

FILED

JAN 08, 2014

Court of Appeals
Division III
State of Washington

No. 31499-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ADRIENNA MARIE MOSER,
Defendant/Appellant.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT
Honorable William D. Acey

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....10

 1. Ms. Mosier’s right to due process under Washington
 Constitution, Article 1, § 3 and United States Constitution, Fourteenth
 Amendment was violated where the State failed to prove the essential
 elements of the crime of second degree burglary.....10

 2. Ms. Mosier’s right to due process under Washington
 Constitution, Article 1, § 3 and United States Constitution, Fourteenth
 Amendment was violated where the State failed to prove the essential
 elements of the crime of second degree theft.....16

 3. The directive to pay based on an unsupported finding of ability
 to pay legal financial obligations and the discretionary costs imposed
 without compliance with RCW 10.01.160 must be stricken from the
 Judgment and Sentence.....19

 a. The finding of ability to pay and the directive to pay monthly
 payments must be stricken.....20

b. The imposition of discretionary costs of \$1,425 must also be stricken.....	24
D. CONCLUSION.....	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	20
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)...	20
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	10
<i>Leary v. United States</i> , 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).....	17
<i>Turner v. United States</i> , 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970).....	15, 17, 19
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	22
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	11, 16, 19
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	22, 24, 25, 26
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	14, 17
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	19, 22, 23

<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (2013), rev. granted (Sup. Ct. no. 89028-5, oral argument scheduled February 11, 2014)..	19–20
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	22
<i>State v. Calvin</i> , __ Wn. App. __, 302 P.3d 509 (2013)....	19, 22, 23, 25, 26
<i>State v. Collins</i> , 110 Wn.2d 253, 751 P.2d 837 (1988).....	12, 14
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	11
<i>State v. Corcoran</i> , 82 Wash. 44, 143 P. 453, 455 (1914).....	13
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	11
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	20, 21, 25
<i>State v. Deitchler</i> , 75 Wn. App. 134, 876 P.2d 970 (1994).....	14, 16
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	19
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	19
<i>State v. Hundley</i> , 126 Wn.2d 418, 894 P.2d 403 (1995).....	11–12
<i>State v. Kovac</i> , 50 Wn. App. 117, 747 P.2d 484 (1987).....	15, 17
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011).....	23, 24
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	11
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	11
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002).....	23
<i>State v. Steinbach</i> , 101 Wn. 2d 460, 679 P.2d 369 (1984).....	13
<i>State v. Souza</i> , 60 Wn. App. 534, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991).....	24

<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	11
<i>State v. Thomson</i> , 71 Wn. App, 634, 861 P.2d 492 (1993).....	12
<i>State v. Wade</i> , 98 Wn. App. 328, 989 P.2d 576 (1999).....	12

Statutes

U.S. Const. amend. 14.....	10, 16
Const. art. 1, § 3.....	10, 16
RCW 9.94A.760(1).....	20
RCW 9.94A.760(2).....	20
RCW 9A.08.020(3)(a).....	16
RCW 9A.52.010(5).....	12
RCW 9A.52.030(1).....	12
RCW 9A.56.040(1)(a).....	16
RCW 10.01.160.....	19, 24, 25
RCW 10.01.160(1).....	20
RCW 10.01.160(2).....	21
RCW 10.01.160(3).....	20, 21, 25, 26

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of second degree burglary.
2. The evidence was insufficient to convict appellant of second degree theft.
3. The record does not support the express finding that appellant has the current or future ability to pay Legal Financial Obligations.
4. The trial court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Was appellant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of second degree burglary?
2. Was appellant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of second degree theft?
3. Should the directive to pay legal financial obligations based on an express finding of current or future ability to pay be stricken from the

Judgment and Sentence as clearly erroneous, where the finding is not supported in the record?

4. Does a trial court abuse its discretion in imposing discretionary costs where the record does not reveal that it took appellant's financial resources into account and considered the burden it would impose on her as required by RCW 10.01.160?

B. STATEMENT OF THE CASE

The defendant, Adrienna Marie Mosier, was charged with second degree burglary and second degree theft from her employer of a number of years. CP 1-2; 1/24/13 RP 88; 1/25/13 RP 115. At trial, the state presented the following evidence.

