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Court of Appeals
Division III
State of Washington

No. 34206-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

JASON MICHAEL CATLING,

Appellant.

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

The Honorable Annette S. Plese

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Following a jury trial, Jason Michael Catling was convicted of possession of a controlled substance (methamphetamine) and second degree possession of stolen property.

During its closing argument the State committed prosecutorial misconduct by vouching for the credibility of the State's officer witness. Because the majority of the evidence in this case was based upon the credibility of the witnesses, the State's prosecutorial misconduct prejudiced the defendant. For this reason Mr. Catling respectfully requests his convictions be reversed and remanded for a new trial.

Mr. Catling also objects to any appellate costs should the State prevail on appeal.

B. ASSIGNMENTS OF ERROR

1. The State committed prosecutorial misconduct by vouching for the credibility of an officer witness.
2. An award of costs on appeal against the defendant would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the State's vouching for the credibility of an officer witness during closing arguments constituted prosecutorial misconduct.

Issue 2: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

On September 26, 2013, law enforcement officers executed a search warrant on the residence of the defendant, Jason M. Catling. (RP 103). Inside the bedroom of the home, law enforcement officers discovered two containers with methamphetamine inside. (RP 78-82; 129-130). Law enforcement officers also located within the residence an REI credit card, which belonged to Katherine Denenny and had been previously stolen. (RP 70-71, 105-106).

Law enforcement officers questioned Mr. Catling at the residence about the methamphetamine and REI credit card, and he made several statements to Spokane Valley Police Sergeant Harold Whapeles. (RP 105, 111-118). Mr. Catling admitted to renting the residence from his mother and living there with his girlfriend, Amy Kempe. (RP 114, 118). He said he tries to help people who are “heroin sick”¹ by providing them with heroin. (RP 114-115). Mr. Catling stated that the people he provided heroin to also left items at his home, but that the items were not in exchange for heroin. (RP 115). Mr. Catling suspected that some of the items left at his residence by others were stolen. (RP 115). Mr. Catling told Sergeant Whapeles the methamphetamine containers in his home

¹ Mr. Catling used the phrase “heroin sick” to refer to the way heroin users feel when going through withdrawal. (RP 115).

were both his and Ms. Kempe's and that he may have used some of the methamphetamine. (RP 116). When asked why he had other people's identification credit cards, Mr. Catling shrugged, stating he did not remember who brought the cards to him. (RP 117).

The State charged Mr. Catling with one count of possession of a controlled substance (methamphetamine) and one count of second degree possession of stolen property. (CP 1, 11). The case proceeded to a jury trial. (RP 69-234).

Sergeant Whapeles testified consistent with the Mr. Catling's statements above. (RP 113-118). He also acknowledged it was possible the methamphetamine belonged to Ms. Kempe. (RP 119).

Mr. Catling testified the methamphetamine discovered by law enforcement was his Ms. Kempe's. (RP 157). He testified he was born with a disfigurement, which is a source of severe pain despite approximately 60 surgeries. (RP 135). He admitted that he started using heroin to alleviate the pain, that he has never purchased methamphetamine before, and does not prefer to use it because it does not help with pain management. (RP 136, 144). He noted that Ms. Kempe decorated the containers that held the methamphetamine, that she purchased and used methamphetamine, and that he had previously accompanied Ms. Kempe to court for her methamphetamine charges. (RP 144, 157).

Mr. Catling also stated at trial that he did not steal the REI credit card and does not know how he obtained it. (RP 161). He added that he collects cards and pieces of identification that he randomly finds, but does not use them for identity theft. (RP 159-160).

Mr. Catling's mother, Ruth Bishop, testified that Mr. Catling has a hoarding problem and collects many random items, including trash, such as empty food containers and empty two liter bottles. (RP 182). She also testified Mr. Catling was born with a physical deformity, causing him severe pain. (RP 183).

In its closing argument, the State made the following argument about Mr. Catling's statements to law enforcement: "[a]ll his statements were written down. They were testified to under penalty of perjury." (RP 233). Defense counsel did not object to this statement. (RP 233)

The jury found Mr. Catling guilty as charged. (RP 236; CP 53-54).

