

NO. 48465-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMIL ALKITAB AL WALI MUTAZZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Michael Schwartz

No. 15-1-00820-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence for a jury to find defendant guilty of unlawful possession of a stolen vehicle?
2. Whether the Court should award appellate costs if the State substantially prevails and if the State submits a cost bill to which defendant may object?

B. STATEMENT OF THE CASE.

1. Procedure

On March 2, 2015, the Pierce County Prosecutor's Office (State) charged Jamil Alkitab Al Wali Mutazz (defendant) with one count of assault in the second degree, one count unlawful possession of a stolen vehicle, one count attempting to elude a pursuing police vehicle, and one count of resisting arrest. CP 1-2. On September 2, 2015, the State amended the information adding to counts one, two, and three the following aggravators: defendant was under community custody at the time of the commission of the crime; defendant committed the current offense shortly after being released from incarceration; defendant's multiple current offenses and high offender score would result in some offenses going unpunished; and defendant's prior unscored misdemeanors would result in a presumptive sentence that was too lenient. CP 6-10.

Following trial, a jury found defendant guilty of unlawful possession of a stolen vehicle, attempting to allude a pursuing police vehicle, and resisting arrest. CP 143-145. Defendant waived a jury determination for the rapid recidivism aggravator. CP 100-101. The trial court found defendant committed the crime after recent release from incarceration and his high offender score would result in a current offense being unpunished. 3RP 510, 513. On January 15, 2016, the trial court sentenced defendant to a standard range sentence for counts two and four, and an exceptional sentence above the standard range for count three. CP 165-179. The trial court imposed mandatory legal financial obligations, to which defendant made no objection. 3RP 515. Defendant filed a timely notice of appeal. CP 185.

2. Substantive Facts

On February 28, 2015, Young Kim drove his new Lexus to the dry cleaning store he owned in downtown Seattle, Washington. 1RP 119-120. He arrived at approximately 5:00 AM. 1RP 120-121. He had recently purchased the Lexus and it was in brand new condition. 1RP 124-25. He did not have anyone in the car with him when he drove to work that morning. 1RP 122. Kim left the keys in his car when he went into the store to use the bathroom. 1RP 121. When he came out of the bathroom, his car was gone. 1RP 121.

Kim's employee, Juan Galvan-Garcia, was also working that day. 1RP 109. He saw Kim's Lexus from inside the store. 1RP 111. Galvan-

Garcia saw a black male wearing a dark colored sweatshirt with a hood walk up to the driver's side of the vehicle, get in, and speed out quickly into the street. 1RP 111-13.

Kim immediately reported the theft of his car to police. 1RP 123. His Lexus was equipped with a LoJack device which, once activated upon report the car has been stolen, sends a signal to police allowing them to track the location of the vehicle. 1RP 123-24, 131.

At approximately 8:00 AM on the same day, Pierce County Sheriff's Deputy Olivarez received the activation signal from the Lexus' LoJack in Tacoma, Washington. 2RP 158, 169. Tacoma Police Officer Fredericks spotted the stolen Lexus at approximately 8:48 AM near J Street in Tacoma. 2RP 219. Fredericks saw only one occupant in the Lexus when he drove by it. 2RP 220. He did not see anyone else get in the car before it started moving. 2RP 220.

Fredericks, in a fully marked police vehicle, followed the Lexus which defendant was driving at a normal speed. 2RP 220-21. Olivarez located the Lexus with Fredericks behind it at a red light; he pulled in behind Fredericks to join in following the Lexus. 2RP 166. Olivarez was also driving a fully marked police vehicle. 2RP 151-52. When the light turned green, Fredericks and Olivarez both activated their emergency equipment, which included overhead light bars on their police vehicles, in an effort to stop the Lexus. 2RP 166. As soon as the officers activated their emergency lights, defendant started to flee, picking up speed very

quickly. 2RP 167. Defendant led officers on a high speed chase. 2RP 225. He drove the Lexus through a crosswalk which was occupied by a pedestrian and blew through red traffic lights with no attempts to stop. 2RP 177, 213.

Tacoma Police Officer Roberts also received the LoJack signal for the stolen Lexus and joined in the search. 2RP 245. Roberts received information regarding the direction the Lexus and pursuing officers were headed and positioned himself at an intersection through which the Lexus was likely to travel. 2RP 246. He set spike strips out on the roadway to disable and stop the fleeing vehicle when it passed through. 2RP 254, 258. When defendant approached in the Lexus, he swiftly turned the car towards Roberts, nearly hitting him. 2RP 263-64. There were no other occupants in the vehicle other than defendant when Roberts saw the Lexus. 2RP 270.

