SUPREME COURT NO. 96088-7

NO. 34172-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY PUGH AKA COREY WILLIAMS,

Appellant.

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

The Honorable Bruce Spanner, Robert Swisher, Jacqueline Shea-Brown,
Alexander Ekstrom, Vic Vanderschoor, Judges

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Corey Javon Pugh, also known as Corey Javon Williams, the appellant below, seeks review of the Court of Appeals decision in State v. Williams, noted at 3 Wn. App. 2d 1048, 2018 WL 2069499, No. 34172-1-III (2018) (Appendix A), following denial of his motion for reconsideration on June 12, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. The State conceded it presented no evidence that the lien Pugh filed and used to obtain control over the motor vehicle was invalid. Although a detective testified Pugh had filed invalid liens in the past, the jury was instructed to consider the detective's testimony only for the "common scheme or plan of using legal documents to obtain property," not for establishing that such liens were fraudulent or invalid. Was there therefore insufficient evidence that Pugh obtained the vehicle either wrongfully or by color or aid of deception?

2. The prosecutor argued the jury heard no testimony about the validity of Pugh's lien, suggesting it was Pugh's burden to present such evidence. Was this reversible misconduct given that it commented on Pugh's decision not to testify and/or shifted the burden to Pugh by suggesting he held to burden to produce evidence as to the lien's validity?

3. Was the trial court's Farretta[1] colloquy inadequate because it failed to ensure Pugh understood the risks of self-representation?

4. Division Three's General Order on Appellate Costs[2] conflicts with RAP 14.2 and RAP 15.2 in that it requires an indigent appellant to complete additional procedural requirements and affirmatively establish continuing indigency to avoid the imposition of appellate costs. Should Division Three's General Order be stricken because, under RCW 2.06.040 and RAP 1.1(i), it conflicts with the rules promulgated by the Washington Supreme Court?

C. STATEMENT OF THE CASE

1. Charges and factual background

The State charged Pugh with theft of a motor vehicle. CP 1-2. The State alleged Pugh failed to return a vehicle rented from Avis Budget Group d/b/a Budget Rental Car in Richland. 4RP[3] 96, 105, 112-13. The registered owner of the vehicle was P.V. Holding Corporation and the lienholder on the car was Bank of New York Mellon Trust Company. 4RP 108, 121-22, 192.

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[1] Farretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[2] For ease of reference, the general order on appellate costs is attached as Appendix C.

[3] Consistent with briefing below, the verbatim reports of proceedings are referenced as follows: 1RP—December 28, 2015; 2RP—January 14, 2016 and March 23, 2016; 3RP—January 28, 2016; 4RP—February 22 and 23, 2016; 5RP—May 12 and 18, 2016).

Pugh contacted Budget and indicated that the Bank of New York Mellon owed him significant money and stated he was therefore going to file a lien to take possession of the vehicle. 4RP 150. Pugh filed a lien against the bank and faxed the Uniform Commercial Code financing statement to Budget. 4RP 154, 156-58.

The State, attempting to dispute Pugh's lien, sought leave under ER 404(b) to present testimony about Pugh's previous use of invalid liens to obtain property. 4RP 70. The trial court permitted this testimony, finding Pugh had used legal documents as a common scheme or plan "to assert authority or ownership over a variety of items . . . ." 4RP 74-75. Detective Rick Runge testified about his investigations into Pugh's use of legal documents to obtain or assert ownership interests in property. 4RP 230-59. However, Runge was not involved in investigating in the instant case.

Although Runge testified Pugh had falsified documents in the past to obtain property, the jury was instructed it could not consider Runge's testimony for this purpose. 4RP 305. The limiting instruction requested by the prosecution and given to the jury stated the jury could consider Runge's testimony "for the purpose of determining whether the defendant had a common scheme or plan of using legal documents to obtain property." CP 55; 4RP 317. It did not permit Runge's testimony to be considered for establishing Pugh's scheme of falsifying legal documents, given that the State

had not proven that the lien Pugh filed was false and given that the State conceded as much. 4RP 305.

Because the State presented no evidence as to the lien's falsity, the prosecutor argued in closing, "You guys, we didn't hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made." 4RP 325. Pugh objected that the prosecutor "was testifying for me" and the trial court overruled the objection. 4RP 325.

2. *Farretta* colloquy

Prior to trial, at Pugh's initial appearance, Pugh indicated he did not wish to be represented by an attorney. 1RP 3. The trial court asked Pugh if he understood he would be held to the same standards as an attorney as to his knowledge of the law, court rules, and presentation of evidence, and Pugh answered, "Yes, sir." 1RP 5. The trial court then inquired into Pugh's educational background; Pugh had stated he completed three years of college. 1RP 5. Pugh indicated he was familiar with the evidence rules after studying criminal and business law at Columbia Basin College, and also indicated he was familiar with the Revised Code of Washington. 1RP 5. When asked how he was familiar, Pugh stated, "I believe that I've had prior 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court [of Washington]." 1RP 6.

