FILED
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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34624-2-III

STATE OF WASHINGTON, Respondent,

v.

TERI LOUISE TROWER, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Teri Trower was convicted of possessing a stolen motor vehicle on evidence that placed her in the passenger's seat of a vehicle towing it shortly after it was taken. The court imposed a sentence based upon a score of "3", but the State did not present proof of the alleged prior convictions and Trower did not affirmatively acknowledge them. She was ordered to pay discretionary legal financial obligations as well as $5,000.00 in restitution for the vehicle, even though she was not convicted of stealing it, and even though the record reflects that she receives food stamps and lost her job. Because the evidence was insufficient to sustain the conviction and the restitution order, the judgment and sentence should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports the conviction for possessing a stolen motor vehicle.

ASSIGNMENT OF ERROR 2: Insufficient evidence supports the offender score.

ASSIGNMENT OF ERROR 3: The restitution order is not causally related to the crime of conviction.

ASSIGNMENT OF ERROR 4: The trial court erred in imposing discretionary legal financial obligations.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the evidence presented at trial shows only that the defendant was in proximity to a stolen vehicle and later attempted to cover up any association with the vehicle, is the evidence sufficient to establish the element of possession?

ISSUE 2: Does the sentencing court exceed its authority when it calculates an offender score on the basis of the State's unsupported assertions about the defendant's criminal history?

ISSUE 3: Is restitution for the loss of property allowed when the defendant is not convicted of causing the property loss?

ISSUE 4: Is the imposition of discretionary legal financial obligations clearly erroneous when the court does not conduct a *Blazina* inquiry and evidence in the record shows the defendant receives public assistance and lost her job?

IV. STATEMENT OF THE CASE

On April 12, 2016, Connor Chandler drove home from work, locked his truck, a 1983 Toyota, and went to bed. RP 27, 49, 50. The next morning when he woke up, the truck was gone. RP 28. The Chandlers reported the truck missing to law enforcement, and Connor posted a notification on Facebook. RP 32, 52.

On April 14th, Jason Collins, who had seen Connor Chandler's Facebook post, saw the truck at a gas station being towed on a trailer by another truck. RP 57-58, 59-60, 137. Collins saw two people with the truck, including a male driver and a passenger with long hair. RP 77-80. The same day, a state trooper, Donald Field, saw a truck and a trailer pull into a gas station and a male got out of the driver's side. RP 100, 103-04. When he ran the registration on the trailer, it came back registered to a Teri Ann Christiansen. RP 104. Trooper Field then confirmed that a female, who was climbing out of the truck, was the registered owner. RP 104-05. When he later obtained a description of the Chandlers' stolen truck, he drove back to look for it but was unsuccessful. RP 105-06.

Police then contacted the defendant, Teri Trower, at her workplace and interviewed her. RP 151-52. Trower told them that the truck that was being pulled in the trailer on April 14th was hers. RP 152. She said that

her friend Jack had helped her transport it up to Stevens County to have a friend work on it, but found out upon arriving that the friend was incarcerated. RP 152-56. Consequently, they took the truck back to her residence. RP 156.

Trower provided police with a copy of her title for a 1992 Toyota pickup truck and said they could come to her house the next day to see the truck. RP 154, 157. However, when police arrived the next day, the garage door was locked and Trower advised them she had no key. RP 160. About a week later, police were able to look at Trower's truck in the garage and determined it was not the same vehicle that had been on the trailer on April 14thh. RP 174–75, 80.

Police were also able to retrieve several surveillance videos from gas stations in the area. RP 145, 160, 166. Two of them showed a 1980s Toyota pickup matching Connor Chandler's truck in the trailer. RP 145, 162. But in one of them, obtained from Loon Lake where Trower told police they had stopped on the way back to her house, the trailer was now empty. RP 168.

Police arrested Trower and charged her with possessing a stolen motor vehicle. RP 181; CP 1. At trial, Trower argued that the State did

not show Trower was ever in control of the truck, and therefore she did not possess it. RP 283, 284, 285. The jury found her guilty. RP 291

At sentencing, the State alleged that Trower had three prior felony convictions and intervening misdemeanors that prevented them from washing out, but it did not present evidence of them, nor did Trower stipulate to them. RP 305, 306-08. The trial court accepted the State's representations and sentenced Trower to twelve months' incarceration based upon a score of 3. RP 310; CP 91, 93. The trial court also did not conduct a *Blazina* inquiry but observed that Trower was "employable," imposing $1,250 in legal financial obligations, including a $500 attorney fee recoupment. RP 309, 311, CP 96. At the time she initiated the appeal, the record shows Trower was receiving food stamps and had lost her job. CP 25, RP 313.

