

**NO. 47028-4-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**KARENA EIDSMOE,**

Appellant.

---

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

The Honorable Toni A. Sheldon, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. Defense counsel had no tactical reason for failing to object to the admission of incriminating business records for which the State provided no adequate foundation for admission.

2. The admission of Exhibits 2 and 4 prejudiced Eidsmoe.

3. Defense counsel's failure to object to the admission of business records for which there was no adequate foundation deprived Eidsmoe effective representation.

4. The trial court failed to conduct an adequate determination of Eidsmoe's criminal history, offender score, and standard range sentence.

5. The State failed to prove Eidsmoe had prior felony convictions.

6. The trial court erred by including in Eidsmoe's criminal history offenses that were neither admitted, acknowledged, nor proven.

7. The trial court erred by sentencing Eidsmoe with an offender score of seven.

8. The sentencing court imposed discretionary legal financial obligations without considering Eidsmoe's present or future ability to pay them.

9. The pre-printed finding in the judgment and sentence that Eidsmoe has the current or future ability to pay legal financial obligations is erroneous.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Eidsmoe received ineffective assistance of counsel when, after the State failed to provide a sufficient basis for the admission of a trespass order and a photograph of Eidsmoe as business records, counsel failed to object to their admission prejudicing Eidsmoe by the admission of otherwise inadmissible evidence crucial to the State's case?

2. Whether the trial court erred in calculating Eidsmoe's offender score as seven based on prior convictions when the State failed to present adequate evidence of the prior convictions?

3. Whether the trial court abused its discretion when it imposed discretionary legal financial obligations on Eidsmoe without considering Eidsmoe's individualized present or future ability to pay them?

C. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Karena Eidsmoe with second degree burglary<sup>1</sup> of a Shelton Walmart<sup>2</sup> and resisting arrest.<sup>3</sup> CP 19-20. A jury found Eidsmoe guilty of both charges. CP 16-18.

At sentencing, the State named six prior felony convictions with some dates of conviction or sentence, and some counties where

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<sup>1</sup> RCW 9A.52.030(1)

<sup>2</sup> The store name appears in the record both as "Walmart" and Wal-mart."

<sup>3</sup> RCW 9A.76.040

convictions occurred. RP<sup>4</sup> 165. The court also received three pre-sentence reports prepared by the Department of Corrections (DOC) listing similar criminal history. RP 170; Supplemental Designation of Clerk's Papers, Risk Assessment Reports (sub. nom. 74 and 75) and FOSA Risk Assessment Report (sub. nom. 176). The State presented no evidence that Eidsmoe had any criminal history. RP 167. Eidsmoe did not admit or acknowledge any prior convictions. RP 167-69. The court found Eidsmoe had all the prior felony convictions specified by the prosecutor and listed in the pre-sentence reports. RP 170. The court sentenced Eidsmoe with an offender score of seven. CP 6.

The court sentenced Eidsmoe to 38 months for the burglary. The court imposed 90 days for the resisting arrest to be served consecutively to the burglary. CP 7; RP 170.

The court also imposed discretionary legal financial obligations on Eidsmoe with no consideration for her present or future ability to pay them. CP 9-10; RP 170-72. Eidsmoe did not object. RP 170-72.

Eidsmoe appeals all portions of her judgment and sentence. CP 3.

## 2. Trial Evidence

On the afternoon of December 15, 2013, Eidsmoe and her husband, Robert Nagel, entered a Shelton Walmart to do some shopping.

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<sup>4</sup> There is a single volume of verbatim for this appeal.

RP 24-25, 74-75. As soon as Eidsmoe entered the store, members of loss prevention watched Eidsmoe. RP 43, 62. There are surveillance cameras throughout the store. RP 45. The loss prevention agents watched her both remotely using the store's video surveillance and in person on the store's floor. RP 43, 66-67. They also asked the police to respond to a theft in progress. RP 24. Shelton Officer Robert Auderer joined the video surveillance of Eidsmoe in the loss prevention office. RP 24.

Katherine Brewer testified she saw Eidsmoe conceal two packages of batteries in her purse and conceal a greeting card under her shopping cart's child seat. RP 62-63. She also watched Eidsmoe and Nagel check out at a register. They paid for unrelated merchandise but not the batteries and card. RP 63. After checking out, Eidsmoe grabbed a glow pet stuffed animal, placed it in her cart, and passed all the registers without paying for it. RP 25-26, 63.

Officer Auderer and several loss prevention agents stopped the couple as they were about to leave the store. RP 26, 64. Eidsmoe declined to accompany the agents to the loss prevention office. RP 64. Officer Auderer described Eidsmoe as verbally resistant. RP 27. She tried to walk away and became progressively more resistant so he stepped in to restrain her. RP 27. She pulled her hands away from Officer Auderer when he tried to control her. RP 27.

Once in the loss prevention office, Eidsmoe continued to struggle with Officer Auderer. RP 27-29. He told her she was under arrest for resisting arrest. RP 29-30. She apologized to Officer Auderer for taking the batteries. RP 30. Auderer claimed Eidsmoe resisted his arrest three times: once in the loss prevention office vestibule by trying to pull away from him, and twice more in the office when she struggled out of his grasp and threw herself to the floor. RP 31-32.

