

FILED
Court of Appeals
Division III
State of Washington
11/9/2017 1:22 PM
No. 35231-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON WILLIAM CATE,

Appellant.

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

The Honorable Judge Christopher Culp

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

After a reported break-in to a shed owned by Kevin Bowling, Brandon W. Cate was identified as a potential suspect. According to a law enforcement officer, Mr. Cate admitted involvement in this incident, along with a separate break-in that allegedly occurred two days later at Omak Marine. With respect to the incident at Mr. Bowling's shed, the State charged Mr. Cate with one count second degree burglary, one count of second degree theft, and one count of third degree malicious mischief. With respect to the incident at Omak Marine, the State charged Mr. Cate with one count of second degree burglary and one count of third degree theft.

At the jury trial held on the charges, without any objection by defense counsel, the trial court admitted State's Exhibit No. 3, the restitution estimate Mr. Bowling submitted to the prosecutor's office. Mr. Cate was convicted as charged.

Mr. Cate now appeals, arguing there was insufficient evidence to convict him of second degree theft, or, in the alternative, that he is entitled to a new trial on this charge because of defense counsel's failure to object to the admission of State's Exhibit No. 3 as inadmissible hearsay. Mr. Cate also challenges the imposition of a sentence consecutive to another matter on which he was sentenced on the same day as this case. Mr. Cate also preemptively objects to the imposition of any appellate costs.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Cate guilty of second degree theft, where there was insufficient evidence that the value of the property he obtained exceeded \$750.
2. Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of State's Exhibit No. 3 as inadmissible hearsay.
3. The trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4, where Mr. Cate was sentenced on both matters on the same day.
4. An award of costs on appeal against Mr. Cate would be improper in the event that the State is the substantially prevailing party.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Cate guilty of second degree theft, where there was insufficient evidence that the value of the property he obtained exceeded \$750.

Issue 2: In the alternative, whether Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of State's Exhibit No. 3 as inadmissible hearsay.

Issue 3: Whether the trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4, where Mr. Cate was sentenced on both matters on the same day.

Issue 4: Whether this Court should deny costs against Mr. Cate on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On January 7, 2017, Officer Shane Schaefer of the Omak Police Department responded to a burglary complaint at the residence of Kevin Bowling in Omak. (RP 171-172). Mr. Bowling led Officer Schaefer to a building on his property, described as a tool shed or a shop. (RP 173, 196, 198-199). A window on the side of the shed was broken, and tools were missing from inside the shed. (RP 173-175, 197-202; State's Exs. 5-11). Officer Schaefer took photographs at the scene. (RP 175-179; State's Exs. 5-16).

Two days later, Officer Schaefer responded to a burglary complaint at a business, Omak Marine. (RP 179-180, 214-215, 217). The business owner showed Officer Schaefer surveillance video of an individual jumping the business' security fence into a fenced area surrounding the business, and siphoning gas out of vehicles inside this fenced area. (RP 180-181, 215-223; State's Exs. 17-20).

A witness identified Brandon William Cate as a potential suspect in the incident at Mr. Bowling's shed. (RP 190-194, 225-226, 233, 235-236).

Subsequently, Mr. Cate was arrested and questioned by law enforcement officers. (RP 227-235). According to Officer Brian Bowling of the Omak Police Department, when Mr. Cate was arrested, he noticed a gas can in front of Mr. Cate's residence that looked like a gas can in the surveillance video from Omak Marine. (RP 228). Mr. Cate admitted involvement in the incident at Mr.

Bowling's shed, including taking some tools from inside the shed. (RP 231-234).

Mr. Cate also admitted involvement in the incident at Omak Marine. (RP 234).

With respect to the incident at Mr. Bowling's shed, the State charged Mr. Cate with one count second degree burglary, one count of second degree theft, and one count of third degree malicious mischief. (CP 189-190). The second degree theft count was charged as follows:

On or about January 7th 2017, in the County of Okanogan, State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over property, other than a firearm, as defined in RCW 9.41.010, or services of another, to-wit: Stihl MS170 Chainsaw, Dremel Max Saw, 12 Amp Skill Saw, Portable Dewalt Drill with charger, Senco Nail gun, Craftsman Corded Hammer Drill, Drive brand compressed air impact tool, of a combined value exceeding \$750 but less than \$5,000, with intent to deprive such other of such property or services

(CP 190).