After the judgment and sentence was entered, the trial court held a hearing on restitution. The court ultimately imposed restitution of $5,000, finding the truck (which was never recovered) was worth $2,500 and applying its discretion to double that amount. RP 33, Supp. RP 15.

Trower now appeals and has been found indigent for that purpose. CP 109, 123.

V. ARGUMENT

A. The evidence is insufficient to establish the element of possession because Trower was not shown to be more than a passenger.

To convict Trower of the crime charged, the State was required to prove that she possessed the Chandlers' truck in Stevens County on April 14, 2016. CP 1-2; RCW 9A.56.068(1). A person possesses stolen property when he or she knowingly receives, retains, possesses, conceals, or disposes of it. *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016). Because the State's evidence failed to show that Trower exercised the kind of control over the vehicle that is necessary to establish her possession of it, the conviction must be reversed.

Actual possession exists when the item is in the physical custody of the person charged, whereas constructive possession exists when the defendant has dominion and control over it, even if it is not in her actual physical possession. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Neither mere proximity to contraband, nor temporary handling and momentary control are sufficient to establish possession. *Id.*

Evidence that the defendant was a passenger in a stolen vehicle and failed to contradict the driver's statements about the vehicle's provenance does not show that the defendant had dominion and control

over the vehicle, and is therefore insufficient to support a conviction for possessing the stolen vehicle. *State v. Plank*, 46 Wn. App. 728, 731 P.2d 1170 (1987). In *Plank*, two men were stopped at the Canadian border in a car that was later reported stolen. Both men told police that they had borrowed the vehicle the night before. *Id.* at 729. On appeal, the court considered whether the passenger could be convicted of possessing the vehicle. *Id.* at 731. Concluding that the evidence failed to establish actual or constructive control over the vehicle, the *Plank* court rejected the State's argument that the defendants were engaged in a joint enterprise as evidenced by their similar statements. *Id.* at 731, 733. In reaching this decision, the court considered cases from Washington as well as other states and determined that more than proximity and access must be shown to overcome reluctance to find a passenger in control of a stolen vehicle. *Id.* at 732-33. Accordingly, the court stated,

> Turning to the evidence in this case, it establishes no more than that Killion was a passenger in an allegedly stolen vehicle driven by Plank. The fact Killion did not contradict Plank's statements to the officers does not logically bear on the issue of dominion or control of the vehicle.

Id. at 733.

In all material respects, the present case is virtually indistinguishable from *Plank*. The evidence in this case failed to show

that Trower was anything but a passenger inside a vehicle that was hauling the stolen truck on April 14th. That she made statements about the provenance of the truck that later turned out not to be true could tend to show knowledge that the hauled truck was stolen, but would still not establish any grounds for concluding that she had dominion and control over the stolen truck. As in *Plank*, absent some further evidence that Trower was more than proximate to the stolen truck, the State's evidence fails. Accordingly, the conviction must be reversed.

B. The offender score is unsupported in the record.

The trial court calculated Trower's offender score as "3" based solely upon the representations of the prosecuting attorney. RP 304-05, 310, CP 91. Trower did not acknowledge the history at any time, and the record contains no other substantiation of the State's allegations. RP 306-08. Because the State's allegations are insufficient to establish the offender score, the sentence must be reversed.

Offender score error may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on an improperly calculated offender score, it acts without

statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

The court of appeals reviews the calculation of an offender score *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In determining whether the offender score is supported by the record, the reviewing court considers that "the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530.

The burden of providing sufficient evidence to support the offender score rests squarely on the State. In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court evaluated the State's burden of proof to establish the offender score, stating:

> It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." Further, unless convicted pursuant to a plea agreement, the defendant has "no obligation to present the court with evidence of his criminal history." (Internal citations omitted.)

Thus, while evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but are mere argument. *Hunley*, 175 Wn.2d at 911-12.

Moreover, a defendant's failure to object to the State's assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State's burden. *Id.* at 913 (*citing State v. Mendoza*, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)). This is because the defendant has no burden of proof on the issue; as such, silence cannot operate as a waiver of the defendant's right to hold the State to its evidentiary burden.

Here, the record is devoid of any evidentiary proffer or any acknowledgment of criminal history by the defendant that would relieve the State of proving the score. "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481. Because the State's calculation of Trower's offender score is not supported by an evidentiary foundation in the record, the sentence imposed does not comport with minimal due process requirements and must be reversed.