When asked whether Pugh wanted to represent himself, Pugh responded, "Absolutely. As a secured party, I am." 1RP 7. The court inquired what Pugh meant by secured party and Pugh responded, "I'm secured party in the State of Washington. My organization is secured party C. Williams LLC. I've been brought before this Court in that the Court is aware of my secured party status. Nothing further." 1RP 8. "With that said," the court allowed Pugh to represent himself. 1RP 8.

3. Verdict, judgment, sentence, and appeal

The jury found Pugh guilty of theft of a motor vehicle. CP 58; 4RP 345. Pugh was sentenced to the top of the standard range, 57 months. CP 90; 2RP 49.

Pugh appealed and argued, among other things, sufficiency of the evidence, burden-shifting prosecutorial misconduct, and inadequate Farretta colloquy. CP 66-67. The Court of Appeals rejected these arguments.

Despite Pugh's documented indigency, the State filed a cost bill asking that $4,667.57 in appellate costs be imposed against Pugh. Pugh objected and has not yet received a ruling on appellate costs.[4]

[4] Pugh will withdraw his challenge to Division Three's General Order if the Court of Appeals denies appellate costs while this petition for review is pending. If the Court of Appeals imposes appellate costs, Pugh will move to modify that decision and, if unsuccessful, seek discretionary review in this court. Only by filing this petition may Pugh preserve his challenge to Division Three's General in the event the Court of Appeals imposes costs against him.

D. ARGUMENT IN SUPPORT OF REVIEW

1. BECAUSE NO EVIDENCE WAS PRESENTED THAT PUGH OBTAINED PROPERTY WRONGFULLY OR BY COLOR OR AID OF DECPETION, THE STATE'S EVIDENCE OF THEFT WAS INSUFFICIENT

The State bears the due process burden of proving all elements of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The State presented no evidence that Pugh obtained the motor vehicle wrongfully or by color or aid of deception, alternative means of committing theft under RCW 9A.56.020(1)(a) and (b). The State presented evidence that Pugh had filed a lien against the owner of the vehicle and that Pugh indicated to Budget Rental Car that he was taking ownership of the vehicle through legal process because the legal owner of the vehicle owed him money. 4RP 150, 156-58. Pugh faxed a financing statement showing his lien. 4RP 151, 154, 156-57. Although the State introduced evidence of Pugh's lien, it never introduced evidence that the lien was invalid.

To be sure, the State sought and obtained pretrial permission to present Detective Runge's testimony that Pugh had previously used legal documents to attempt to obtain or pass off ownership interests in property. 4RP 230-59. However, Runge did not investigate this case and gave no indication that the lien filed in this case was anything but valid. 4RP 273-74.

The lack of evidence regarding the lien's validity became apparent when the parties discussed the limiting instruction associated with Runge's testimony. The trial court proposed including language that Runge's testimony regarding Pugh's common scheme or plan could be considered for whether Pugh "falsif[ied] documents to obtain property." 4RP 305. The State was "concerned about that language that by putting that in there that the State would then be held to have to prove the falsity of those documents" and noted, "that could be putting a burden on the State to prove an additional element of theft of a motor vehicle that I have not proven." 4RP 305. The State proposed removing "falsifying and just say use legal documents without a comment on the veracity of the document; to say use legal documents to obtain property." 4RP 306. The trial court agreed, and the instruction permitted the jury to consider Runge's testimony "only for the purpose of determining whether the defendant had a common scheme or plan of using legal documents to obtain property. You may not consider it for any other purpose." CP 55; 4RP 317.

The limiting instruction thus cabined the jury's consideration of Runge's testimony, allowing the jury to consider it for the sole purpose of whether Pugh had the common scheme of using legal documents to obtain property. But this issue was not in dispute. Pugh obviously had used legal documents to obtain control of the vehicle. The jury was not permitted to consider Runge's testimony to determine whether Pugh wrongfully used legal documents to obtain property. Nor was the jury permitted to consider Runge's testimony to determine whether Pugh used legal documents by color or aid of deception to obtain property. Even when viewing the evidence in the light most favorable to the State, a rational trier of fact could not consider Runge's testimony to establish Pugh's use of legal documents to obtain the vehicle was wrongful or deceptive.

The State expressly conceded it did not prove Pugh's lien was falsified. 4RP 305. No evidence was presented to the jury that the lien was wrongful or deceptive rather than completely lawful and binding. The State failed to carry its due process burden of proving every element of theft.

Nonetheless, the Court of Appeals concluded that the fact Pugh notified Budget he was taking possession of the car and then did not return the car was "evidence from which theft by taking and theft by deception could both be found." Appendix A at 7. But the Court of Appeals did not explain how this was so. It is troubling that the Court of Appeals did not so much as

acknowledge the effect of the limiting instruction on the evidence presented or that the State expressly conceded it presented no evidence as to the lien's validity. Because the Court of Appeals relieved the State of its burden in conflict with the constitutional decisions of this court on basic sufficiency principles, review is warranted under RAP 13.4(b)(1) and (3).

