

NO. 287785-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

DEC 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

TOM OLLIN MILLS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-01186-4

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Deputy
Prosecuting Attorney
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ISSUES

1. Was there sufficient evidence to convict the defendant?
2. Should this Court remand the matter to determine the defendant's offender score?

"Beware of charisma..." Ralph Waldo Emerson.

"A man of such obvious and exemplary charm must be a liar." Anita Brookner.

COUNTERSTATEMENT OF FACTS

The defendant was charismatic and Joe Molvik, the founder of Tri City Fabricating, liked that. (RP 10/20/09, 137). As a result, shortly after hiring the defendant on March 19, 2008, the defendant was named general manager on May 25, 2008 (RP 10/20/09, 159). After the defendant repeatedly requested a company credit card, the business gave him one on June 10, 2008. (RP 10/20/09, 84, 159). Thereafter, the defendant made a series of purchases for his personal dining, transportation, vehicle maintenance,

pharmaceutical, clothing, golfing, shipping, and extra-marital affair needs, as the chart below shows¹:

DATE	PLACE	AMOUNT	CITATION
06/10/08	El Chapala	\$ 50.00	RP 49.
06/10/08	Denney's	\$ 35.00	RP 49.
06/12/08	Shell Oil	\$ 71.75	RP 49-50.
06/14/08	Kohl's	\$ 88.15	RP 50.

The Kohl's expense was one of the few that the defendant even attempted to explain away, claiming that he made a business-related purchase of rugs, frames, and other decorations. (RP 10/20/09, 163). The defendant's explanation was not truthful: the actual receipt from Kohl's shows he purchased golf shirts. (RP 10/20/09, 164).

DATE	PLACE	AMOUNT	CITATION
06/16/08	El Chapala	\$ 32.00	RP 50.

¹Unless otherwise noted, all of the charges are to business.

DATE	PLACE	AMOUNT	CITATION
06/19/08	Ross	\$ 16.22	RP 50.
06/17/08	Walmart	\$ 67.14	RP 51.
06/17/08	Exxon	\$ 68.83	RP 52.
06/18/08	FX McRory's Steak Seattle, WA	\$ 65.86	RP 52.
06/21/08	Walmart	\$ 168.80	RP 53.
06/24/08	El Chapala	\$ 31.00	RP 53.
06/26/08	Shell Oil, Prosser, WA	\$ 73.00	RP 53.
06/27/08	W. Richland Municipal Golf Course	\$ 55.00	RP 53.
06/29/08	Shell Oil	\$ 40.14	RP 53.
06/29/08 ¹	Red Lobster	\$ 100.00	RP 54.
07/01/08	Shell Oil	\$ 99.00	RP 55.
07/03/08	AT&T	\$ 140.78	RP 55.
07/06/08 ²	Breakplace	\$ 99.00	RP 56.
07/09/08	Shell Oil	\$ 99.00	RP 56.
07/10/08	El Chapala	\$ 20.00	RP 56.
07/11/08	El Chapala	\$ 50.00	RP 56.
07/11/08	Rite Aid, Yakima, WA	\$ 86.00	RP 57.

¹ June 29, 2008, was a Sunday. (RP 54) .

² July 6, 2008, was also a Sunday. (RP 56) .

DATE	PLACE	AMOUNT	CITATION
07/12/08 ³	Shell Oil	\$ 99.00	RP 57.
07/13/08 ⁴	W. Richland Municipal Golf Course	\$ 344.37	RP 57.
07/14/08	Schucks ⁵	\$ 101.27	RP 57.
07/14/08	UPS Store	\$ 109.35	RP 58.
07/16/08	Breakplace	\$ 99.00	RP 58-59.
07/18/08	Fred Meyer Fuel, Oregon	\$ 100.00	RP 59.
07/19/08	Shell Oil	\$ 69.04	RP 59.
07/20/08 ⁶	W. Richland Municipal Golf Course	\$ 400.00	RP 59.
07/21/08	Exxon	\$ 77.98	RP 59.
07/22/08	Famous Dave's	\$ 136.13	RP 59-60.
07/22/08	Lowe's	\$767.11	RP 60.
07/23/08	Tesoro	\$ 100.00	RP 60.
07/25/08	Shell Oil	\$ 99.00	RP 60.
07/25/08	Bonefish Grill	\$ 148.00	RP 60.
07/26/08 ⁷	Exxon	\$ 24.52	RP 60.
07/26/08	Clover Island	\$ 121.73	RP 60.