The remedy for the error is to vacate Trower's sentence and remand the case for resentencing. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). The State should be permitted to present evidence substantiating the offender score on remand. RCW 9.94A.530(2); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

C. <u>The restitution order erroneously compels Trower to pay for losses her conduct did not cause.</u>

The trial court assessed the entire value of the car at the time it was stolen on Trower, even though she was neither charged with nor convicted of stealing it. Because the loss resulting from the theft is not causally connected with the loss resulting from Trower's temporary possession days later, the restitution assessment was an abuse of the trial court's discretion.

Restitution assessments are within the trial court's discretion and are reversed when the trial court abuses that discretion, or when its supporting findings are not supported by substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution is only allowed for losses that are causally connected to the crime charged. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The causal

connection is determined by applying a "but-for" test – but for the charged crime, the loss would not have occurred. *Griffith*, 164 Wn.2d at 966.

Griffith involved theft of jewelry that, in total, was valued at $11,500. 164 Wn.2d at 962. The defendant was convicted of possessing stolen property after she attempted to sell some of the jewelry to a coin shop. *Id.* at 964-65. However, the coin shop owner stated that he could not identify all of the items in the defendant's possession as the same jewelry that was stolen from the victim. *Id.*

In reversing the restitution assessment, the Supreme Court observed that culpability for possession of stolen property does not include culpability for stealing it. *Griffith*, 164 Wn.2d at 967. There, the fact that the defendant was convicted after bringing "stuff" to the coin shop was not substantial evidence that the defendant unlawfully possessed all of the victim's stolen property. *Id.*

In the context of stolen vehicles, the court applied these principles in *State v. Acevedo*, 159 Wn. App. 221, 248 P.3d 526 (2010) to reverse a restitution order. There, the defendant was convicted of possessing a stolen vehicle which he claimed to have bought in stripped condition sometime after it was stolen from a body shop. *Id.* at 224-25. The court observed that there is no causal connection with losses incurred before the

act constituting the crime. *Id.* at 230 (citing *State v. Woods*, 90 Wn. App. 904, 909, 953 P.2d 834 (1998)). Because there was no evidence that Acevedo stole the car or stripped it, his possession of it was not the "but-for" cause of the damage and the restitution order for the pre-theft value of the car was reversed. *Id.* at 229-31.

The present case falls squarely within the rule established in *Acevedo* and *Griffith*. The conduct for which Trower was convicted consisted of being present in a vehicle that was hauling the stolen truck two days after it was taken. CP 1. She was not convicted of stealing the truck or trafficking in it, nor was her temporary and marginal possession of it two days later the "but-for" cause of its loss. The vehicle was taken from the Chandlers before Trower was ever associated with it, and the conduct for which she was convicted was not the cause of the vehicle's disappearance. Accordingly, the restitution order was in error because insufficient evidence established that Trower's conduct was causally related to the loss of the vehicle.

D. The trial court's imposition of discretionary legal financial obligations was clearly erroneous.

The trial court imposed discretionary LFOs totaling $500 on Trower without conducting an inquiry into her financial circumstances and in spite of her indigency. CP 96, RP 311. Because substantial evidence does not support the trial court's implicit finding that Trower had the ability to pay discretionary obligations, the discretionary attorney fee recoupment should be vacated.

Courts may not impose discretionary legal financial obligations (LFOs) on convicted defendants unless the defendant has the present or future ability to pay them. RCW 10.01.160(3). A sentencing court's finding that a defendant has the ability to pay LFOs is reviewable under a "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). In applying the clearly erroneous standard, the reviewing court reverses when substantial evidence does not support the finding, meaning that there is an insufficient quantum of evidence to persuade a fair-minded person of the truth of the finding. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

In the present case, the trial court imposed $500 in fees for the cost of public defense services. CP 95. These costs may not be imposed unless the defendant has the ability to pay them, as determined by the trial court after considering the financial resources of the defendant and the burden the payment requirement will impose. RCW 10.01.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015), the Washington Supreme Court instructed sentencing courts to seriously question the ability to pay of a person who meets the GR 34 standard for indigency, evidenced by factors such as need-based assistance. Here, the record shows that Trower receives food stamps and therefore meets the GR 34 standard. CP 25. The colloquy at sentencing did not address the required *Blazina* factors, such as the existence of other debt and the effects of incarceration. *Id.* at 838. Instead, based upon her attorney's description of her work history and the fact that she had maintained employment in the past, the court determined that she was employable. RP 306-08, 309. But the court failed to address the loss of her job, the effect of a year's employment on her job prospects, her support of a child, or any other factors that would tend to demonstrate Trower's ability to earn enough to pay her necessary expenses. In light of her qualification under GR 34, the substantial restitution award, and the prospect of Trower being released from jail with no job, the finding that she had the ability to pay

discretionary financial obligations is unsupported by sufficient evidence to justify a reasonable person in reaching the same conclusion.