Review is also warranted under RAP 13.4(b)(4) as a matter of public importance, given the Court of Appeals' choice to assume the role of the prosecutor. Neither Pugh nor the State discussed the legal effect of the financing statement in their briefing, and the State certainly did not present evidence to the jury that the financing statement provided no legal interest in the vehicle. Yet the Court of Appeals addressed the legal effects of financing statements sua sponte, citing statutes and noting it "was evidence at most that The C Williams Group purported, unilaterally, to have a legal interest" and, "We can assess the UCC-1 financing statement for what it is: legally meaningless." Appendix A at 8. The State had every opportunity at trial to prove that Pugh's financing statement was "legally meaningless" and didn't even attempt to do so, as it directly acknowledged. The Court of Appeals' choice to act as auxiliary counsel for the prosecution, introducing evidence for the first time in an appellate decision that the State concededly failed to introduce, calls for RAP 13.4(b)(4) review.

2. PROSECUTORIAL BURDEN-SHIFTING ARGUMENTS AND COMMENTS ON PUGH'S CONSTITUTIONAL RIGHTS DEPRIVED PUGH OF A FAIR TRIAL

Perceiving she had presented insufficient evidence, the prosecutor argued, "You guys, we didn't hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made." 4RP 325. The Court of Appeals approved of the prosecutor's comment on Pugh's right to remain silent and improper burden-shifting.

The Court of Appeals decision conflicts with State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009). There, prosecutor argued, "Did the defendant make any statement that 'he put [the drugs] in my purse'? No. We didn't hear any of that testimony." Id. at 57-58. This was reversible error given that "the prosecutor suggested Dixon had an obligation to testify and to produce evidence of [the other] person's guilt." Id. at 58. RAP 13.4(b)(2) review is warranted because the misconduct here is essentially identical to the reversible misconduct in Dixon.

In addition, a "prosecutor may not comment 'on the lack of defense evidence because the defendant has no duty to present evidence.'" Dixon, 150 Wn. App. at 54 (quoting State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990)). "A prosecutor may only 'comment on a defendant's failure to call a witness' where 'it is clear the defendant was able to produce the witness

and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.'" Id. at 55 (quoting State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)).

Pugh did not imply that a missing witness would be able to corroborate the validity of his lien; Pugh did not testify. Nor was any such witness particularly under Pugh's control. The State could have called its own witnesses to attempt to establish the invalidity of Pugh's legal interest in the vehicle but did not. Instead, "the prosecutor shifted the burden of proof to [Pugh] when [s]he implied that []he should have presented evidence to support h[is] defense." Id.

The Court of Appeals held, "the prosecutor also reasonably argued that juror could and should find that Mr. Williams had no *right* to claim dominion," and that the "prosecutor merely argued that based on the evidence presented, the jurors could find that the UCC-1 form was 'not worth the paper it's written on.'" Appendix A at 8-9. But the Court of Appeals did not specify *what evidence* was presented that permitted this argument. As discussed, there was none, which the State conceded. As such, the State was not permitted to shift the burden to Pugh to prove that he had a valid legal claim to the vehicle. Because the Court of Appeals decision conflicts with Dixon and the cases cited therein regarding commenting on a defendant's silence and shifting the burden to present evidence, RAP 13.4(b)(2) review is warranted.

3. THE TRIAL COURT'S *FARRETTA* COLLOQUY WAS INADEQUATE

A waiver of counsel must be knowing, voluntary, and intelligent. City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). The defendant should be made aware of the nature and classification of the charge, the maximum penalty upon conviction, and the dangers and disadvantages of self-representation and what the task entails. Farretta, 422 U.S. at 835. Defendants should be advised that presenting a defense requires observance of technical rules and is not just "telling one's story." State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997). Courts are required to indulge in every reasonable presumption against finding that a defendant has waived the right to counsel. State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702 (2014).

While a colloquy is "strongly recommend[ed] . . . as the best means of assuring that the defendant understands the risks of self-representation," where there is no colloquy, the record must indicate that the defendant is actually aware that presenting a defense requires the observance of technical rules and is not just a matter of telling one's story. Acrey, 103 Wn.2d at 211; Nordstrom, 89 Wn. App. at 741-42.

The Court of Appeals decision cannot be squared with this case law, as the Court of Appeals described the trial court's colloquy as "extensive" while also acknowledging that the colloquy lacked the bare minimum

advisements set forth in Acrey. See State v. Williams, noted at 3 Wn. App. 2d 1008, 2018 WL 1611628, at *6 (2018).[5] The court correctly pointed out that a colloquy is strongly recommended by Acrey, not required, and that the court may look to evidence on the record to show the defendant's "actual awareness" of the risks. Id. However, the information relied on the Court of Appeals to establish actual awareness was profoundly inadequate.