On July 5, 2012, office manager Karen Bolen arrived to open the Riverview Animal Clinic in Clarkston, Asotin County, Washington, and discovered a daily receipts bag containing checks and roughly \$1400 in cash was missing. 1/24/13 RP 15-16, 38, 67-68. 74. The money bag was last seen when employee Tara Cunningham secured it into a lockbox two days earlier at the close of business before the July 4th holiday. 1/24/13 RP 19, 50-52, 70, 92-93. There was no evidence the clinic had been broken into or the lock box forced open. 1/25/13 RP 122.

The office manager noticed her desk drawers and files had been rifled through, but police found no useable fingerprints. 1/24/13 RP 20–21, 69. She thought it “didn’t look right” when she found Dr. Meyers’ chair in the middle of the room rather than left “neat and tidy” at his desk as was his habit. 1/24/13 RP 20, 68. As other employees arrived at work, they joined in looking for the missing bag. 1/24/13 RP 19, 53, 92, 1/25/13 RP 104, 121–22.

The clinic has a reception area for clients and their pets, and rooms comprising a back area including an office for staff. 1/24/13 RP 19, 67–69, 73. Mosier worked in the back of the clinic. 1/24/13 RP 73, 79. The lockbox was kept in a back “feed” room and its key was kept in a prescription-type bottle located inside a refrigerator in a separate back “animal isolation” room. 1/24/13 RP 16, 51–52, 75–76. Dr. William Meyers ran the clinic, which had been founded by his father. 1/24/13 RP 85. Each of the 13 or 14 employees had a key to the clinic building. 1/24/13 RP 87. Every employee knew the one set of keys to the lockbox was kept in a prescription bottle in a refrigerator in the isolation room. 1/24/13 RP 87–88.

Dr. Meyers and four employees admitted to being in the clinic on the Fourth of July. Dr. Meyers and the two kennel workers had seen and

talked to each other that morning; Amanda Clark had come in to pick up some suture scissors in the late afternoon; and Mosier had stopped by to pick up moving boxes that evening. 1/24/13 RP 21–22, 71–72, 85–87, 90–91. All except Mosier had been there earlier than 9:30 p.m. 1/24/13 RP 23. Amanda, who had arrived between 5:30 p.m. and 6:00 p.m., noticed the front office chairs were pushed back against the wall and that lights were on in the feed room where the lockbox was kept and in another room used for holding animals. She turned the lights off. As she left, she noticed a protective fence in the back of the clinic was knocked over. 1/24/13 RP 91–92.

The day after the incident, Mosier arrived at work 20 to 25 minutes late. Running late was not unusual for her. 1/24/13 RP 72; 1/25/13 RP 105. When Dr. Kathy Ponozzo asked if she knew anything about the missing money bag, Mosier said she didn't know, and that she'd been in the clinic the night before getting boxes. 1/24/13 RP 73; 1/25/13 RP 106. Mosier had previously mentioned the possibility of moving away from the area to some of her co-workers, but not others. 1/24/13 RP 55, 64, 93; 1/25/13 RP 107–08, 116, 124. Although they were not very close, Dr. Ponozzo thought Mosier's eyes were red, as if she were upset or from crying. 1/25/13 RP 105, 107. The office manager thought Mosier was not

her usual self, instead being a little quiet and withdrawn. 1/24/13 RP 72–73. Dr. Ponozzo thought they all were a little reserved that day because of the situation. 1/25/13 RP 106.

Asotin County Sheriff's Detective Jackie Nichols¹, who had previously worked at the clinic for a number of years, conducted the investigation. 1/24/13 RP 13–15, 71. She interviewed only those three or four people she'd been told may have been at the clinic during the time frame of the incident. 1/24/13 RP 33, 37, 44–45, 48. In her interview five days after the incident, Mosier told the detective that on the Fourth of July she'd unsuccessfully looked for her kids prior to the fireworks show at 10 p.m., and they hadn't done much earlier that day. 1/24/13 RP 23–24. She arrived at the clinic about 9:30 p.m. to get empty boxes to use for moving her and her boyfriend Brent Glass into his mother's house in Pullman, Washington. She'd driven their one car, a white Pontiac, while Brent stayed at home. 1/24/13 RP 24–25. Mosier entered through the back door of the clinic, got the key to the storage shed where the boxes are kept, opened the storage shed, put the key back, took the boxes with her and left. 1/24/13 RP 25. After leaving the clinic Mosier found her kids and went home to pack with Brent, and then went to bed. 1/24/13 RP 25–26,

30–31. Mosier said her car remained at her home the rest of the night, and no one took it. 1/24/13 RP 31–32.