³ July 12, 2008, was a Saturday. (RP 57) .

⁴ July 13, 2008, was a Sunday. (RP 57) .

⁵ The defendant also asked for a cash reimbursement of this item. (RP 58).

⁶ July 20, 2008, was a Sunday. (RP 59) .

⁷ July 26, 2008, was a Saturday. (RP 61) .

DATE	PLACE	AMOUNT	CITATION
07/26/08	Shell Oil	\$ 60.03	RP 60.
07/27/08 ⁸	W. Richland Municipal Golf Course	\$ 310.91	RP 61.
07/28/08- 08/01/08	Clover Island	\$1547.00	RP 62, 107, 108.
07/28/08	AT&T	\$ 97.40	RP 61.
07/29/08	Azteca	\$ 75.00	RP 62.
07/29/08	Shell Oil	\$ 99.00	RP 62.
07/31/08	Car Wash	\$ 9.00	RP 62.
08/01/08	Total Stop	\$ 122.00	RP 62.
08/02/08	West Richland Municipal Golf Course	\$ 200.00	RP 62.
08/02/08 ⁹	Yakimart, Toppenish, WA	\$ 48.00	RP 63.
08/04/08	El Chapala	\$ 22.00	RP 64.
08/06/08	Shell Oil	\$ 99.00	RP 64.
08/06/08	Chevron, Touchet, WA	\$ 64.32	RP 64.
08/08/08	Car Wash	\$ 9.00	RP 64-65.
08/08/08	Shell Oil	\$ 99.00	RP 65.
08/09/08	Lowe's	\$ 336.46	RP 65.

⁸ July 27, 2008, was a Sunday. (RP 61) .

⁹ August 2, 2008, was a Saturday. Further, the company had no business in Toppenish, but "Yakimart" is near the Legends Casino (RP 63, 208) .

DATE	PLACE	AMOUNT	CITATION
08/12/08	Exxon	\$ 100.00	RP 65.
08/16/08	Car Wash	\$ 9.00	RP 65.
08/16/08	Shell Oil	\$ 9.29	RP 65.
08/17/08	Car Wash	\$ 9.00	RP 65.
08/20/08	Shell Oil	\$ 99.00	RP 65.
08/20/08	Schuck's	\$ 140.02	RP 65.
08/20/08	Chevron	\$ 74.63	RP 65.
08/22/08	Atomic Brew Pub	\$ 35.11	RP 65.
08/23/08 ¹⁰	Shell Oil	\$ 2.90	RP 65.
08/23/08	Shell Oil	\$ 58.67	RP 65.
08/23/08	Exxon	\$ 9.14	RP 66.
08/23/08	Walmart	\$ 76.89	RP 66.
TOTAL OF CREDIT CARD PURCHASES:		\$8074.57	RP 66.

Some credit card purchases may have been business related.

Joe Molvik agreed that some of the expenses may have been business related, namely:

¹⁰ August 23, 2008, was a Saturday.

DATE	PLACE	AMOUNT	CITATION
06/20/08	Lowe's	\$ 371.00	RP 124.
06/24/08	El Chapala	\$ 32.00	RP 98.
07/03/08	AT&T	\$ 140.78	RP 55.
07/22/08	Lowe's	\$ 767.11	RP 124.
07/28/08	AT&T	\$ 97.40	RP 61.
08/08/08	Chevron, Touchet, WA	\$ 64.32	RP 64.
TOTAL WITHDRAWN BUSINESS RELATED:		\$1471.61	
TOTAL STOLEN:		<u>\$6601.96</u>	

Mr. Molvik was charitable in discounting the above purchases. For example, the defendant apparently purchased some tools with the company credit card. (RP 125). Those tools were in the defendant's possession when he was terminated. on September 12, 2008 (RP 125, 171).