First, when the trial court asked Pugh if he was familiar with the evidence rules and Revised Code of Washington, Pugh answered, "Yes." 1RP 5. The colloquy did not reach topics such as Pugh's substantive understanding of particular rules or statutes, or even their existence. Second, the Court of Appeals noted that Pugh "absolutely" understood he would be held to the same standards as an attorney, but was never told what those standards were. Williams, 2018 WL 1611628, at *6; 1RP 5. Third, the Court of Appeals relied on Pugh's college courses in criminal and business law as evidence of his actual awareness that technical rules existed which would bind him in the presentation of his case. Williams, 2018 WL 1611628, at *6. But it is unclear what, if anything, a criminal or business law student would learn about the evidence rules.

[5] The Court of Appeals imported its rejection of Pugh's challenge under Farretta from this other appeal undertaken by Pugh, so Pugh cites it accordingly. Appendix A at 2.

"[O]nly rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation." Acrey, 103 Wn.2d at 211. The trial court's inquiry, whether "extensive" or not, failed to advise Pugh that technical rules existed that would bind him in presenting his case. The evidence from the record the Court of Appeals relied on to establish Pugh's actual knowledge is inadequate, placing the Court of Appeals decision in conflict with Acrey and presenting a significant constitutional question. RAP 13.4(b)(1) and (3) review is warranted.

4. DIVISION THREE'S GENERAL ORDER ON APPELLATE COSTS CONFLICTS WITH RULES PROMULGATED BY THIS COURT

The Court of Appeals "may establish rules supplementary to and not in conflict with rules of the supreme court." RCW 2.06.040; accord RAP 1.1(i). "These supplementary rules will be called General Orders." RAP 1.1(i).

Division Three promulgated a general order on an adult offender's request to deny a cost award on June 10, 2016. It states, in pertinent part,

> (2) An adult offender convicted of an offense who wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request, together with citations to legal authority and references to relevant parts of the record, in the offender's opening brief or by motion as provided in Title 17 of the Rules

> on Appeal. Any such motion must be filed and served no later than 60 days following the filing of the appellant's opening brief. RAP 17.3 and 17.4 apply to the motion's content, filing and service and to the submission and service of any answer or reply.
>
> (3) If inability to pay is a factor alleged to support the request, then the offender should include in the record on appeal the clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of indigency and the offender's current or likely ability to pay discretionary financial obligations. The offender shall also file a report as to continued indigency and likely future inability to pay an award of costs on the form set forth below. The original report, signed by the offender under penalty of perjury, shall be filed with the court and a copy shall be served on the respondent no later than 60 days following the filing of the appellant's opening brief.

See Appendix C. This order thus requires indigent offenders to present arguments against the imposition of appellate costs in briefs or motions, or forgo their challenge to such costs. The order also mandates that indigent offenders file a report of continued indigency whenever the request for an appellate cost waiver is based on an inability to pay. These supplementary requirements conflict with RAP 14.2 and RAP 15.2 and are accordingly legally invalid. Because of the conflict between rules promulgated by the Washington Supreme Court and supplementary rules promulgated by the Court of Appeals, RAP 13.4 (b)(1) review is warranted.

Appellate courts interpret court rules using principles of statutory interpretation. Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). "If the rule's meaning is plain on its face, we must give effect to that meaning as

an expression of the drafter's intent." Id. The plain meaning of any given provision "is to be discerned from the ordinary meaning of the language at issue as well as from the context of the [court rule] in which that provision is found, related provisions, and the . . . scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Interpretation of court rules presents a question of law that is reviewed de novo. Jafar, 177 Wn.2d at 526.

Under RAP 14.2 and RAP 15.2(f), the trial court's determination of indigency creates a rebuttable presumption that indigency continues throughout the appeal. RAP 15.2(f) mandates that appointed counsel "bring to the attention of the appellate court any significant improvement during review in the financial condition of the party." If appellate counsel has not brought any change in financial circumstances to the appellate court's attention, "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f).

RAP 14.2 explicitly states that the RAP 15.2(f) presumption remains in effect "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly

improved since the last determination of indigency." "The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay." RAP 14.2.

The language of RAP 14.2 and RAP 15.2(f) is straightforward and easy to discern. An indigent appellant who remains indigent need do nothing at all to benefit from the continued presumption of indigency. If neither the State nor the offender submits evidence of significant improvement to financial circumstances, the trial court's indigency determination remains in effect. Appellate costs may not be awarded because no evidence has been offered to rebut the presumption of indigency and therefore no clerk or commissioner has evidence to determine an offender's ability to pay.

Division Three's general order is inconsistent with the presumption of continuing indigency established by RAP 15.2(f) and RAP 14.2. The general order states that if an offender "wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request," citing legal authority and the record. Thus, if no report is submitted and no request not to aware cost is made, then the general order indicates Division Three will automatically impose appellate costs.

This result is simply not compatible with the continuing presumption of indigency provided for in RAP 14.2 and RAP 15.2. Under these rules,

neither the offender nor the offender's attorney is required to undertake any action for the offender to continue to benefit from the trial court's indigency determination. The only exception is the RAP 15.2(f) requirement that the offender and his or her attorney notify the appellate court of a significant improvement in finances if there is one.