With respect to the incident at Omak Marine, the State charged Mr. Cate with one count second degree burglary and one count of third degree theft. (CP 190-191).

After Mr. Cate completed an indigency screening form, the trial court determined he was eligible for a public defender at no expense. (CP 180-181, 192; RP 8).

The case proceeded to a jury trial. (RP 143-286). At the jury trial, witnesses testified consisted with the facts stated above. (RP 170-240).

In addition, Officer Schaefer testified that Mr. Bowling identified the items he thought were missing from his shed. (RP 174). Specifically, he testified “[t]here was a chain saw, which had serial numbers, and then some miscellaneous other tools, like hand sanders, drills. I could not recite them all off by memory.” (RP 175). In terms of the value of the missing items, Officer Schaefer testified “[I] believe the total would have been somewhere near \$1,700.” (RP 174).

Mr. Bowling testified he took Officer Schaefer out to his shed and listed the items he thought were missing. (RP 198-199). He testified he filled out a restitution estimate for the prosecutor’s office, in which he estimated the values for the tools that were missing. (RP 199; State’s Ex. 3). The restitution estimate was admitted into evidence as State’s Exhibit No. 3. (RP 200-201; State’s Ex. 3). Mr. Cate did not object. (RP 201).

Mr. Bowling testified that State’s Exhibit No. 3 included a complete list of the items missing from his shed. (RP 201; State’s Ex. 3). He testified the following items were missing: a Craftsman reciprocating saw; a pneumatic nailer; a DeWalt cordless drill; a Craftsman half-inch hammer drill; a Husky three-inch cutoff tool; an impact tool; a battery charger; a corded dremel tool; a dremel cutting tool; a Stihl chainsaw; and a small sander. (RP 201-202). Mr. Bowling testified he calculated the total value of these items as \$1,149.24. (RP 202-203).

When asked how he got the values for the missing items, Mr. Bowling testified “I just went online, and - - like Home Depot, Sears, and - - places where I

- - I purchased the tools, and - - and got the current value of them.” (RP 198-199; State’s Ex. 3). He testified he had a receipt for the purchase of the chain saw that was missing. (RP 200; State’s Ex. 3).

State’s Exhibit No. 3 included the following items and prices:

- A sales receipt for a MS 170-16 Stihl Chainsaw, dated March 29, 2011, for \$242.80¹;
- An internet printout from Home Depot, dated January 7, 2017, for a Dremel Saw-Max 6.0 Amp Corded Tool Kit with 2 Blades for Metal, Wood, and Plastic Cutting, for \$79.00;
- An internet printout from Home Depot, dated January 7, 2017, for a Black+Decker Mouse 1.2 Amp Detail Sander, for \$39.97;
- An internet printout from Ace Hardware, dated February 2, 2017, for a Craftsman Orbital Reciprocating Saw 10.0 Amp 800-2700 SPM Variable Speed, for \$79.99;
- An internet printout from Home Depot, dated January 7, 2017, for a Senco FinishPro 18BMg 18-Gauge Pneumatic Brad Nailer, for \$99.98;
- An internet printout from Home Depot, dated January 7, 2017, for a Dewalt 20-Volt Max XR Lithium-Ion 1/2 in. Cordless Brushless Compact Drill/Driver Kit, for \$199.00;
- An internet printout from Craftsman, dated January 7, 2017, for a Craftsman 1/2 in. Corded Hammer Drill, with a handwritten note of “Sears \$80.00”;
- An internet printout from Home Depot, dated January 7, 2017, for a Husky 3 in. Cut-Off Tool, for \$44.98;
- An internet printout from Home Depot, dated January 7, 2017, for an Ingersoll Rand 1/2 in. Drive Composite Air “Impactool,” for \$138.57;
- An internet printout from Battery Mart, dated February 2, 2017, for a Battery Doc 6/12 Volt, 2/10/55 Ah Battery Charger with Engine Start, for \$85.95; and

¹ The total on the receipt is \$242.80. However, the chainsaw price is \$179.95. The total includes \$12.59 and \$12.95 for miscellaneous items, \$19.95 for “1 case” and \$17.36 for tax. (State’s Ex. 3).