Because the record does not support the imposition of discretionary financial obligations, the judgment and sentence should be vacated or, in the alternative, the discretionary obligations should be ordered stricken.

E. In the event Trower does not prevail on appeal, the court should decline to impose appellate costs.

With respect to appellate costs, Trower was found to lack sufficient funds to prosecute an appeal and was found indigent for that purpose by the trial court. CP 123. The presumption of indigence continues throughout review. RAP 15.2(f).

The Court of Appeals recently recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and

equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Here, Trower was found to be indigent for appeal purposes based upon an affidavit showing she receives public nutrition assistance. CP 125. Her completed Report as to Continued Indigency, attached hereto, shows that she has no real property, no income, and a vehicle worth about $250, while also carrying thousands of dollars in legal debt and child support arrearages. In the past three years, she has held only part-time work at H&R Block preparing income tax returns, and it appears from the record that she lost that job upon her felony conviction, leaving her with a high school education, a dependent child, and a nominal work history. RP 313-14.

Trower's appeal is prosecuted in good faith, and she has complied with the requirements of this court's General Order issued on June 10, 2016. Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs.

VI. CONCLUSION

For the foregoing reasons, Trower respectfully requests that the court REVERSE and DISMISS the conviction; or, in the alternative,

VACATE the judgment and sentence and REMAND for resentencing and to STRIKE the restitution award and discretionary legal financial obligations.

RESPECTFULLY SUBMITTED this 13 day of February, 2017.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

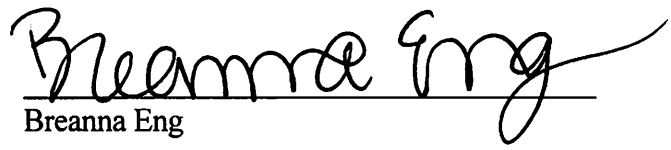
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Timothy Rasmussen
Stevens County Prosecutor
215 S. Oak Street
Colville, WA 99114

Teri Trower
Stevens County Jail
215 S. Oak Street, Room 113
Colville, WA 99114

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

Signed this 13th day of February, 2017 in Walla Walla, Washington.



Breanna Eng

APPENDIX

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, TERI TROWER certify as follows:

1. That I own:
   - (X) a. No real property
   - ( ) b. Real property valued at $_____.
   - ( ) c. Real property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

2. That I own:
   - ( ) a. No personal property other than my personal effects
   - (X) b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at $ 250.
   - ( ) c. Personal property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

3. That I have the following income:
   - (X) a. No income from any source.
   - ( ) b. Income from employment: $_____ per month.
   - ( ) b. Income of $_____ per month from the following public benefits:

☐ Basic Food (SNAP) ☐ SSI ☐ Medicaid ☐ Pregnant Women Assistance Benefits

☐ Poverty-Related Veterans' Benefits ☐ Temporary Assistance for Needy Families

☐ Refugee Settlement Benefits ☐ Aged, Blind or Disabled Assistance Program

☐ Other: _____

4. That I have:
   - ( ) a. The following debts outstanding:

	Approximate amount owed:
Credit cards, personal loans, or other installment debt:	$_____
Legal financial obligations (LFOs):	$1250+
Medical care debt:	$_____
Child support arrears:	$3000-
Other debt:	$_____

Approximate total monthly debt payments: $4250+

MY RESTITUTION IN THIS CASE IS $1250 BUT IT DOESNT

( ) b. No debts. INCLUDED THE VICTIMS VALUE OF THE TRUCK. THAT COURT DATE IS SET FOR 10.18.16

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State: $ Ø.

7. That I am 44 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 12+.

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
H+R BLOCK	25	$250	4

10. That I have received the following job training over the past three years: H+R BLOCK - INCOME TAX PREPARER

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: _____.

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.): BROOKLYN CHRISTENSON.

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

9-1-16 Ferry Co. Jail — Teri Trower

Date and Place — Signature of (Defendant) (Respondent) (Petitioner)