To further illustrate the conflict between Division Three's general order and the rules of appellate procedure, in 2016, this court proposed its own amendments to RAP 14.2 that contained a reporting requirement similar to what Division Three currently requires. This court's 2016 proposal read, in relevant part,

> An indigent adult offender who objects to a cost bill pursuant to RAP 14.5 shall file a report as to continued indigency and likely future ability to pay an award of costs on a form prescribed by the office of public defense. The form need not reiterate information contained in the trial court indigency screening form, but shall include supplemental information necessary to provide a basis for making a determination with respect to the individual's current or likely future ability to pay such costs. The form shall include a certification that no significant improvement during review in the financial condition of the indigent adult offender has occurred or, if a significant improvement during review in the financial condition has occurred, shall describe such improvements.

Proposed RAP 14.2, available at https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=535 (last visited May 1, 2018).[6] But, ostensibly based on the negative comments submitted about the

[6] For ease of reference, this proposed amendment to RAP 14.2 is attached as Appendix D.

reporting requirement, this court rejected this proposed amendment and instead amended RAP 14.2 to read as it currently does, giving a presumption of continuing indigency. Because this court rejected its own proposal for a reporting requirement, this court should take review to reject Division Three's general order that imposes a very similar reporting requirement.

Even though Pugh complied with the general order and even though his report indicates he remains indigent,[7] the State filed a cost bill anyway, seeking more than $4,000 in appellate costs against Pugh. Pugh has objected, but if costs are awarded, it will thwart the presumption of continuing indigency established by RAP 14.2 and RAP 15.2(f). RAP 13.4(b)(1) review is appropriate.

Finally, this petition should also be granted pursuant to RAP 13.4(b)(4) as an issue of substantial public importance. Not all indigent persons will be able to comply with Division Three's general order. It is not uncommon for indigent offenders to be totally or partially illiterate or suffer from other disabilities that make them unable to read or fill out the report. It is not uncommon for indigent offenders to speak and read languages other than English, and the report is not offered in any language but English. It is not uncommon for indigent offenders to be homeless or unstably housed, and

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[7] Although Pugh filed the report Division Three currently requires, he did not do so without objection to this procedural requirement.

therefore lack a fixed address to and from which a report can be mailed. In these scenarios, where the indigent offender would perhaps benefit the most from the continuing presumption of indigency, Division Three would impose appellate costs anyway. This unjust result is inconsistent with the policy reflected in RAP 14.2and RAP 15.2 and therefore merits review as a matter of substantial public importance under RAP 13.4(b)(4).

E. CONCLUSION

Because he satisfies all RAP 13.4(b) criteria, Pugh asks that review be granted.

DATED this 12th day of July, 2018.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON,	)	
	)	No. 34172-1-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
COREY JAVON WILLIAMS,	)	
	)	
Appellant.	)	

SIDDOWAY, J. — Corey Javon Williams—aka Corey Javon Pugh, Sr., who asked to be addressed as Corey Pugh, Sr. in the trial below[1]—appeals his conviction for theft of a motor vehicle. He contends the evidence was insufficient to support the jury's finding

[1] We will refer to the appellant as Corey Javon Williams, notwithstanding that the trial court honored his request to be referred to during trial as Corey Pugh.

The State offered evidence at trial that the appellant uses both names. He was charged and convicted as Corey Javon Williams, which is how he is identified on the FBI's Interstate Identification Index and on the Washington Judicial Information System's defendant case history.

of guilt, the prosecutor committed misconduct during closing argument, and that legal financial obligations (LFOs), some unconstitutional, were imposed without an adequate inquiry. A fourth assignment of error to the trial court's decision to allow Mr. Williams to represent himself was rejected in our decision in *State v. Williams*, No. 34171-2-III (Wash. Ct. App. Apr. 3, 2018) (unpublished), http://www.courts.wa.gov/opinions /pdf/341712_unp.pdf (*Williams* I). We accept the State's concession to strike three discretionary LFOs, remand with that direction, and otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

In September 2015, Corey Javon Williams rented a Ford Mustang from Budget Rental Car in Richland under the name "Corey J. Pugh." He did not return the car a week later, when the terms of his rental agreement provided for its return. The rental agreement provided for an extension of the rental prior to the return date by calling a toll-free number, but Mr. Williams did not request an extension. When Budget Rental's loss prevention department attempted to run the credit card used for the rental to cover additional charges accrued following the return date, the charge was declined. Budget Rental reported the Mustang stolen approximately five weeks after the missed return date.

