wooden. RP 102-03. Nevertheless, defense counsel did not object when the State moved to admit the CD containing the video. RP 113. If this Court holds defense counsel did not adequately preserve

the challenge to the admission of the video, the error should be considered through the lens of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Strickland, 466 U.S. at 687. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllö, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Defense counsel should object to evidence that is inadmissible and harmful to his or her client. See State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to prior convictions was deficient performance; court could discern no reason why counsel would not have objected to such damaging and prejudicial evidence when evidence was inadmissible).

Here, counsel objected to the admission of the still photos from the video. RP 93, 95. In supporting his objection, he questioned Ms. Wooden, getting her to admit that she was shown "these videos" the day before trial. RP 92. In arguing that the court should not admit the photos, he argued that Ms. Wooden had not "testified that she has an independent recollection that this is an accurate video of what transpired." RP 95. His

arguments necessarily encompassed and logically extended to excluding the video for lack of authenticity as well. Like the photos, the video was damaging to Mr. Wisner. If the timestamp on the video was accurate, it showed a man resembling Mr. Wisner in the Chase bank on the same day as the fraudulent transaction. As in Hendrickson, there is no reason to be discerned for why Mr. Wisner's trial counsel did not object when the State moved to admit exhibit 5, the CD with the video. Unless counsel's earlier objections to the photos are deemed sufficient to preserve the error, counsel's performance was deficient.

Once the defendant shows deficient performance, the defendant must prove there is a reasonable probability that, but for the deficient performance, the outcome would have been different. Kyllo, 166 Wn.2d at 862. As argued, the photos and video were a central part of the trial. Without the video or photographs in evidence, Officer Kilkenny could not have identified Mr. Wisner. The jury also acquitted Mr. Wisner of a substantially similar charge. The evidence supporting the State's theory for that charge was similar except that there was no video or pictures. Given this record, Mr. Wisner satisfies his burden.

**2. The trial court failed to inquire as to Mr. Wisner’s ability to pay financial legal obligations. This Court should remand for a new sentencing hearing.**

**a. Before imposing legal financial obligations, a sentencing court must inquire as to the defendant’s current and future ability to pay. Appellate courts may address this issue for the first time on appeal.**

Recently, our Supreme Court held that before a trial court imposes legal financial obligations (LFOs), RCW 10.01.160(3) requires that the sentencing judge must make an individualized inquiry into the defendant’s current and future ability to pay. State v. Blazina, No. 89028-5, slip op. at 12 (Wash. Mar. 12, 2015). The Court further held that Washington appellate courts have discretion to review LFOs challenged for the first time on appeal and reviewed the claims before it due to the importance of the issue:

RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *State v. Russell*, 171 Wn.2d 118, 122, 249, P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

Blazina, slip op. at 6-7. The Court rejected the State’s argument that the ripeness doctrine precluded review of LFOs. Blazina, slip op. at 4 n.1; 6-7.

**b. The trial court failed to inquire as to Mr. Wisner's ability to pay legal financial obligations. This court should exercise its discretion and remand for a new sentencing hearing.**

The trial court imposed \$1425 in discretionary legal financial obligations (\$600 in court costs; \$825 in fees for court appointed attorney). CP 103. At sentencing, the trial court did not inquire as to Mr. Wisner's current or future ability to pay. RP 371-81. And the State did not offer any evidence as to Mr. Wisner's ability to pay. RP 371-81. Still, in a boilerplate finding similar to the one in Blazina, the trial court recited that Mr. Wisner had the ability to pay. CP 103.

Under Blazina, the trial court erred. This Court has discretion to reach the issue. Following our Supreme Court's lead, which recognized that judicial action is necessary to remedy our broken LFO system, this Court should exercise its discretion and remand for a new sentencing hearing consistent with Blazina.

**F. CONCLUSION**

The State failed to properly authenticate the photographic and video evidence. The photos and video should not have been admitted. Because the error was prejudicial, this Court should reverse the conviction. If the conviction is not reversed, this Court should still

remand to the trial court for an inquiry as to Mr. Wisner's ability to pay legal financial obligations.

DATED this 10th day of April, 2015.

Respectfully submitted,

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/s Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 46597-3-II
	)	
RONALD WISNER,	)	
	)	
APPELLANT.	)	

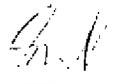
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# WASHINGTON APPELLATE PROJECT

**April 10, 2015 - 4:14 PM**

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