

No. 50156-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS BAJARDI

Appellant.

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

The Honorable Chris Lanese
Cause No. 16-1-01896-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in admitting a certified copy of Erin Roblin's driver's license as a self-authenticating business or public record under RCW 5.44.020 or 5.44.040.

2. Whether sufficient evidence supported the trial court's finding that Bajardi was guilty of Felony Violation of a Domestic Violence No Contact Order.

3. Whether this Court should impose appellate costs pursuant to RCW 10.73.160(1) if the State prevails in this appeal.

B. STATEMENT OF THE CASE.

1. Substantive Facts

A no-contact order was issued against Nicholas Bajardi by the Thurston County Superior Court protecting Erin Roblin. Bajardi signed the no-contact order on November 10, 2014. Exhibit 2, CP 93. Bajardi had previously been convicted of three violations of a no contact order. Exhibit 3, CP 93.

On November 2, 2016 around 1:00 pm Officers Lett and Rodriguez were called to a wooded area off Somerset Hill Drive on report of a suspicious vehicle that might have been trespassing. RP 48. When the officers arrived they heard a male voice and a female voice. RP 50. They began to walk towards the vehicle, and split up approaching the vehicle from different angles. RP 51. When the man, who the officers later identified as Nicholas Bajardi by his

driver's license, RP 76, saw Officer Lett he started to walk away from the van and the woman. RP 52. Officer Lett stopped and talked to the woman who was in the van with a child, RP 52, while Officer Rodriguez spoke with Bajardi. RP 53. Officer Lett identified the woman at the scene. RP 64. Both officers testified that the woman on the photograph of Roblin's driver's license, admitted as Exhibit 1, was the same woman who they contacted on November 2, 2016. RP 58; RP 76.

After speaking with the female, the officers detained Bajardi for further investigation. RP 54. After being handcuffed Bajardi told the officer's "I wasn't talking to her." RP 56, CP 93. Officer Rodriguez also confirmed that Bajardi had a Department of Corrections warrant for escaping community custody. RP 74.

2. Procedural Facts

At trial Bajardi's attorney objected to the use of Exhibit 1, Roblin's driver's license. The objection was overruled and Bajardi was found guilty of Felony Violation of No-Contact Order. RP 112-113, CP 94. Bajardi timely appealed. RP 144.

C. ARGUMENT.

1. The trial court did not abuse its discretion by admitting the driver's license as self-authenticating.

The trial court did not abuse its discretion when it admitted Erin Roblin's driver's license into evidence as Exhibit 1. The court of appeals should affirm the trial court's decision that the driver's license was admissible, and that it was within the trial court's discretion to do so. The "court reviews a trial court's decisions as to admissibility of evidence under an abuse of discretion standard." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The decision of the trial court will not be reversed absent a manifest abuse of discretion. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Further, "the trial judge's decision to admit or exclude business records is given great weight and will not be reversed unless there has been a manifest abuse of discretion." State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990) (see Cantrill v. American Mail Line Ltd., 42 Wn.2d 590, 608, 257 P.2d 179 (1953); State v. Barringer, 32 Wn. App. 882, 885, 650 P.2d 1129 (1982).

"Discretion is abused if it is exercised on untenable grounds or for untenable reasons." State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting State v. Thang, 145, Wn.2d 630, 642,

41 P.3d 1159 (2002) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). “Whether this discretion is based on untenable grounds, or is manifestly unreasonable... depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Relevant evidence is defined as “evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Relevant evidence is admissible, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. A trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.” Stenson, 132 Wn.2d at 701-02.

In State v. Mares, Mares appealed his conviction of violation of no-contact order in which Brittany Knopff was the petitioner. State v. Mares, 160 Wn. App. 558, 560, 248 P.3d 140 (2011). Knopff did not attend the trial, and to prove that she was the person protected by the no-contact order the State introduced a copy of

her driver's license. Id. at 561. "The license was admissible as a public record." Id. at 565. The court stated that business and public records are admissible because they are "created for administration of an entity's affairs and not for the purpose of proving or establishing a fact at trial, they are not testimonial." Id. at 564.