The credit card use was not the only questionable practice.

The State focused on the defendant's purchases with the company credit card. However,

the defendant also billed the company heavily for his hours, when in actuality he would come to work, leave, and not return the rest of the day, occasionally choosing to answer his phone. (RP 187). Further, the defendant purchased a vehicle on the company's dime without any authorization. (RP 177).

Why the repeated \$99.00 gas purchases at Shell Oil and Breakplace?

The defendant made ten (10) purchases of gasoline in the amount of \$99.00 at Shell Oil and Breakplace. (Please See above chart.) Why \$99.00? Because that is the maximum those businesses allow a person to purchase in gasoline at the pump. (RP 322). As the defendant stated, "the gas pumps don't go into triple digits." (RP 321).

The defendant's witness contradicts the defendant regarding the \$1547.00 Clover Island bill.

The defendant called Michael Precechtel regarding the \$1547.80 Clover Island Motor Inn

bill. Mr. Precechtel testified that he was to meet with the defendant on a weekend, and cancelled the meeting on a Friday. (RP 247). The defendant actually rented the most expensive suite on a Monday, July 28, 2008, for two adults, and stayed four nights checking out on August 1, 2008. (RP 107). The general manager of the hotel saw the defendant with a woman. (RP 110).

The sentence.

The defendant was found guilty of Theft in the First Degree with an aggravating factor of the crime being a "major economic offense," based on the defendant's abuse of a position of trust, confidence, or fiduciary responsibility. (CP 5, 52, 53). Although the trial court could have sentenced the defendant to an exceptional sentence based on the aggravating factor, the defendant was sentenced to nine (9) months on work release. (CP 62-69). The sentence was based on a standard range of four to twelve months, based on an offender score of three. (CP 62-69).

ARGUMENT

1. **THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT.**

Standard on Review: The defendant correctly stated the standard on review. Evidence is sufficient if, viewed in the light most favorable to the State, it would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

The evidence is overwhelming.

The evidence can be dissected, rearranged, criticized, and/or recomputed. Anyway to look at it, the defendant is guilty. Consider:

- **The Clover Island Motor Inn charge alone would have resulted in a guilty verdict.**

If the defendant were really meeting with a group of engineers, organized by Mr. Precechtel, he would have had time to cancel the room since Mr. Precechtel cancelled on a Friday. (RP 247). *If* the defendant were meeting the group on a

weekend, when Mr. Precechtel stated the meeting would occur, he would not have checked into the motel on a Monday. (RP 252). *If* the defendant had a last-minute cancellation, he would not have extended his rental from two days to four days. By itself, this charge is over the First Degree Theft amount of \$1500.00.

- **The gasoline charges are bogus.**

There is over \$2,000.00 in gasoline purchases alone. *If* the defendant is to be believed, in the space of a week (7-12-08 to 7-19-08), the defendant needed to fill up for gas four times, for a total of \$367.04, with only one purchase in the Tri-Cities. In the space of three days (7-23-08 to 7-26-08), the defendant needed to fill up four different times, for a total of \$284.35, all without leaving the Tri Cities. Within two days (8-6-08 to 8-8-08), the defendant needed to fill up twice for a total of \$198.00, again without leaving the Tri Cities. In a single day, August 20, 2008, the defendant needed to

fill up twice for a total of \$173.63, having never left the Tri Cities. The fact is, the defendant knew the maximum he could spend for gasoline (\$99.00) and went for it over and over.

