

NO. 75172-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

KARLA CHAVEZ-MONTOYA,

Appellant.

FILED
Sep 30, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Brian L. Stiles, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's conviction for Robbery in the Second Degree.

2. The trial court erred when it entered conclusions of law 3 through 5, which indicate or suggest appellant used force to obtain, retain, or overcome resistance to the taking of stolen property.

3. The sentencing court erred when it treated the \$200 criminal filing fee as a mandatory legal financial obligation (LFO).

Issues Pertaining to Assignments of Error

1. Appellant and a friend entered a Walmart store, placed several items in a cart, and the friend then walked out of the store without paying. Store security confronted appellant's friend and a second Walmart employee took control of the cart. The friend resisted security's efforts to bring her back into the store, eventually punching the security guard. Appellant then also punched the guard, causing the guard to disengage, and allowing the two to leave the scene. The robbery statute requires proof of force used to obtain, retain, or overcome resistance to the taking of stolen property. Where, as here, the evidence demonstrates – at most – force used to escape without the stolen property, must appellant's robbery

conviction be reversed?

2. In finding appellant guilty, the trial judge entered several conclusions of law indicating the State had proved the use of force to obtain, retain, or overcome resistance to the taking of stolen property. Where there is no evidence to support these conclusions, are they erroneous?

3. At sentencing, based on appellant's established indigence, the court waived all discretionary LFOs. It assumed, however, that the \$200 criminal filing fee was mandatory and ordered appellant to pay it. Did the sentencing court err?

B. STATEMENT OF THE CASE

The Skagit County Prosecutor's Office charged Karla Chavez Montoya one count of Robbery in the Second Degree. CP 6-7. Chavez Montoya waived her right to jury trial and agreed to have her guilt determined by the Honorable Brian Stiles. CP 8; 1RP¹ 7-8.

Chavez Montoya was convicted. 1RP 85-89. Judge Stiles's written findings of fact summarize the evidence presented. On October 16, 2015, at around 3:00 a.m., Chavez Montoya and a second female known only as "Smiles" entered a Mt. Vernon

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 31, April 1, 4, and 5, 2016; 2RP – May 6, 2016.

Walmart and shopped for about 30 minutes, placing numerous items in a shopping cart. CP 29-30. Smiles then exited the store with the cart and without paying. CP 30.

Ryan Meyer, working store security, confronted Smiles and directed her back into the store. During that process, she began to hit him. CP 30. A store surveillance video shows that shortly after Smiles began hitting Meyer, Chavez Montoya also began to strike Meyer. CP 30. Meyer eventually disengaged. Smiles and Chavez Montoya then left the area together in the car in which they had arrived. CP 30.

Judge Stiles found Chavez Montoya's explanation for what happened – that she was unaware Meyer worked for Walmart, was merely attempting to defend Smiles from what appeared to be an attack by Meyer, and was not involved with the theft of merchandise – not credible. CP 30-31; 1RP 60-65.

At the close of the State's case and again at the close of evidence, the defense argued the evidence was insufficient to demonstrate that force was used to obtain or retain the stolen merchandise, or to overcome resistance to the taking. 1RP 57-59, 82-83. Judge Stiles disagreed. 1RP 59-60, 86-88.

At sentencing, Judge Stiles imposed a standard range sentence of three months. 2RP 6; CP 17. The State asked Judge Stiles to impose "standard legal financial obligations." 2RP 3. Chavez Montoya asked for consideration of her "financial situation." 2RP 5. Judge Stiles waived all discretionary LFOs and, instead, imposed "the standard mandatory/legal financial obligations including; a five hundred dollar victim's assessment fee and then a criminal filing fee of two hundred dollars and one hundred dollar DNA collection fee and order that restitution be paid and determined at a later date." 2RP 6. Thus, LFOs total \$800. CP 18-19.

Finding that Chavez Montoya is "unable by reason of poverty/indigency to pay for any of the expenses of appellate review," Judge Stiles entered an order authorizing review at public expense. CP 38. Chavez Montoya timely filed her Notice of Appeal. CP 37.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S ROBBERY CONVICTION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25

L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Following a bench trial, appellate courts review findings of fact for substantial supporting evidence and review conclusions of law to determine whether the findings support them. State v. Homan, 181 Wn.2d 102, 105-106, 330 P.3d 182 (2014). Chavez Montoya does not challenge Judge Stiles written findings, but – as discussed below – neither the evidence nor his written findings support several of his written conclusions. Review of these conclusions is de novo. Id. at 106.

“A person is guilty of robbery in the second degree if he or she commits robbery.” RCW 9A.56.210(1). A person commits robbery when:

he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate

force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking

RCW 9A.56.190.

This statute has been interpreted to criminalize any taking of property by force, even when force is only used to retain property that has already been stolen. Thus, for example, where a shoplifter initially takes property without use of force, exits the store, and then uses force to retain the property once confronted, the crime committed is still robbery despite the absence of force used to take the property at the outset. See State v. McIntyre, 112 Wn. App. 478, 481-482, 49 P.3d 151 (2002) (discussing State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992) and State v. Manchester, 57 Wn. App. 765, 790 P.2d 217, review denied, 115 Wn.2d 1019, 802 P.2d 126 (1990)).