Mosier had handled the money bag before at work, including a time she hid gas cards she'd won at the casino in the lockbox so that Brent wouldn't use or sell them. 1/24/13 RP 32, 76; 1/25/13 RP 123. Mosier never got into the safe box in Brent's presence and said he wouldn't have known where it was. 1/24/13 RP 32, 81. She didn't think there was any reason his fingerprints might be in the office area of the clinic. 1/24/13 RP 81–83. Mosier mentioned that at one time Brent had done some outside landscape work at the clinic. 1/24/13 RP 82.

Police discovered Mosier and Brent each had Clearwater River Casino cards, which tracked usage there. 1/24/13 RP 34. Mosier's card was used twice on July 3, from 3:39 p.m. to 6:09 p.m. on July 4, and for 25 minutes just after midnight. 1/24/13 RP 34. For the latter event, a surveillance tape showed Mosier and Brent's arrival in the white Pontiac and their gambling inside the casino. 1/24/13 RP 35.

Part of veterinary assistant Kellee Whipple's duties was to collect accumulated cardboard boxes and take them to the recycling center.

¹ Detective Nichols is married to the Asotin County Prosecutor, Benjamin C. Nichols. 1/24/13 RP 15.

1/24/13 RP 60. Usually if someone wanted boxes they'd ask her not to dispose of them. 1/24/13 RP 60–61. Whipple didn't check on July 5th to see whether any stored boxes had been taken away. 1/24/13 RP 63.

Employee Carrollene Klein wasn't scheduled to work July 3 through July 5. 1/25/13 RP 113–14. She and Mosier were pretty good friends. 1/25/13 RP 115. On July 5th a crying and upset Mosier called about 4:00 a.m., saying her boyfriend Brent had left in their car and asked Carrollene to give her a ride to work that day if he didn't return in time. Carrollene said she would. 1/25/13 RP 114. She received a second call during Mosier's lunch hour, when Mosier asked to borrow her truck to move to Pullman. 1/25/13 RP 115, 118. Carrollene thought it a little odd that Mosier didn't mention the burglary or theft of the clinic, which Carrollene learned about from a co-worker who'd called about the same time as Mosier. 1/25/13 RP 116–17. Mosier mentioned she was "broke" by the 4th, having been paid on July 2, but gave no details. 1/25/13 RP 118–19.

Clinic employees thought the burglary and theft must have been committed by an insider—an employee. According to the detective, most of the people she talked to suspected Mosier, or Mosier and Brent, or Brent. 1/24/13 RP 46–47. Dr. Meyers did not think Mosier would commit

the crime on her own, but suspected Brent could have taken her keys and committed the crime without her knowledge. 1/24/13 RP 43. He didn't want to believe that Mosier did it because she'd worked for the clinic a number of years, he wanted to trust her and liked working with her.

1/24/13 RP 88.

Tara Cunningham and Amanda Clark felt someone had to have keys to the office itself and know where the lock box and its key were kept.

1/24/13 RP 54–55, 93. Cunningham was not good friends with Mosier and suspected her because “there's no one else in our clinic that I would suspect” and couldn't say for sure whether Brent was a part of it. 1/24/13 RP 56–58. Clark thought she and Mosier were pretty good friends, that Brent was not trustworthy, and assumed Brent had taken the money perhaps by bullying Mosier into the burglary. 1/24/13 RP 93–95.

Kellee Whipple didn't socialize with Mosier outside of work and didn't consider her a good friend. 1/24/13 RP 61, 64. She suspected Brent and Mosier because Mosier came late to work on July 5th, didn't seem surprised that the money was gone and became nervous when she told Mosier they were sure it was an inside job by someone who had a key.

1/24/13 RP 62–63. The office manager “deep down” believed that Brent was involved and couldn't honestly say whether she believed Mosier was

involved—she hoped Mosier didn't feel a need to steal from Dr. Meyers because he'd been such a great boss to all of them. 1/24/13 RP 75–76.

Sometime after the detective interviewed Mosier, Brent went to the clinic, and yelled at the employees because he was upset that Mosier was accused of being involved in the burglary. 1/24/13 RP 36, 64–65. Dr. Ponzozzo encouraged Dr. Meyers to terminate Mosier because of the threats and her suspicion that Mosier had been involved in the burglary and theft. 1/25/13 RP 110–11. Mosier was thereafter fired. 1/24/13 RP 45, 125.

The jury was instructed as to accomplice liability regarding both charges.² The jury convicted Mosier of second degree burglary and second degree theft as charged. CP 1–2, 56. The court imposed concurrent sentences of 90 days confinement. CP 60. Additionally, it imposed discretionary costs of \$3,822.96³ and mandatory costs of \$1,425⁴, for a total Legal Financial Obligation (“LFO”) of \$5,247.96. CP 58 at ¶ 4.1.