The Lexus slowed after the spike strips caused the front tire to deflate. 2RP 270, 185. Olivarez approached the Lexus and saw the driver, whom Olivarez identified as the defendant, exit the vehicle as it was still moving. 2RP 186-87. Olivarez immediately took chase after defendant. 2RP 187. He twice ordered defendant to stop, who continued to run. 2RP 188. Defendant stopped after Olivarez drew his service weapon and said, "Stop or I'll shoot." 2RP 189. Defendant identified himself to Olivarez. 2RP 189.

At trial, defendant took the stand and admitted he had possession of the vehicle. 3RP 375.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A JURY TO FIND DEFENDANT GUILTY OF UNLAWFUL POSSESSION OF A STOLEN VEHICLE.

Evidence is sufficient to support a conviction if any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* All inferences must be drawn most strongly against the defendant. *Id.* Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

RCW 9A.56.068 and RCW 9A.56.140 proscribe conduct constituting possession of a stolen vehicle. The jury was correctly instructed to find the following elements had been proved in order to convict:

(1) That on or about 28th day of February, 2015, the defendant knowingly possessed a stolen motor vehicle; (2) That the defendant acted with knowledge that the motor vehicle had been stolen; (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto; (4) That any of these acts occurred in the State of Washington.

CP 118.

Here, the evidence was overwhelming. A witness saw a person matching defendant's description steal the Lexus. 1RP 111-113. The theft was immediately reported to the police. 1RP 123. The LoJack tracking device on the vehicle was activated and within three hours, police located the vehicle in a nearby city. 2RP 158, 169. Police started following the vehicle and defendant immediately took off, leading them on a high speed chase. 2RP 167, 220. On appeal, defendant specifically challenges the State's evidence of his knowledge the vehicle was stolen. Brief of App. 5-8.

Evidence of flight and defendant's incomplete and improbable explanation as to how he came to be in possession of the stolen Lexus support a conclusion of guilty knowledge. *See State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1992) (possession, together with slight corroborating evidence of knowledge, may be sufficient to prove guilty knowledge); *see also State v Ladely*, 82 Wn.2d 172, 175-76, 509 P.2d 658 (1973) (in charge of grand larceny by possession, a false, improbable, or difficult to verify explanation in addition to possession was sufficient); *see*

also *State v. Withers*, 8 Wn. App. 123, 128, 504 P.2d 1151 (1972) (“[I]t is well established that when a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction”).

Defendant admitted he was driving the Lexus but he was unclear as to how he obtained it. 3RP 375-77. Defendant vaguely indicated he received the Lexus as the result of a drug transaction, “there was like a transaction sort of thing, and that’s how I was able to get behind the wheel and what have you.” 3RP 375. He did not know the name of the person from whom he claimed to have gotten the Lexus. 3RP 376, 389. He did not know where that person lived, and could not pinpoint where the transaction took place. 3RP 389-90.

Defendant claimed the person from whom he received the Lexus was in the vehicle with him in the passenger seat when he fled from police. 3RP 377. However, this was unsupported by the evidence. To the contrary, witnesses never saw another occupant in the vehicle. The witness to the theft of the vehicle saw only one person get in it. 1RP 111-113. Officer Fredericks saw only one occupant in the vehicle when he first located and approached it. 2RP 220. There were no other occupants in the vehicle while defendant led officers on the high speed chase. 2RP 220, 270. There was no indication of another occupant when Officer Olivarez approached the Lexus after it had been disabled. 2RP 186. Defendant never stated in his account of the events that this second person got out of

the car at some point. A jury may conclude from this incredible explanation that defendant is guilty.

Defendant's flight from police when they attempted to pull him over is circumstantial evidence of his guilt and corroborates that he knew the vehicle was stolen. *State v. Baxter*, 68 Wn.2d 416, 421, 413 P.2d 638 (1966); *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010) ("Analytically, flight is an admission by conduct").

Defendant committed additional crimes and risked lives, including his own, in an attempt to escape being caught in the stolen vehicle. 2RP 177, 213, 225. Defendant blew through red lights with no attempts to stop, he sped through an occupied crosswalk, he nearly hit Officer Roberts, and he exited the vehicle while it was still moving to continue his flight on foot. 2 RP 177, 213, 263-64, 186-88. Only after being ordered to stop or risk being shot did defendant abandon his attempt to escape. 2RP 189. His explanation that he fled to avoid being caught with drugs is inconsistent with the extreme measures he took to avoid capture. It is reasonable to conclude his actions were more consistent with those of someone who knew they were in a recently stolen vehicle and who wanted to avoid the consequences stemming from the theft and possession of that vehicle.