Thus, under this “transactional view” of robbery, the force can occur during the taking or thereafter to retain possession, and the transaction is not complete “until the assailant has effected his escape.” Handburgh, 119 Wn.2d at 290, 293 (quoting Manchester, 57 Wn. App. at 769); State v. Truong, 168 Wn. App. 529, 535-536, 277 P.3d 74, review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012).

Importantly, however, this does not mean that, following a theft, every use of force converts that theft to robbery. In State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005), the Supreme Court made clear that, even under the “transactional view” of robbery, the force must be used to obtain or retain property, or to prevent or overcome resistance to the taking. Force used merely to escape without the stolen property is not robbery.

Johnson walked out of a Walmart store with a television-video cassette recorder for which he had not paid. Johnson, 155 Wn.2d at 610. When confronted by store security, Johnson abandoned the shopping cart containing the stolen merchandise and began to run away before turning back. Id. When a security guard grabbed his arm, Johnson punched the guard in the nose and ran away. Id. Rejecting an attempt to expand the “transactional view” of robbery beyond the statutory elements of the crime, the Supreme Court held, “The transactional view of robbery as defined in Washington’s robbery statute requires that the force be used to either obtain or retain property or to overcome resistance to the taking.” Id. at 610-611. Because Johnson was not attempting to retain the stolen property when he punched the guard, but was merely attempting to escape after leaving the property behind, there was no robbery. Id.

at 611.

Johnson controls the outcome in Chavez Montoya's case. No force was used inside Walmart to obtain the stolen property. Moreover, Meyer's testimony, and the video of what occurred after Smiles left the store without paying, fail to demonstrate that force was used in an attempt to retain the stolen property or overcome resistance to its taking. Rather, at most, the evidence demonstrates force was used merely to escape without that property.

Meyer testified that, after he contacted Smiles, identified himself, and began directing her back into the store, she began punching him. 1RP 31. Chavez Montoya initially ran to her car, dropped off her purse, and then returned, eventually assisting Smiles in punching Meyer. 1RP 32, 40-41. Meyer disengaged and both women ran off, leaving the shopping cart behind, and fled in the car in which they had arrived. 1RP 32-34. Chavez-Montoya left her wallet in the cart, allowing police to identify her and arrest her later that day. 1RP 35-37, 44-52.

Videos related to the incident were admitted at trial as exhibit 17.² These videos show Smiles (dressed in dark clothing) leaving the store with the cart, followed by Meyer, followed by Chavez Montoya (dressed in gray), followed by another Walmart employee. Exhibit 17, "Vestibule" at 3:25:55-3:26:27; 1RP 38-39. Meyer initially makes contact with Smiles out of view, but when they return to frame, Meyer is attempting to physically force Smiles back into the store. Smiles no longer has the cart and is resisting his efforts. Exhibit 17, "Customer Entrance" at 3:26:00-3:26:13. Chavez Montoya briefly has contact with the two. Smiles and Meyer, with Chavez Montoya in their vicinity, then move out of view again. Exhibit 17, "Customer Entrance" at 3:26:13-3:26:19. The second Walmart employee takes possession of the cart and merchandize as Chavez Montoya can be seen walking away into the parking lot and toward the car. Exhibit 17, "Customer Entrance" at 3:26:22-3:26:36.

The second Walmart employee maintains possession of the cart thereafter. Exhibit 17, "Customer Entrance" at 3:26:36-3:27:17. Chavez Montoya eventually returns from the car and walks back

² Exhibit 17 is a DVD containing several video clips of Smiles and Chavez Montoya arriving at Wal-Mart, shopping, and leaving the store. Two clips, in particular, portray the two leaving and eventually tussling with Meyer. One is titled "Vestibule" and the second shares its title, "Customer Entrance," with several other clips. It can be distinguished by its size, however, which is 1.53 mb.

toward Smiles and Meyers, who are still out of view. Exhibit 17, "Customer Entrance" at 3:26:52-3:26:57. When the three come back into frame, Meyer has Smiles by the arm, Smiles punches Meyer, and Chavez Montoya joins in. Exhibit 17; "Vestibule" at 3:26:54-3:27:03; "Customer Entrance" at 3:27:00-3:27:03. Meyer disengages and the two girls run away. Exhibit 17, "Customer Entrance" at 3:27:03-3:27:12. The second Walmart employee then takes the recovered cart and merchandise back into the store. Exhibit 17, "Vestibule" at 3:27:04-3:27:17.

As in Johnson – and contrary to Judge Stiles's conclusions of law 3, 4, and 5 – there is no evidence Smiles or Chavez Montoya used force to retain the stolen property or overcome resistance to the taking. Neither Meyers's testimony nor the video clips establish any use of force while Smiles retained possession of the cart and its contents. The only use of force by Smiles or Chavez Montoya was after Smiles had been separated from the cart. Neither one of them attempted to regain possession of the cart thereafter, even after Meyer let them go.

