

No. 50001-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

MELWYN VAN FIELDS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 15-1-00552-9

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF CASE</u>	1
C. <u>ARGUMENT</u>	2
1. Fields does not dispute that there is sufficient evidence to prove that he stole the victim’s EBT card, as charged in this case, but he contends that the evidence is insufficient to prove that the EBT card that he stole was, in fact, an access device. The State contends that because evidence in the record shows that the EBT card can be used in the same way as a debit card to buy items in a store, it falls within the statutory definition of an “access device” and, thus, this evidence is sufficient to sustain the jury’s verdict of guilty.....	2
2. Fields contends that, because he is indigent or has a current claim of indigence, this Court should relieve him from any obligation to pay appellate costs in the event that the State is the substantially prevailing party on appeal. The State contends that notwithstanding Fields’s current claim of indigence, the evidence shows that he has the ability to pay LFOs and that, therefore, in the event that the State is the substantially prevailing party on appeal and in the event that the State files a cost bill and seeks the payment of appellate costs, this Court should allow a court commissioner to decide the issue in the normal course of procedure.....	6
D. <u>CONCLUSION</u>	8

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	7
<i>State v. Clay</i> , 144 Wn. App. 894, 184 P.3d 674 (2008).....	5
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	4
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	7
<i>State v. Rose</i> , 175 Wn.2d 10, 282 P.3d 1087 (2012).....	4, 5, 7
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	4
<i>State v. Schloredt</i> , 97 Wn. App. 789, 987 P.2d 647 (1999).....	5
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612	7
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254	4

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statutes

RCW 9A.56.010(1).....3, 5
RCW 10.73.1607

Court Rules

RAP 10.3(b).....1
RAP 14.27

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Fields does not dispute that there is sufficient evidence to prove that he stole the victim's EBT card, as charged in this case, but he contends that the evidence is insufficient to prove that the EBT card that he stole was, in fact, an access device. The State contends that because evidence in the record shows that the EBT card can be used in the same way as a debit card to buy items in a store, it falls within the statutory definition of an "access device" and, thus, this evidence is sufficient to sustain the jury's verdict of guilty.
2. Fields contends that, because he is indigent or has a current claim of indigence, this Court should relieve him from any obligation to pay appellate costs in the event that the State is the substantially prevailing party on appeal. The State contends that notwithstanding Fields's current claim of indigence, the evidence shows that he has the ability to pay LFOs and that, therefore, in the event that the State is the substantially prevailing party on appeal and in the event that the State files a cost bill and seeks the payment of appellate costs, this Court should allow a court commissioner to decide the issue in the normal course of procedure.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Fields's statement of facts, except where the State offers additional facts or contrary facts as appropriate to complete the record in support of the State's arguments, below. RAP 10.3(b).

State's Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

C. ARGUMENT

1. Fields does not dispute that there is sufficient evidence to prove that he stole the victim's EBT card, as charged in this case, but he contends that the evidence is insufficient to prove that the EBT card that he stole was, in fact, an access device. The State contends that because evidence in the record shows that the EBT card can be used in the same way as a debit card to buy items in a store, it falls within the statutory definition of an "access device" and, thus, this evidence is sufficient to sustain the jury's verdict of guilty.

Fields contends that there is insufficient evidence to prove that an EBT card is an access device. Br. of Appellant at 6-17. To support his contention, Fields provides argument wherein he compares EBT cards to funded gift cards and credit cards. Br. of Appellant at 12. Fields argues that "[a] credit card or funded gift card is unlike an EBT card because a credit card or gift card, once activated, is shockingly easy to use illicitly and remains active until it is cancelled by the issuing company, bank or credit union." Br. of Appellant at 12. But Fields offers no citation to the record to support his factual contention, and still more, Fields has not shown that his contentions are factually accurate or, for the purposes of defining an access device, that there is any relevant difference between a credit card, gift card, and an EBT card. Fields argues that "[t]he operation of an EBT card is unlike that of a credit card or even gift card, where there is an assurance that something of value can be obtained from an account

by illegal use of the card.” Br. of Appellant at 16. But, again, Fields has not identified any meaningful distinction, because any access device, whether an EBT card, a credit card, or a debit card, can expire or otherwise become invalidated due to over limit spending, a closed account, or for any number of other reasons, and thus there is no more certainty of receiving something of value from a debit or credit card than there is from an EBT card.

The meaning of the term “access device” is defined by statute, as follows:

“Access device” any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

RCW 9A.56.010(1). Here, Freeman testified that “[y]ou can use an EBT card just like any other debit card at the store” and that “[a]s long as they accept it, you can use it just as a debit card” to access TANF and food stamp benefits. RP 89. Freeman also testified that the EBT card is accessed by use of a code related to user’s birthday. RP 89. It follows that the EBT card is “any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

another access device” and that it can be used in this way “to obtain money, goods, services, or anything else of value[.]”