State v. Ziegler analyzes RCW 5.45.020 which allows for business records to be admitted as evidence. Ziegler states that RCW 5.45.020 "makes evidence that would otherwise be hearsay competent testimony." Ziegler, 114 Wn.2d at 537. Also Ziegler "contemplates that business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify." Id. at 538.

"Copies of all records and documents on record or on file in the offices...of this stated.., when duly certified by the respective officers having by law the custody thereof, under their respective seals, shall be admissible in evidence in the courts of this state." RCW 5.44.040. Certified records of the Department of Licensing have consistently been held to qualify as a public record under RCW 5.44.040. State v. Monson, 113 Wn.2d 833, 784 P.2d 485 (1989). RCW 5.44.040 "provides for admissibility of certified copies of public records as an exception to the hearsay rule." Id. at 839.

With the established exception to the hearsay rule, Washington courts have focused the inquiry regarding admissibility on the confrontation clause. U.S. Const. amend VI; Wash., art I, Sec. 22; Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004); State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012); State v. Mares, 160 Wn. App. 558 (2011).

In Mares, the Court stated that “business and public records are generally admissible absent confrontation because, having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial.” Mares, 160 Wn.App.at 564.

The facts in this case are quite similar to the facts in Mares, and the admission of a certified copy of Roblin’s driver’s license mirrors the approach that was approved in Mares. Id. at 561, 564. The trial court admitted the document as self-authenticating. RP 23. Officers Lett and Rodriguez both testified that the picture of the woman in the driver’s license admitted as Exhibit 1 was the same woman that was in the vehicle when they arrested Bajardi. RP 58, 76.

The trial court’s decision to admit the driver’s license as self-authenticating was accurate and was not error under either the

public records exception under RCW 5.44.040 or the business records exception under RCW 5.44.020. The driver's license is relevant evidence that aided in the determination that the Erin Roblin in the no-contact order is the same Erin Roblin that was in the vehicle at the time Bajardi was arrested. The trial court's admission of the driver's license as evidence was made with the broad discretion imparted upon the trial court and should be affirmed on review.

2. The State presented sufficient evidence to convict Mr. Bajardi of violating a no contact order.

The evidence presented by the State was sufficient to convict Bajardi of violating a no contact order. This court should hold that the evidence presented in the trial court was sufficient. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably

support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be

unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

In the case at hand to establish the Erin Roblin from the scene as the same Erin Roblin in the no-contact order the police officers identified the woman by the photo in her driver's license, Exhibit 1. RP 58, 76. The trial court specifically found that both officers were credible. CP 93. It is not a mere coincidence that the information from Exhibit 2, the no-contact order, matches the information from Exhibit 1, Erin Roblin's driver's license. The information is the same because they are the same person. The trial court carefully reviewed the evidence presented and thoughtfully weighed the evidence in both its oral and written findings of fact. RP 109-112, CP 90-94. When this information is viewed in the light most favorable to the State any rational trier of fact could have found Bajardi guilty of the crime which he was charged. The evidence reasonably supports a finding of guilt. This court should hold that the evidence presented by the State at trial was sufficient to convict Bajardi of violating a no-contact order.

3. The court should not waive the appellate costs.

“RCW 10.73.160 provides for recoupment of appellate costs from a convicted defendant.” State v. Blank, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). Under this statute, an appellate court “may require an adult . . . convicted of an offense . . . to pay appellate costs.” RCW 10.73.160(1). Costs are limited to expenses incurred by the State in prosecuting or defending an appeal or collateral attack from a conviction and includes the costs of report of proceedings, clerk’s papers, and fees for court appointed counsel. RCW 10.73.160(2); Blank, 131 Wn.2d at 234. The statute adopts by reference the procedures under RAP 14 for a cost award. RCW 10.73.160(3) (“Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure[.]”). The awarded costs become part of the judgment and sentence. RCW 10.73.160(3). The statute allows the trial court “at any time” to remit any unpaid portion of the costs at a request by the defendant who is not in contumacious default in the payment, if

it appears that payment “will impose manifest hardship on the defendant” or his or her immediate family. RCW 10.73.160(4).