Taking defendant's improbable account of how he obtained the Lexus, his refuted testimony about a passenger in the vehicle, and his aggressive flight from police could lead a jury to conclude beyond a reasonable doubt that defendant knew he was driving a stolen vehicle.

Slight corroborating evidence of knowledge, along with possession of a recently stolen vehicle, is sufficient. *Scoby*, 117 Wn.2d at 61-62. In this case, the corroborating evidence is substantial and supports a finding of guilty of unlawful possession of a stolen vehicle.

2. THIS COURT SHOULD DECLINE TO ADDRESS THE AWARD OF APPELLATE COSTS BECAUSE THE ISSUE IS NOT RIPE; THE STATE HAS YET TO SUBSTANTIALLY PREVAIL AND HAS NOT SUBMITTED A COST BILL TO WHICH DEFENDANT MAY OBJECT.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *See State v. Sinclair*, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016); *see also State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); RAP 14.2. The question is not whether the Court can decide to order appellate costs but rather, when and how the Court will order appellate costs.

The legal principle that convicted offenders contribute toward the costs of the case, including the costs of appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). Requiring a defendant to contribute toward paying for

appointed counsel under this statute does not violate or even “chill” the right to counsel. *State v. Barklind*, 87 Wn.2d 814, 818, 557 P.2d 314 (1977).

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. RCW 10.73.160(1). In *Blank*, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). *Blank*, 131 Wn.2d at 239.

Under RCW 10.73.160, the time to challenge the imposition of legal financial obligations (LFOs) is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *see also State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009) (*citing State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant’s ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *See Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). “A defendant’s indigent status at the time of sentencing does not bar an award of costs.” *Crook*, 146 Wn. App. at 27. Likewise, the proper time for findings “is the point of collection and when sanctions are sought for nonpayment.” *See Blank*, 131 Wn.2d at 241–242; *see also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

It is only after the State has prevailed on appeal that RAP 14.2 affords the appellate court discretion in awarding costs. *Nolan*, 141 Wn.2d at 626. In *Nolan*, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. The Court in *Nolan* was explicit in that disposition of the appeal is required prior to ruling on appellate costs. *Id.* at 625. "[T]he first step in determining if costs under Title 14 of the Rules of Appellate Procedure may be awarded in a criminal appeal is to determine if the State is the 'substantially prevailing party.'" *Id.* Defendant's objection to appellate costs in his opening brief prematurely raises an issue that is not before the Court. Brief of App. 8-11. Defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail and if the State files a cost bill.

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency "must do more than plead poverty in general terms" in seeking remission or modification of LFOs. *State v. Woodward*, 116 Wn. App. 697, 704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *See Woodward*, 116 Wn. App. at 703-04; *see also Bearden v. Georgia*, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976).

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote:

The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *See Id.* at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Blazina*, 182 Wn.2d at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. The majority of criminal defendants are represented at public expense at trial and on appeal. To be represented at public expense in trial or on appeal, a defendant must be found to be indigent. *See generally Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed 891 (1956). Thus, the majority of the defendants taxed for costs under RCW 10.73.160 are indigent. Additionally, subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” RCW 10.73.160(3). It stands to reason then, that the defendants referenced by subsection 3 have been found indigent by the court.

Defendant argues that because he was found indigent at trial, there should be a presumption of indigency upon appeal and based on this, the Court should decline any future requests for costs. Brief of App. 10. Under defendant's argument, the Court should excuse any defendant found indigent at trial from payment of all costs at all stages, including appeal. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, the court in *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. *Sinclair*, 192 Wn. App. at 385. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *Id.* at 386 (citing RCW 10.73.160(4)).

In this case, the State has yet to "substantially prevail," nor has it submitted a cost bill to which the defendant may object on the grounds of manifest hardship. Therefore, this Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and to decline to review defendant's

objection to appellate costs until and if the State substantially prevails and the State submits a cost bill.

DATED: September 6, 2016.

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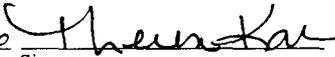
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9.8.16 
Date Signature

PIERCE COUNTY PROSECUTOR

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