The owner of the agency doing business as Budget Rental Car in Richland has a sister, Shelly Horton, who works for Budget Car Sales in the same building. Many years before he rented the Mustang, Mr. Williams and Ms. Horton had been coworkers at

Budget Car Sales. At about the same time that Budget Rental was moving forward with filing a report that the Mustang had been stolen, Ms. Horton received a telephone message about the car from Corey Pugh, who she later determined to be Mr. Williams. When Ms. Horton spoke to Mr. Williams, he told her that the bank that "was the legal owner on the title" to the Mustang owed him "a large sum of money," and he was going to file a legal proceeding to take ownership of the Mustang. Report of Proceedings (RP) (Trial) at 150, 156. He asked for a fax number and faxed Ms. Horton the copy of a UCC-1 financing statement. The financing statement had been filed by The C Williams Group, Mr. Williams's limited liability company (LLC), shortly after he rented the car. It represented that The Bank of New York Mellon Trust Company and PV Holding Corp. were indebted to The C Williams Group, that a "lien" was attached for "1,000,000,000.00 dollars," and that the billion dollar liability was secured by the Mustang. Ex. 3, at 1.

Budget Rental's practice was to keep the vehicle registration for its rental cars in the car's unlocked glove box. The registration for the Mustang rented by Mr. Williams would have provided him with information that title was held by PV Holding Corp. and that The Bank of New York Mellon and Trust Company was a lienholder.

The State charged Mr. Williams with theft of a motor vehicle on November 16, 2015. The Olympia Police Department recovered the Mustang on December 26, 2015.

On December 28, 2015, Mr. Williams appeared for arraignment in two matters: this matter and charges of two residential burglaries in Benton County case no. 15-1-

01178-6. He told the court he wished to proceed pro se. A *Faretta*[2] inquiry followed that is reproduced in our opinion in *Williams* I. *Williams* I, slip op. at 3-5. At a combined hearing on motions in both matters that took place in late January 2016, the court cautioned Mr. Williams about self-representation further, in statements that are also reproduced in our earlier opinion. *See id.* at 5.

The court allowed Mr. Williams to represent himself, which he did. In this case, he filed a number of motions and defended himself at a two day jury trial that began on February 22, 2016. During the trial, the State called as witnesses the owner of the Budget Rental agency, Ms. Horton, an investigating officer, and Detective Rick Runge.

Detective Runge testified to similar crimes for which Mr. Williams had been convicted in the past. Like the motor vehicle theft, the crimes described by Detective Runge had involved Mr. Williams's assertions of ownership based on unsubstantiated representations that he had some type of lien or security interest in personal or real property.

Mr. Williams called two witnesses: he recalled the owner of the Budget Rental agency and called the deputy prosecutor who was trying the case for the State.

During closing arguments the prosecutor argued, in part:

> [PROSECUTOR]: . . . [T]wo days before the car is due back, Mr. Williams or Mr. Pugh, or the C. Williams Group, all the same person is—

[2] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

> . . . .
>
> [PROSECUTOR]: —is making documentation, legal documentations that he's [owed] a billion dollars before their car is ever due back. . . . Well if he owned it, if he's owed a billion dollars, why not tell them right away? It's mine, I'm keeping it.
>
> You guys, we didn't hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made.
>
> MR. WILLIAMS: Objection, Your Honor. They did a jury instruction stating that the defendant does not have to testify, now she's testifying for me.
>
> THE COURT: No. I'm going to overrule the objection. Go ahead, counsel.
>
> [PROSECUTOR]: . . . So we know sometime between September 29th and October 4th, P.V. Holding Corp., or Budget Car Sales, came to owe him a billion dollars, if you believe the lien filing.
>
> You could also find, though, as a jury, that this lien filing is not worth the paper it's written on. You can find, based on the weight of the testimony from all of the witnesses who testified, based on his history, that this is just a way to obtain a car by theft; that this lien document is a way to take a rental car that belongs to someone else . . . and keep it. Because this is what he does.

RP (Trial) at 324-26.

The jury found Mr. Williams guilty. At sentencing, the trial court asked a couple of questions about his past work and future ability to work, found that he had the ability or likely future ability to pay LFOs, and imposed a total of $651.34.[3] Mr. Williams did not object. He now appeals.

[3] The court imposed a $200.00 criminal filing fee, a $60.00 sheriff's service fee, a $250.00 jury demand fee, a $100.00 DNA (deoxyribonucleic acid) collection fee, and $41.34 in witness fees.

ANALYSIS

In *Williams* I, we held that the trial court in this action and in Benton County case no. 15-1-01178-6 did not abuse its discretion in allowing Mr. Williams to represent himself. *Williams* I, slip. op. at 12-15. Our decision in that case disposes of that assignment of error here.

The additional issues raised in this appeal are the sufficiency of the evidence, alleged prosecutorial misconduct, and challenges to the court-ordered LFOs. We address the issues in the order stated.

The evidence was sufficient

Mr. Williams points out that while the State introduced evidence of a security interest and a lien through which he told Ms. Horton he intended to take ownership of the Mustang, it never produced evidence that his interest was invalid. Without proof that his interest was invalid, he claims that the State's evidence of theft of a motor vehicle was insufficient.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). A criminal defendant's claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015).