In Blank, a 1997 decision, the Supreme Court held that an inquiry into the defendant’s ability to pay is not constitutionally required before appellate costs are imposed under RCW 10.73.160, although such an inquiry is required “before enforced collection or any sanction” for nonpayment. Blank, 131 Wn.2d at 239-42. The court pointed out that the statute contemplates an inquiry into ability to pay at the time the defendant requests remission of costs. Id. at 242. “[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant’s finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer.” Id. The court further held that RAP 15.2, which presumes a defendant’s indigency “throughout the review” is not inconsistent with the statute because a cost award is made “after review is completed.” RAP 15.2(f) (“The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the

party's financial condition has improved to the extent that the party is no longer indigent."); Blank, 131 Wn.2d at 239-42.

Blazina addressed imposition of discretionary legal financial obligations (LFOs) at sentencing under RCW 10.01.160(3), which provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The court interpreted the statute to require "an individualized inquiry into the defendant's current and future ability to pay." Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The court stated that the trial court should look to GR 34 for guidance—"if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. Id. Further, in reaching the merits of the issue of LFOs for the first time on appeal, the Supreme Court discussed national-level problems associated with LFOs imposed against indigent defendants who are unable to pay them (such as compounding interest) as well as significant disparities in the administration of LFOs in Washington. Id. at 834-837.

The requirement that the trial court assess the defendant's ability to pay derives from RCW 10.01.160(3) and does not apply to appellate costs. In re Pers. Restraint of Wolf, 196 Wn. App. 496, 511, 384 P.3d 591 (2016), citing State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016).

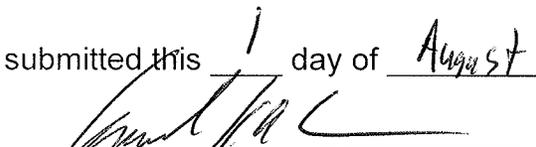
Bajardi asks this court to waive his appellate costs because he was found indigent by the trial court for purposes of appeal. CP 221-22. It is not unfair to ask the appellant to shoulder the cost of proceedings resulting from his commission of a crime. Those costs have to be paid by someone; they do not simply evaporate. If Bajardi does not pay them the taxpayers must, and it takes only a glance at any newspaper to discern that a good share of the taxpayers are also struggling financially. At such future time as the State seeks to collect the costs of appeal, Bajardi has the statutory right to seek remission if he truly cannot pay. He may, however, become a productive citizen who can afford to pay those costs. The appellate courts have discretion under RCW 10.73.160(1) whether to grant or deny appellate costs. State v. Young, 198 Wn. App. 797, 804, 396 P.3d 386 (2017).

The State respectfully asks this court to exercise its discretion and impose the costs as requested by the State in the cost bill.

D. CONCLUSION.

For the reasons stated above the trial court did not abuse its discretion in admitting Erin Roblin's driver's license as a self-authenticating business or public record. The evidence presented at trial was sufficient to support the trial court's finding of guilt. The State respectfully asks that this court affirm the findings of the trial court.

Respectfully submitted this 1 day of August, 2017.



Joseph J.A. Jackson, WSBA# 37306
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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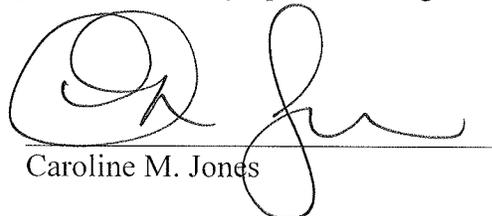
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1 day of August, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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