² CP 48 (Instruction No. 8, defining accomplice); CP 51 (Instruction No. 11, “... that on or about the 4th day of July 2012, the Defendant entered or remained unlawfully in a building or aided another in such entry;”); CP 54 (Instruction No. 14, “... That on or about the 4th day of July 2012, the Defendant ... aided another in such wrongful obtaining or exertion of unauthorized control;”).

³ \$2,022.96 restitution (CP 58, 2/11/13 RP 191); \$500 victim assessment; \$200 criminal filing fee; \$1,000 fine; \$100 DNA fee. CP 58.

⁴ \$675 sheriff service fees; \$750 court-appointed attorney. CP 58.

The trial court made an express finding that Mosier has the “ability or likely future ability” to pay the LFOs. CP 58 at ¶ 2.5.

The court did not inquire into Mosier’s financial resources, and the nature of the burden that payment of LFOs would impose. 2/11/13 RP 187–92. The trial court ordered Mosier to make monthly payments of not less than \$50, to begin 60 days after release from incarceration. CP 59; 2/11/13 RP 191–92.

This appeal followed. CP 67.

C. ARGUMENT

1. Ms. Mosier’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree burglary.

The evidence was insufficient to convict Mosier of burglarizing the Riverview Animal Clinic because her entry and remaining on the premises were lawful and there was no evidence of intent to commit a crime against person or property therein. In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368

(1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d

418, 421–22, 894 P.2d 403 (1995); *State v. Wade*, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

A person is guilty of second degree burglary if, “with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1). A person enters or remain unlawfully “in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(5).

Here, there is no question that Mosier had a key to the clinic building, provided to her by her employer. 1/24/13 RP 87. There is therefore no question that Mosier entered the clinic lawfully. The question is whether there were any restrictions placed upon her use of the key, and if so, whether her use of the key violated the restriction and thus constituted “remaining unlawfully.” RCW 9A.52.010(5).

A defendant’s invitation to enter a building can be expressly or impliedly limited as to place or time, and a defendant who exceeds either type of limit, with intent to commit a crime in the building, engages in conduct that constitutes “burglarious, i.e. felonious, remaining.” *State v. Thomson*, 71 Wn. App, 634, 638, 861 P.2d 492 (1993); see also *State v. Collins*, 110 Wn.2d 253, 261–62, 751 P.2d 837 (1988) (although Collins

was invited to enter house to use telephone, he exceeded implied limitation on scope of invitation, thereby unlawfully remaining); *State v. Steinbach*, 101 Wn. 2d 460, 679 P.2d 369 (1984) (alternative residential placement order did not specify that minor defendant was not to return home, and defendant was never informed by her mother that she was absolutely prohibited from returning; therefore, defendant's entry was privileged, and her subsequent taking of items from house did not support her conviction for second-degree burglary). If an employee has the right to enter the store by the use of his key at any time in the day or night, that is, has an unrestricted and unlimited right of entrance, he could not be guilty of the crime of burglary, even though he carried away the goods from the store. *State v. Corcoran*, 82 Wash. 44, 50, 143 P. 453, 455 (1914) (entry out of hours by means of a key, given an employee to open the building mornings, held to be a breaking).

Here, the record does not disclose any express or implied restrictions placed upon Mosier's use of the key. All employees enjoyed access to the clinic after hours and on holidays. The State presented no evidence that Mosier, who worked in the back areas and openly accessed the lockbox at times, would have been in an unauthorized area of the clinic.

Had she been the thief, which is disputed herein, she neither entered an unauthorized area nor entered the clinic at a time beyond her authority.

Under the State's evidence there was no express limitation, and an implied limitation on the scope of Mosier's license to be in the clinic as an employee cannot be inferred. See *Collins*, 110 Wn.2d at 262 (not all cases will support inference of an implied limitation on privilege to be on premises). This Court should reverse Mosier's conviction with directions to dismiss. See *State v. Deitchler*, 75 Wn. App. 134, 139, 876 P.2d 970 (1994) (burglary conviction reversed with instructions to dismiss based on insufficient evidence).