"A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." RCW 9A.56.065. "Theft," according to RCW 9A.56.020(1), means:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services.

"Subsection (a) is known as theft by taking while subsection (b) is known as theft by deception." *State v. Smith*, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990). In the trial below, the jury was instructed on both alternatives and was told it need not be unanimous as to means, so sufficient evidence must support both alternatives. *See State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

The State presented evidence that title to the Mustang was held by PV Holding Corp. It presented evidence that Mr. Williams had rights under a rental agreement that were limited to a week-long term and any extension authorized in accordance with the agreement's terms. It presented evidence that Mr. Williams never returned the Mustang nor took the steps required to extend the rental. It proved that his failure to return the car was knowing, as evidenced by his filing the UCC-1 financing statement and notifying Ms. Horton that he intended to take ownership. This is evidence from which theft by taking and theft by deception could both be found.

As for the State having offered the UCC-1 financing statement into evidence, a UCC-1 form exists to provide notice. It is not signed by the debtor and is not itself proof of any legal interest. *See* RCW 62A.9A.521(a); Ex. 3. The C Williams Group was not entitled to file the financing statement unless it was authorized to do so by the purported debtors. *See* RCW 62A.9A-509(a). It was subject to statutory damages if it filed the statement without the debtors' authorization. *See* RCW 62A.9A-625(e). The financing statement was evidence at most that The C Williams Group purported, unilaterally, to have a legal interest.

If jurors had mistakenly believed that the UCC-1 financing statement proved that Mr. Williams had an interest and acquitted him, their mistake would be unreviewable. But the jury did not acquit. We can assess the UCC-1 financing statement for what it is: legally meaningless. The evidence of theft was sufficient.

Prosecutorial misconduct

Mr. Williams contends that the prosecutor's statement during closing argument about having heard no testimony about how Mr. Williams came to be owed a billion dollars constituted prosecutorial misconduct. He characterizes it as an impermissible comment on his constitutional right to remain silent and as shifting the burden of proof to the defense.

Criminal defendants have no duty to present evidence, and a prosecutor commits error if he or she suggests otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830

(2003). A prosecutor's argument that shifts the State's burden of proof to the defendant constitutes misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, "[t]he mere mention that [the] defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). A defendant claiming prosecutorial misconduct bears the burden of proving "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)).

Mr. Williams ultimately argued two theories in his closing argument. One was that Corey Pugh, not Corey Williams, rented the Mustang. The other was that late return of a rental car without paying for the extension because of a declined credit card may be a breach of the rental agreement, but it is not a crime. To prove that Mr. Williams did not innocently hold onto the car intending to pay additional charges, the State offered the evidence that shortly after renting it, he filed the UCC-1 form and later told Ms. Horton he was taking ownership.

Having made the point that Mr. Williams was claiming dominion over the Mustang, not merely extending his rental, the prosecutor also reasonably argued that jurors could and should find that Mr. Williams had no *right* to claim dominion. The prosecutor never said it was Mr. Williams's burden to prove he had acquired title to the

car. The prosecutor merely argued that based on the evidence presented, the jurors could find that the UCC-1 form was "not worth the paper it's written on." RP (Trial) at 326. That was a fair inference from the evidence. The record included testimony and documentary evidence that the registered owner of the car was PV Holding Corp., countered only by a dubious representation by The C Williams Group that it had accepted the car as security for a billion dollar loan. The prosecutor's argument was neither improper nor prejudicial.

Legal financial obligations

Mr. Williams argues that the trial court's inquiry into Mr. Williams's present and future ability to pay before imposing discretionary LFOs was inadequate under RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). He challenges the court's treatment of the $200 criminal filing fee as if it were mandatory rather than discretionary and, assuming it is mandatory, as imposing it in violation of his right to equal protection. Finally, he argues that the victim's penalty assessment, imposed under RCW 7.68.035, and the DNA collection fee, imposed under RCW 43.43.7541, violate substantive due process when applied to defendants who do not have the ability to pay them.

The State concedes Mr. Williams's challenge to discretionary LFOs and agrees to a remand with directions to strike the sheriff's service fee, the jury demand fee, and the witness fees from the cost bill. It defends the remaining LFOs as mandatory and

constitutional. We accept the State's concession and will remand with directions to strike the three discretionary LFOs.

Turning to Mr. Williams's remaining challenges, as we held in *Williams* I, the criminal filing fee is mandatory. *Williams* I, slip op. at 20-21 (citing *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *State v. Gonzales*, 198 Wn. App. 151, 153, 392 P.3d 1158, *review denied*, 188 Wn.2d 1022, 398 P.3d 1140 (2017)).

His equal protection challenge to that fee, which he argues arises from the fact that the filing fee for indigent *civil* litigants may be waived under GR 34, has been rejected by this court. *State v. Mathers*, 193 Wn. App. 913, 925-26, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015, 376 P.3d 1163 (2016).