At sentencing the court only imposed the mandatory legal financial obligations (LFOs) of \$800. (RP 250; CP 84-85). Defense counsel presented the court with Mr. Catling's physical disability history and rare birth defect (some of which Mr. Catling and Ms. Bishop previously testified to during trial). (RP 134-135, 183, 243-245, 247-248; CP 67). During the sentencing hearing, Mr. Catling was in pain and requested the opportunity

to seek medical attention prior to any incarceration. (RP 248). The court imposed a 30-day sentence under electronic home monitoring. (RP 249).

The Judgment and Sentence contains boilerplate language stating the “court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” (CP 82). It also contains the following language: “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 86). An order of indigency on file indicates Mr. Catling’s impoverished status. (CP 97-98).

Mr. Catling timely appeals his judgment and sentence. (CP 99-100).

E. ARGUMENT

Issue 1: Whether the State’s vouching for the credibility of an officer witness during closing arguments constituted prosecutorial misconduct.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (citation and internal quotation marks omitted). If the defendant fails to object “at the time the misconduct occurred, he must establish that no

curative instruction would have obviated any prejudicial effect on the jury” and that “prejudice resulted that had a substantial likelihood of affecting the jury verdict.” *Id.* at 455.

“It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citations omitted); see also *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). Improper vouching for a witness’ credibility occurs “if a prosecutor expresses his or her personal belief as to the veracity of the witness” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor also improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they “were just telling you what they saw and they are not being anything less than 100 percent candid”). “Whether a witness has testified truthfully is entirely for the jury to determine.” *Ish*, 170 Wn.2d at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated.” *Ramos*, 164 Wn. App. at 333 (citation omitted).

Here, in its closing argument, the State vouched for the credibility of its officer witness Sergeant Whapeles. (RP 233). This officer witness

testified at trial that Mr. Catling made several incriminating statements to him. (RP 113-118). It was improper for the State to assert that the incriminating statements attributed to Mr. Catling were truthful and accurate because Sergeant Whapeles testified “under penalty of perjury.” (RP 233).

Moreover, this improper vouching prejudiced the defendant’s right to a fair trial by encroaching upon the jury’s decision-making authority. *See Ish*, 170 Wn.2d at 196 (“[w]hether a witness has testified truthfully is entirely for the jury to determine”). The case was substantially based on the credibility of the witnesses. Were it not for the vouching by the State, the jury may have believed Mr. Catling’s testimony that the methamphetamine was Ms. Kempe’s. (RP 135-136, 144, 157). The jury may also have found persuasive Mr. Catling’s assertion that he did not know where the REI credit card came from and that he merely collected cards he found, given his history of hoarding. (RP 159-160, 182).

Defense counsel did not object to the prosecutor’s improper statement. (RP 233). However, no curative instruction would have neutralized the comment the prosecutor made to the jury. *See Ramos*, 164 Wn. App. at 333 (citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)).

For these reasons, Mr. Catling respectfully requests his convictions be reversed and remanded for a new trial.

Issue 2: Whether this Court should refuse to impose costs on appeal.

Mr. Catling preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Catling anticipates filing for this Court's review a report as to his continued indigency and likely inability to pay an award of costs, as evidence of his inability to pay costs on appeal. The imposition of appellate costs would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such

a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 86. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, the trial court imposed only mandatory costs. (RP 250; CP 84-85). Mr. Catling

qualified for indigent appellate counsel upon filing the underlying notice of appeal and likely remains indigent at this time. (CP 97-98).

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina*'s recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “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.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . *may* require an adult . . . to pay

appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53.

In *Blazina*, our Supreme Court stated:

[W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security* or food stamps . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.*

Blazina, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Catling is in constant need of medical care and receives social security benefits for his medical condition and rare birth defect, the record demonstrates he does not have the ability to pay costs on appeal. (RP 134-135, 183, 243-245, 247-248). Mr. Catling also requests this Court review any subsequently filed report as to his continued

indigency and likely inability to pay an award of costs, as evidence of his inability to pay costs on appeal.

For these reasons, Mr. Catling respectfully requests that no costs on appeal be assigned to him in the event that the State substantially prevails on appeal.

F. CONCLUSION

The State committed prosecutorial misconduct by vouching for its officer witness during closing argument. Mr. Catling respectfully requests this Court reverse his convictions and remand for a new trial.

Mr. Catling objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 8th day of September, 2016.

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COURT OF APPEALS
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Plaintiff/Respondent) COA No. 34206-9-III
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)
JASON MICHAEL CATLING)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 8, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at SCPAappeals@SpokaneCounty.org using Division III's e-service feature.

Dated this 8th day of September, 2016.

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