Whether stolen property is voluntarily abandoned (Johnson) or removed from the shoplifter's possession by store personnel (this case), where the only evidence is that force was employed thereafter

to escape, rather than to retain the property or overcome resistance to the taking, a robbery conviction cannot stand even under a “transaction view” of the offense. Therefore, Chavez Montoya’s robbery conviction must be reversed and dismissed. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficient evidence is dismissal with prejudice).

2. THE \$200 CRIMINAL FILING FEE IS DISCRETIONARY AND SHOULD NOT HAVE BEEN IMPOSED.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing discretionary LFOs unless “the defendant is or will be able to pay them.” In determining LFOs, courts “shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3); see also State v. Blazina, 182 Wn.2d 827, 837-839, 344 P.3d 680 (2015) (requiring trial courts to consider an individual’s current and future ability to pay before imposing discretionary LFOs).

Judge Stiles considered Chavez Montoya’s financial circumstances, determining she should only be responsible for mandatory LFOs. He erred, however, in assuming criminal filing fees are mandatory. The nature of this fee is a question of statutory

interpretation, which this Court reviews de novo. State v. Moon, 124 Wn. App. 190, 193, 100 P.3d 357 (2004) (citing State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004)).

RCW 36.18.020 provides:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (emphasis added).

In State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013), Division Two of this Court found that criminal filing fees are mandatory, leaving sentencing courts without discretion to waive them based on a defendant's established poverty. But the Lundy court provided no rationale and no analysis of the language of RCW 36.18.020(2)(h). See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (without statutory analysis, Division Three merely cites Lundy for assertion filing fee must be imposed regardless of indigency).

Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay

inquiry. This Court should find against Lundy's determination that the filing fee is a mandatory LFO.

The language of RCW 36.18.020(2)(h) is markedly different from that in statutes imposing mandatory fees. The Victim's Penalty Assessment (VPA) is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). The statute is unambiguous in its command that such a fee shall be imposed. Likewise, the mandatory nature of the DNA-collection fee statute is also unambiguous, stating: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

In contrast, RCW 36.18.020(2)(h) does not directly set forth a mandatory fee, providing only that: "Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." Emphasis added. Despite the fact the Legislature clearly knows how to create an unambiguous mandatory fee, which absolutely must be included in a sentence, it did not do so in this statute. RCW 36.18.020(2)(h) does not say that every sentence

must include the fee or that judges may not waive the fee.

Indeed, the Washington Supreme Court's recent decision in State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016), acknowledges the different language found in RCW 36.18.020(2)(h). Discussing LFOs, the Duncan Court made the following observation:

We recognize that the legislature has designated some of these fees as mandatory. *E.g.*, RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals, State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020(2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). . . .

Duncan, 185 Wn.2d at 436 n.3 (underlined emphasis added). That the Court would identify those fees designated as mandatory by the Legislature, on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory, on the other, indicates an identified distinction.

By directing only that the defendant be "liable" for the criminal filing fee, the Legislature did not create a mandatory fee in RCW 36.18.020(2)(h). Blacks Law Dictionary recognizes the term "liable" encompasses a broad range of possibilities – from making

a person “obligated” in law to imposing on a person a “future possible or probable happening that may not occur.” Blacks Law Dictionary 915 (6th ed. 1990). Thus, “liable” can mean a situation from which a legal liability *might* arise. At best, RCW 36.19.020(2)(h) is ambiguous and, under the rule of lenity, its language must be interpreted in Chavez Montoya's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281, 283 (2005).

Judge Stiles intended only to impose mandatory LFOs. This Court should hold the criminal filing fee is a discretionary LFO and remand so that the \$200 fee can be stricken from Chavez Montoya's judgment and sentence.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

Judge Stiles properly found Chavez Montoya to be indigent, unable to pay the expenses of public review, and entitled to appeal at public expense. 2RP 7-8; CP 38-39. Although Chavez Montoya was employed at the time of her conviction, her modest gross monthly income (approximately \$1,800.00) is largely consumed by her monthly living expenses (\$1,400.00) and she has no significant assets. See CP 26-28; 2RP 7-8 (counsel focuses on Chavez Montoya's low income). Her testimony at trial revealed that she qualifies for food stamps and is responsible for at least one baby.

1RP 63, 68, 74-75.

Chavez Montoya's prospects for paying the costs of litigation in this Court are poor. Therefore, if she does not prevail on appeal, she asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (instructing defendants on appeal to make this argument in their opening briefs), review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs. Judge Stiles concluded, based on Chavez Montoya's circumstances, that he would not impose on her the burden of discretionary LFOs. RP 7. The result should be the same concerning the discretionary costs associated with this appeal.

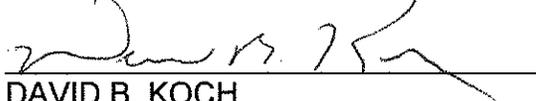
D. CONCLUSION

Chavez Montoya's robbery conviction should be dismissed for insufficient evidence, this Court should strike the \$200 criminal filing fee from her judgment and sentence and, assuming the State prevails on appeal and seeks reimbursement for appellate costs, this Court should deny the State's request.

DATED this 30th day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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