- **The defendant's testimony was unintentionally funny.**

Start with some pretentious gobbledegook.²

Add compulsive use of the verb "to share."³

Throw in some sanctimonious remarks about his fidelity to his wife, as if the four-day Clover Island tryst never happened.⁴ Finally, wrap it up by saying that despite all the interfacing, forging, and sharing, you have not gotten one

² "[I]nterface with the contractors..." (RP 255), "[I]t was a bit fluctuant with regard to our shop staff..." (RP 264); "[I] was the west coast regional manager for the vertispace free standing mezzanine division." (RP 276); "[w]e would stage the guys..." (RP 278); "It was not all about Tri-City Fabricating, it was about forging relationships..." (RP 278); "So if we can forge the same relationships with whoever they have that have the in roads into...that faction of people, . . ." (RP 288); "[I] came from CanAm Steel Corporation where market development, earning market share and product promotion was 80 percent of my job." (RP 291); "To become a recognized entity...to be on a short one call list..." (RP 293).

³ "[I]'d like to share a little bit with you..." (RP 279); "[I]t was shared with me... in a meeting..." (RP 287); "[M]ike hasn't ... shared he's been in the nuclear industry." (RP 287); "I'm not sure how to answer that. If I can share what was shared with me....I'll try and share." (RP 274-275); "We were putting lipstick and makeup on everything And we shared that." (RP 279-280); "[I] shared with them that I was going to have a number of people." (RP 311).

⁴ "I had promised Lonnie [his wife] that ...I wouldn't stay overnight [at jobs in Seattle, Spokane, Walla Walla]." (RP 285).

customer, one nibble, or even a "thank you" from any potential customer. (RP 294).

The jury could have easily concluded that the defendant was dishonest, a thief, and took Tri City Fabricating for a three month long ride where he paid for his meals, purchased gasoline, got medicine, bought clothing, went golfing, and had a fling, at company expense.

2. THE MATTER SHOULD NOT BE REMANDED TO ESTABLISH THAT THE DEFENDANT'S OFFENDER SCORE IS THREE.

There is no dispute that the defendant has three prior felonies. There is no dispute that he was sentenced on his last two felonies on August 30, 2002. The dispute is whether the defendant has spent five consecutive years in the community since his release crime free, pursuant to RCW 9.94A.525(2)(c). He has not. The defendant was convicted of Driving While License Suspended Third Degree on October 5, 2005. (CP 91-92). This Court can review an offender score calculation de novo. *State v. Wilson*, 113 Wn. App. 122, 136, 52

P.3d 545 (2002), *review denied*, 149 Wn.2d 1006, 67 P.3d 1097 (2003).

Further, the trial court had the option to impose an exceptional sentence. *Even if* the defendant had an offender score of zero, the trial court had the authority to impose a nine-month sentence.

Finally, the matter is moot. A case is considered moot if there is no longer a controversy between the parties, if the question is merely academic, or if a substantial question no longer exists. A case is not moot if the court can still provide effective relief. *Hough v. Stockbridge*, 113 Wn. App. 532, 54 P.3d 192 (2002). Here, the defendant was sentenced to nine months on work release on December 3, 2009. (CP 65). The sentence was not stayed. (RP 12/14/09, 432). At this point, the defendant has served his nine-month sentence. Any further questions about his offender score will be relevant only if the defendant commits another felony.

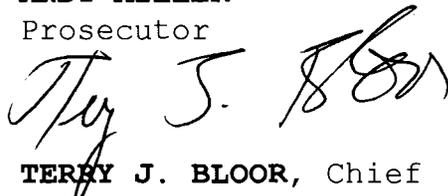
There is no reason to remand the case to determine the defendant's offender score.

CONCLUSION

For the above reasons, the defendant's conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 27th day
December 2010.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor". The signature is written in a cursive style with a large initial "T" and "J".

TERRY J. BLOOR, Chief
Deputy Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

ORIGINAL

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 287785

vs.

DECLARATION OF SERVICE

TOM OLIN MILLS,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on December 27, 2010.

Janet G. Gemberling
Gemberling & Dooris, PS
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on December 27, 2010.


PAMELA BRADSHAW