The State's alternative theory was apparently that Brent committed the burglary and/or theft as a principal, while Mosier assisted him as accomplice. However, a fact finder is permitted to draw inferences from circumstantial evidence **only** so long as these inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). Evidence that Mosier had keys to the clinic does not give rise to a credible inference that Brent had access to or used the keys to enter the clinic. Similarly, the speculation of Mosier's co-workers is not "substantial assurance that the presumed fact is more likely than not to flow

from the proved fact on which it is made to depend.’ ” *State v. Kovac*, 50 Wn. App. 117, 120, 747 P.2d 484 (1987) (citations omitted).

Because it had weak evidence under any theory, the State could only ask the jury to speculate regarding the accomplice theory:

If we assume for just a moment that Brent Glass did it, how did he know? Who told him? Because *if* Ms. Mosier told him where the key was, and where the lockbox was, and told him that she’d been there earlier and that there was nobody there, then she’s guilty, because she’d an accomplice.

If she drove the car to the clinic with him knowing that he was going to go in and steal the money, she’s an accomplice and she’s guilty.

If she drove him away from the clinic after he had done it, she’s guilty. ...

Some weird outsider? Common sense. Some other employee? Any evidence? Brent acting alone? Where is that evidence? There is a mountain of evidence that Ms. Mosier was involved. And if she was involved she’s guilty.

1/25/14 RP 147, 165. There was no evidence Mosier had aided another to burglarize the clinic in any way. It cannot be said with substantial assurance that the presumed “fact” of Mosier’s liability as accomplice for burglary “more likely than not flows” from the above-referenced sparse and innocuous “proven facts”. *Turner v. United States*, 396 U.S. 398, 405, 90 S.Ct. 642, 646, 24 L.Ed.2d 610, 617 (1970).

No rational trier of fact could have found the State proved beyond a reasonable doubt that Mosier aided another to enter or remain unlawfully in the clinic. There is no proof Mosier committed the crime charged, as principal or accomplice. The conviction must be reversed and the case dismissed. *Deitchler, supra*; *Baeza*, 100 Wn.2d at 491.

2. Ms. Mosier's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree theft.

The evidence was insufficient to convict Mosier of second degree theft because the direct evidence and circumstantial evidence did not prove she committed the crime charged. The applicable law regarding sufficiency of the evidence is set forth in the preceding section and incorporated herein.

Second degree theft requires proof that the accused stole property (other than a firearm) or services worth more than \$750. RCW 9A.56.040(1)(a). Under RCW 9A.08.020(3)(a), a person is guilty as an accomplice of another person if, with knowledge that it will promote or facilitate the crime, he or she:

- (i) solicits, commands, encourages, or requests such other person to commit it; or
- (ii) aids or agrees to aid such other person in planning or committing it [.]

A fact finder is permitted to draw inferences from circumstantial evidence so long as these inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d at 707. However, an inference is invalid “ ‘unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.’ ” *Kovac*, 50 Wn. App. at 120, citing *Turner*, 396 U.S. at 405, 90 S.Ct. at 646 (quoting *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57, 82 (1969)).

At best, the State’s evidence placed Mosier in the general vicinity of the crime that occurred sometime within a span of 38 hours.⁵ There were no eyewitnesses. No fingerprints and no moneybag (or its contents) were found. There was no evidence Brent had ever been inside the clinic or had any knowledge of the clinic’s money storage or key-hiding procedures. Mosier’s alleged connection with the crime rests solely on her status as an employee who had a boyfriend disliked by some of her co-workers and with whom she occasionally went to the casino and had fights.

⁵ The money bag was secured for the night on July 3, 2012 at 5:30 p.m., and discovered missing on July 5, 2012 at approximately 7:30 a.m. 1/24/13 RP 51, 67, 72.

The fact that Mosier had a key to the clinic and knew where the key to the lockbox was kept does not establish guilt beyond a reasonable doubt. All 13 to 14 employees had a key and the same knowledge. If the theft was truly an “inside job”, it could just as easily have been masterminded by any of her co-workers. The co-worker’s 6:00 p.m. discovery on July 4th of moved office chairs and lights left on in the clinic occurred well before Mosier arrived to get moving boxes that evening, and the State offered no proof that she did not in fact pick up boxes. Further, Mosier had previously mentioned to one or two co-workers her desire to move. And in the past, Mosier and Brent had gambled at the casino, she’d won several gas cards there, and they decided to go there on this Fourth of July holiday. As noted by defense counsel in closing, lots of people who frequent casinos can play all night on a \$20 stake. 1/25/13 RP 159. It called for pure speculation to assume a comment she was “broke by the 4th” proved beyond a reasonable doubt that Mosier must have stolen \$1,400 from her employer in order to gamble at the casino.