There was concern that Eidsmoe was having a medical problem so paramedics came to the store and checked on her. She was medically cleared. RP 31.

Officer Auderer detained Nagel without incident. RP 26. He too was taken to the loss prevention office. RP 37.

Brewer reviewed the register receipt. Eidsmoe had not paid for the batteries or the greeting card. RP 67-68. The greeting card was found under the child seat. RP 67.

Loss prevention agent Amy Pagel reviewed records kept in a locked office in the store. RP 45, 47; Supplemental Designation of Clerk's Papers, Trial Exhibits 2 and 4. Pagel found a form, Exhibit 2, trespassing Eidsmoe from Walmart stores and property. RP 45; Exhibit 2. Eidsmoe did not object to the admission of Exhibit 2. RP 45-46. The order was issued on November 3, 2009. Exhibit 2. Pagel started working at the

Shelton Walmart about a month after the trespass order was issued. RP 46.

Pagel identified Exhibit 4 as a picture of Eidsmoe. Pagel said the picture was taken in conjunction with the trespass order. RP 46. Eidsmoe did not object to the admission of Exhibit 4. RP 48.

Robert Nagel testified he and Eidsmoe shopped for odds and ends at the store. RP 75. At check out, he put the items on the register conveyer belt. RP 76. Eidsmoe was distracted at checkout by a phone call from her daughter. RP 76. Nagel intentionally put the batteries in Eidsmoe's purse after seeing them in the cart near her purse. RP 77. He also intentionally did not put the greeting card on the conveyor belt but instead left it under Eidsmoe's purse. RP 76-77.

Nagel told the checker to also ring up a bag of ice and a glow pet. RP 78. He paid for the glow pet, the ice, and the items he put on the conveyor belt. RP 78. After leaving the register, he told Eidsmoe she could take a glow pet and she did. RP 79. He did not check the receipt to see if the clerk rang up the ice or the glow pet. RP 81.

He was unaware that Eidsmoe had been trespassed from the store. RP 82. They had shopped there together for years. RP 82. He did not know Eidsmoe told Officer Auderer she took the batteries. RP 81. After

being detained in the loss prevention office for some time, he was allowed to leave with the purchased items. RP 83.

Eidsmoe did not testify. RP 85-86.

D. ARGUMENT

1. EIDSMOE WAS PREJUDICED BY HER COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE ADMISSION OF A TRESPASS ORDER (EXHIBIT 2) AND HER PHOTO (EXHIBIT 4).

The State failed to lay an adequate foundation for the admission of two exhibits, a trespass order and a photo of Eidsmoe, as business records. Having no strategic reason to do so, defense counsel failed to object to the exhibits' admission. The admission provided the only evidence that Eidsmoe was trespassed from Walmart, a fact critical to prove second degree burglary. Defense counsel's failure deprived Eidsmoe effective counsel. Her burglary conviction must be reversed.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under

the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court does not have to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990). An ineffective assistance of counsel claim presents a mixed question of law and fact requiring de novo review. *State v. A.N.J.*, 168 Wn. 2d 91, 109, 225 P.3d 956 (2010).

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement can be either “an oral or written assertion.” ER 801(a). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply here. ER 802.

Records of regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). The business record exception is codified in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

It is unnecessary that the person who made the record provide the foundation for admissible. *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004), *review denied*, 153 Wn.2d 1028 (2005). Even where, as here, the witness who relied on information in a document did not actually prepare it, she may still provide foundation testimony if she knows its mode of preparation and routinely relies on others' preparation of that document. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

As presented in the State's case, Amy Pagel was not qualified to identify the trespass order, Exhibit 2, or the photograph of Eidsmoe, Exhibit 4. Although she referred to both exhibits as "business records," she did not testify as to their mode of preparation. RP 45. Both documents were ostensibly created about a month before Pagel worked for Walmart. RP 46. Neither Pagel, nor the other testifying Walmart employee, Katherine Brewer, provided information as to how either

exhibit was created. Pagel also did not testify the documents are the type she routinely relies on in conducting her loss prevention duties. The jury only heard like documents are not tampered with because they are kept in a locked office. RP 47. No one testified how long these items, ostensibly created in 2009, had been maintained in a locked office.

The elements of proof for second degree burglary demonstrate the critical importance of the trespass order to the State's case. A person commits burglary in the second degree when she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein. Supp. DCP, Court's Instructions to the Jury (sub. nom. 60), Instruction 16. Entry into an otherwise open business is unlawful if the person is not licensed, invited, or otherwise privileged to enter the business. Supp. DCP, Court's Instructions to the Jury, Instruction 11. *State v. Kutch*, 90 Wn. App. 244, 247, 951 P.2d 1139 (1998). Proof that Eidsmoe had been trespassed, i.e., told by Walmart she was no longer invited to be on their property under any condition, was an essential element of the State's case.