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court’s findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Fields relies primarily on the case of *State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087 (2012), Br. of Appellant at 14, and argues that there is insufficient evidence to show that an EBT is an access device, because, he contends, the evidence is insufficient to show that the EBT card was linked to an unexpired account, that Freeman was qualified to receive benefits from the account, whether the card was still active after her name changed due to marital status, whether she continued to be qualified after a review or expiration (apparently in the event that one of these

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

contingencies might have applied to her) Br. of Appellant at 12, 16, and 17. *State v. Rose* held that when the evidence affirmatively shows that a credit card is neither activated nor linked to an active account it is not an access device because in such circumstances there is an affirmative showing that it cannot be used to obtain anything of value. *See* 175 Wn.2d 10, 17-18 & n.1. But *Rose* does not create any presumption that without affirmative evidence that an access device is active and usable, the evidence is insufficient to prove that it is an access device. *Id.* Unlike the facts of *Rose*, the evidence here does not affirmatively shown that Freeman's EBT card was inactive; therefore, *Rose* does not apply to the instant case.

In *State v. Schloredt*, 97 Wn. App. 789, 987 P.2d 647 (1999), the court held that the State makes a sufficient showing of an "access device" where, absent evidence to the contrary, the State presents testimony from which a reasonable inference could be made that the card was active. *Id.* at 794. Similarly, in *State v. Clay*, 144 Wn. App. 894, 184 P.3d 674 (2008), *review denied*, 165 Wn.2d 1014 (2009), the court held that the statutory definition of "access device," RCW 9A.56.010(1), focuses on the capacity of the device be used and does not require the device to be activated. *Clay* at 898-99.

State's Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Here, there is no evidence that the EBT card was inactive, unusable, or not linked to an active account. Therefore, when applying the correct standard of review of claims of insufficiency of the evidence, Freeman's testimony that the EBT card is usable "like any other debit card" to tap into her TANF and food stamp accounts to buy things at the store, RP 89, is sufficient evidence to sustain the jury's verdict of guilty in this case.

2. Fields contends that, because he is indigent or has a current claim of indigence, this Court should relieve him from any obligation to pay appellate costs in the event that the State is the substantially prevailing party on appeal. The State contends that notwithstanding Fields's current claim of indigence, the evidence shows that he has the ability to pay LFOs and that, therefore, in the event that the State is the substantially prevailing party on appeal and in the event that the State files a cost bill and seeks the payment of appellate costs, this Court should allow a court commissioner to decide the issue in the normal course of procedure.

At sentencing, the prosecutor recommended that the sentencing court impose a combined total of \$1,853.80 in mandatory and discretionary legal financial obligations (LFOs). RP 158. Afterward, when the defense addressed the court, Fields's attorney asked the court to impose two months of electronic home monitoring (EHM) and informed the court that Fields was prepared to pay \$148.00 every two weeks for the cost of EHM if the court were to order EHM. RP 160. When Fields

State's Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

addressed the court, he informed the court that he was working two jobs, one of which was seasonal with six months on and six months off. RP 161. Fields informed the court that there was nothing that would prevent him from paying toward his LFOs. RP 162.

The court found that Fields has the current ability to pay LFOs. RP 164. On appeal, Fields asks this Court to exercise its discretion to deny any request for appellate costs in the event that the State is the substantially prevailing party on appeal and requests the payment of appellate costs. Br. of Appellant at 17-19. Fields contends that he should be relieved from the payment of appellate costs because the trial court found him indigent. *Id.* at 18.

Under RCW 10.73.160 an appellate court may require a convicted defendant to pay appellate costs where the State is the substantially prevailing party on the appeal. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). However, the award of appellate costs is discretionary with the Court. *State v. Sinclair*, 192 Wn. App. 380, 385-86, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000); RAP 14.2.

In the instant case, despite Fields's current indigence or claim to indigence, the evidence shows that he has the ability to pay the LFOs that

State's Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the trial court imposed. It follows, then, that – notwithstanding any current indigence or claim to indigence – Fields has the ability to earn income and pay some amount toward appellate costs (in the event the State is the substantially prevailing party on appeal and in the event that the State files a cost bill and requests costs on appeal, the amount of which, is yet undetermined). Accordingly, the State asks that this Court exercise its discretion and allow the State the option of filing a cost bill in this case and seeking the payment of appellate costs, in the event that the State is the substantially prevailing party on appeal.

D. CONCLUSION

For the reasons argued above, the State asks this Court to deny Fields appeal and to sustain the jury’s verdict of guilty in this case.

DATED: August 14, 2017.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State’s Response Brief
Case No. 50001-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON CO PROS ATY OFFICE

August 14, 2017 - 3:35 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50001-9
Appellate Court Case Title: State of Washington, Respondent v Melwyn Van Fields, Appellant
Superior Court Case Number: 15-1-00552-9

The following documents have been uploaded:

- 2-500019_Briefs_20170814153420D2026468_1021.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 50001-9-II --- State v. Melwyn Fields --- Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- bleigh@tillerlaw.com
- ptiller@tillerlaw.com

Comments:

Sender Name: Timothy Higgs - Email: timh@co.mason.wa.us

Address:

PO BOX 639

SHELTON, WA, 98584-0639

Phone: 360-427-9670 - Extension 417

Note: The Filing Id is 20170814153420D2026468