The State offered no proof that Mosier had masterminded or even aided the theft in some way. It cannot be said with substantial assurance that the presumed “fact” of Mosier’s liability as principal or accomplice for theft “more likely than not flows” from the above-referenced sparse and

innocuous “proven facts”. *Turner, supra*. The inference is not plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). No rational trier of fact could have found the State proved beyond a reasonable doubt that Mosier acted with an intent to deprive her employer of cash receipts or that she obtained or aided another to obtain control over them. There is no proof Mosier committed the crime charged. The conviction must be reversed and the case dismissed. *Baeza*, 100 Wn.2d at 491.

3. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

Mosier did not make these arguments below. But, illegal or erroneous sentences may be challenged for the first time on appeal. See *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521 fn 2 (2013) (considering the defendant’s challenge to the trial court’s imposition of LFOs for the first time on appeal) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); see also *State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301

P.3d 492 (2013), rev. granted (Sup. Ct. no. 89028-5, oral argument scheduled February 11, 2014) (declining to consider the challenge for the first time on appeal, where the trial court did not set a date for the defendant to begin paying his financial obligations).

a. The finding of ability to pay and the directive to pay monthly payments must be stricken. There is insufficient evidence to support the trial court's finding that Mosier has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to

pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “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.” RCW 10.01.160(3).

In *Curry*, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific formal finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” *Curry*, 118 Wn.2d at 916. However, the *Curry* court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. *Id.* at 915-16.

Here, there is insufficient evidence to support the trial court's express finding that Mosier has the present and future ability to pay legal financial obligations. CP 58 at ¶ 2.5.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial

evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. at 404 (quoting *Baldwin*, 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 405; see also *Calvin*, 302 P.3d at 522.

Here, the record does not show that the trial court took into account Mosier’s financial resources and the nature of the burden of imposing LFOs on her. The record contains no evidence to support the trial court's express finding that she has the present or future ability to pay

LFOs. To the contrary, the trial court found her indigent for purposes of pursuing this appeal⁶. The finding is simply not supported in the record. The finding is clearly erroneous and the directive to make monthly payments must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 405 (reversing the trial court’s finding of the defendant’s ability to pay LFOs, and stating that this reversal “forecloses the ability of the Department of Corrections to begin collecting LFOs from [the defendant] until after a future determination of her ability to pay.”); *see also Calvin*, 302 P.3d at 522 (striking the trial court’s ability to pay finding).

This remedy of striking the unsupported finding is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is it appropriate to send a factual finding without support in the record back to

⁶ On file; SCOMIS sub-number 62, Order of Indigency filed 4/15/13 and sub-number 63, Amended Order of Indigency filed 5/8/13.

a trial court for purposes of “fixing” it with the taking of new evidence. Compare *State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, recon. denied, rev. denied, 116 Wn.2d 1026 (1991), with *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

b. The imposition of discretionary costs of \$1,425 must also be stricken. Because the record does not reveal the trial court took Mosier’s financial resources into account and considered the burden it would impose on her as required by RCW 10.01.160, the imposition of discretionary court costs must be stricken from the judgment and sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. *Id.* This is a

judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However,

[t]he 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.

RCW 10.01.160(3).

It is well-established that this statutory provision does not require the trial court to enter formal, specific findings. See Curry, 118 Wn.2d at 916. But, in the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). See Calvin, 302 P.3d at 521–22.

Here, the court ordered Mosier to pay discretionary costs of \$1,425. CP 58 at ¶ 4.1. The court made an express finding that Mosier is or will be able to pay them. CP 58 at ¶ 2.5. However, the record reveals no balancing done by the court through inquiry into Mosier’s financial resources and the nature of the burden that payment of LFOs would impose on her. Despite knowing Mosier had several children and was the

sole breadwinner⁷, the trial court neither inquired into her financial resources nor weighed how imposition of discretionary costs might realistically impact her situation.

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) was an abuse of discretion. See Baldwin, 63 Wn. App. at 312 (stating this standard of review). The remedy is to strike the imposition of discretionary costs. See Calvin, 302 P.3d at 522.

D. CONCLUSION

For the reasons stated, the second degree burglary and second degree theft convictions should be reversed and dismissed. In the alternative, the matter should be remanded to strike the express finding of present and future ability to pay Legal Financial Obligations and remove the directive to make monthly payments, and to strike the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted on January 8, 2014.

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⁷ 1/24/13 RP 23–26, 30-31; 1/25/13 RP 107; 2/11/13 RP 187.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 8, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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