Defense counsel's failure to object to admission of the trespass order provided the State with the requisite proof of the unlawful entry element. No tactical or strategic reason drove defense counsel's failure to object to the otherwise inadmissible trespass order. There is a reasonable

probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice is self-evident. Without the trespass order and accompanying photo of Eidsmoe, Exhibits 2 and 4, sufficient evidence did not exist to support the jury's verdict on the second degree burglary.

Counsel's performance was deficient, which was highly prejudicial to Eidsmoe, with the result that she was deprived of her constitutional right to effective assistance of counsel, and is entitled to vacation of her second degree burglary conviction.

2. THE COURT MISCALCULATED EIDSMOE'S OFFENDER SCORE.

The sentencing court must determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been "admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." *State v. Hunley*, 175 Wn.2d 901, 909,

287 P.3d 584 (2012). The burden is on the prosecution to establish the accused's criminal history by a preponderance of the evidence. *Id.*

An offender score calculation is reviewed de novo. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013), *review denied*, 179 Wn.2d 1016 (2014). An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014).

Neither the prosecutor's oral summary of Eidsmoe's alleged criminal history nor DOC's written summary prove that the prior convictions exist. *Hunley*, 175 Wn.2d at 909. Such "bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of prior convictions." *Id.* at 910. This is true even when defense counsel does not object. *Id.* at 915.

At sentencing, the State did not present evidence that Eidsmoe had any prior convictions. RP 167-70. Nonetheless the court found that Eidsmoe had an offender score of seven based on six prior felony convictions. CP 6 (Judgment and Sentence findings 2.3-2.3).

The court appears to have taken its findings verbatim from the State's oral rendition and the DOC pre-sentence report documents. CP 167; Supp. DCP, Pre-sentence reports. The State's oral rendition and DOC's PSIs were not evidence and could not demonstrate that Eidsmoe had any prior convictions. *Hunley*, 175 Wn.2d at 909-10.

Because the State failed to prove that Eidsmoe had any criminal history, the court's finding and offender score are not supported by the evidence. Judgment and Sentence findings 2.2, 2.3, and Eidsmoe's sentence must be vacated and remanded for resentencing.

3. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER EIDSMOE'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Eidsmoe to pay these discretionary legal financial obligations (LFOs): (1) \$64.48 witness costs; (2) \$1,014.50 sheriff service fees; (3) \$250 jury demand fee; (4) \$600 court-appointed attorney; (5) \$850 court-appointed defense expert costs.<sup>5</sup> CP 9-10. The court erred in imposing these LFOs because it failed to make an individualized inquiry into Eidsmoe's current and future ability to pay them.

The court may order a defendant to pay costs under RCW 10.01.160. However, the statute also provides "[t]he 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

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<sup>5</sup> The court also ordered a \$500 victim assessment, a \$200 criminal filing fee, and a \$100 DNA fee. CP 9. Those fees are not at issue on appeal because they are mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes legal financial obligations. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). The record reflects no consideration here. RP 170-72.

In the judgment and sentence, this pre-printed, generic language appears:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant’s 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. (RCW 10.01.160).

CP 7.

Eidsmoe challenges this finding on the ground that the court did not consider her individual financial resources and the burden of imposing such obligations on her. The boilerplate finding regarding ability to pay lacks support in the record. RP 17-72.

Further, “the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Blazina*,

344 P.3d at 683. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentence hearing. *Id.*

The issue is ripe for review. *Blazina*, 344 P.3d at 683. And although defense counsel did not object, an appellate court may reach this error consistent with RAP 2.5. *Id.* at 682. Eidsmoe requests this Court reach the merits. The LFO system is broken.<sup>6</sup> *Id.* at 683. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay legal financial obligations.

#### E. CONCLUSION

Eidsmoe's second degree burglary conviction should be reversed because she was prejudiced by the ineffective assistance of her defense counsel.

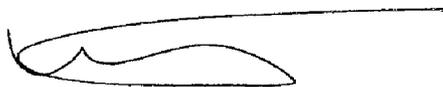
The trial court should also hold a hearing to determine Eidsmoe's individualized ability to pay LFOs.

Alternatively, the case should be remanded to the trial court for a resentencing hearing where the State must prove present evidence of prior convictions.

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<sup>6</sup> Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Blazina*, 344 P.3d 680, 684.

Respectfully submitted this 2nd day of June 2015.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

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LISA E. TABBUT/WSBA 21344  
Attorney for Karena Eidsmoe

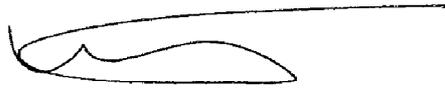
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Timothy Whitehead, Mason County Prosecutor's Office, at timw@co.mason.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Karena Eidsmoe/DOC# 704616, Mission Creek Corrections Center for Women, 3420 NE Sand Hill Road, Belfair, WA 98528.

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

Signed June 2, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Karena Eidsmoe, Appellant

## COWLITZ COUNTY ASSIGNED COUNSEL

**June 02, 2015 - 8:14 AM**

### Transmittal Letter

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