Finally, this court has rejected his substantive due process challenge to imposing the victim's penalty assessment and the DNA collection fee on defendants who do not have the ability to pay. *State v. Seward*, 196 Wn. App. 579, 585, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017).

In a motion filed along with his opening brief, Mr. Williams asks this court to

waive costs on appeal.[4] Under RAP 14.2, "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In order for the panel to exercise informed discretion, a general order of this division requires an appellant to request waiver of costs on appeal in his or her opening brief or by a motion filed and served within 60 days following the filing of the opening brief.[5] If the appellant is alleging inability to pay, he or she is required by the general order to provide the trial court's indigency report and a report as to continued indigency and likely future inability to pay.

In a report as to continued indigency attached to his motion, Mr. Williams lists outstanding debts in an amount that is ambiguous, given one amount that may be substantial but more likely is missing a decimal point. While he reports that he owns no property, has no source of income, and can pay nothing toward any costs awarded to the State, he is presently 40 years old and has completed two years of college. He was sentenced to 57 months' confinement.

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[4] Mr. Williams raises other matters in his motion, but the judges generally determine only those motions identified in RAP 17.2(a). By general order, we also permit criminal appellants to seek a waiver of fees on appeal by motion. That is the only matter raised by Mr. Williams's motion that we will consider. His remaining arguments can be raised in an objection to any cost bill filed by the State.

[5] See General Order of Division III, *In re the Matter of Court Administration Order re: Request to Deny Cost Award* (Wash. Ct. App. June 10, 2016), https://www.courts. wa .gov/appellate_trial_courts/?fa=atc.genorders&div=III.

Having considered his report the panel denies his motion, but without prejudice to his right to demonstrate to our commissioner his current or likely future inability to pay. See RAP 14.2.

We remand with directions to strike the sheriff's service fee, the jury demand fee, and the witness fees from the cost bill. We otherwise affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, A.C.J.

APPENDIX B

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COREY JAVON WILLIAMS, Appellant.	)	No. 34172-1-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 3, 2018 is hereby denied.

PANEL: Judges Siddoway, Korsmo, Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT E. LAWRENCE-BERREY
Chief Judge

APPENDIX C

The Court of Appeals
of the
State of Washington
Division III

IN RE THE MATTER OF COURT ADMINISTRATION ORDER RE: REQUEST TO DENY COST AWARD

GENERAL COURT ORDER

For an adult offender convicted of an offense who wishes the court to exercise its discretion not to award costs in the event the State substantially prevails on appeal, effective immediately,

IT IS HEREBY ORDERED:

(1) Under RAP 14.2, the commissioner or clerk will award costs to the party that substantially prevails on review, "unless the appellate court directs otherwise in its decision terminating review." In most cases, the decision terminating review (which is defined in RAP 12.3(a)) is the court's decision on the merits.

(2) An adult offender convicted of an offense who wishes this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal must make the request and provide argument in support of the request, together with citations to legal authority and references to relevant parts of the record, in the offender's opening brief or by motion as provided in Title 17 of the Rules on Appeal. Any such motion must be filed and served no later than 60 days following the filing of the appellant's opening brief. RAP 17.3 and 17.4 apply to the motion's content, filing and service and to the submission and service of any answer or reply.

(3) If inability to pay is a factor alleged to support the request, then the offender should include in the record on appeal the clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of indigency and the offender's current or likely ability to pay discretionary financial obligations. The offender shall also file a report as to continued indigency and likely future inability to pay an award of costs on the form set forth below. The original report, signed by the offender under penalty of perjury, shall be filed with the court and a copy shall be served on the respondent no later than 60 days following the filing of the appellant's opening brief.

(4) The panel issuing the opinion shall address the request or decide the motion in the opinion. Its decision may direct the commissioner or clerk to award costs subject to criteria identified by the panel.

Dated this 10th day of June, 2016

FOR THE COURT:

GEORGE B.FEARING
CHIEF JUDGE

APPENDIX D

PROPOSED AMENDMENT

RULES OF APPELLATE PROCEDURE

RAP 14.2

WHO IS ENTITLED TO COSTS

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender for whom an order of indigency has been entered does not have the current or likely future ability to pay such costs. An indigent adult offender who objects to a cost bill pursuant to RAP 14.5 shall file a report as to continued indigency and likely future ability to pay an award of costs on a form prescribed by the office of public defense. The form need not reiterate information contained in the trial court indigency screening form, but shall include supplemental information necessary to provide a basis for making a determination with respect to the individual's current or likely future ability to pay such costs. The form shall include a certification that no significant improvement during review in the financial condition of the indigent adult offender has occurred or, if a significant improvement during review in the financial condition has occurred, shall describe such improvements. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

Unless the parties agree that a cost bill will not be filed under RAP 14.2, an adult offender for whom an order of indigency has been entered should include in the record on review clerk's papers, exhibits, and the report of proceedings relating to the trial court's determination of the offender's current or likely future ability to pay discretionary legal financial obligations.

NIELSEN, BROMAN & KOCH P.L.L.C.

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