- An internet printout from Home Depot, dated February 2, 2017, for a Dremel 3000 Series 1.2 Amp 1/8 in. Corded Variable Speed Rotary Tool Kit with 28 Accessories, for \$59.00.

(State's Ex. 3).

On cross-examination, Mr. Bowling testified as follows regarding the tools missing from his shed:

[Defense counsel:] Regarding the - - tools taken from the shed, - - approximately - - how old are these tools?

[Mr. Bowling:] Anywhere from - - (inaudible) - - I couldn't tell you for sure - -

[Defense counsel:] Okay.

[Mr. Bowling:] Most of them were newer. And when - - when I say newer, I mean (inaudible) years.

[Defense counsel:] Okay.

[Mr. Bowling:] And some were older than that. I really couldn't tell you.

[Defense counsel:] All right.

[Mr. Bowling:] I've been collecting them - - or - - or buying them for - - (inaudible) I have had to do a project and needed tool I - - (inaudible) tool.

(RP 204).

On re-direct, Mr. Bowling testified as follows:

[The State:] The tools that were - - were stolen, were those - - You said they were in various sort of conditions, maybe some are older than others. Were any in really terrible condition or broken?

[Mr. Bowling:] No. I take good care of my tools.

(RP 204-205).

The trial court instructed the jury that in order to find Mr. Cate guilty of second degree theft, it had to find the following elements were proved beyond a reasonable doubt:

- (1) That on or about January 7th 2017, the defendant wrongfully obtained or exerted unauthorized control over property of another, to wit, various tools belonging to Kevin Bowling;
- (2) That the property exceeded \$750 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington.

(CP 96; RP 251-252).

The trial court also instructed the jury that “[v]alue means the market value of the property at the time and in the approximate area of the act.” (CP 99; RP 252).

In addition, the jury was instructed on the lesser-included offense of third degree theft. (CP 77, 108-111; RP 256-259).

The jury found Mr. Cate guilty as charged. (CP 78-79; RP 283-286).

At sentencing, the trial court sentenced Mr. Cate on two matters, this case and Okanogan County Superior Court No. 17-1-00039-4. (RP 291-315). In this case, the State requested the trial court impose a term of confinement to run consecutively with Okanogan County Superior Court No. 17-1-00039-4. (CP 51-60; RP 295-299). In its sentencing briefs, the State argued the trial court could impose a consecutive sentence pursuant to RCW 9.94A.589(3). (CP 54, 59-60).

Mr. Cate requested the trial court impose a term of confinement to run concurrently with the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4. (RP 299-300).

The trial court stated it had discretion to impose either concurrent or consecutive sentences. (RP 303-304). The trial court imposed a term of confinement, and ordered this term to run consecutively with the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4. (CP 43; RP 303-304, 310-311).

Also at sentencing, the trial court asked Mr. Cate what he normally does for an income. (RP 304-305). Mr. Cate told the trial court he used to fish, but it has been about two or three years since he was employed. (RP 305). He told the trial court he normally gets money from the tribe and the federal government, consisting of payments he receives from a lawsuit. (RP 305). Mr. Cate told the trial court he was not injured or disabled. (RP 305). Following this colloquy, the trial court found Mr. Cate “currently indigent, with pretty much no ability to make payments.” (RP 306).

The trial court imposed the following legal financial obligations: \$500 victim assessment; \$200 criminal filing fee; and \$100 DNA collection fee. (CP 45-46; RP 306, 311). The trial court stating it was “waiving, under *State v. Blazina*, those other normal fees or costs.” (RP 311). The trial court also entered an order of restitution, agreed to by Mr. Cate. (CP 21-38; RP 312).

The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution: The court has considered the total amount owing, the defendant's 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 42).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 46).

Mr. Cate timely appealed. (CP 5-17). The trial court entered an Order of Indigency, granting Mr. Cate a right to review at public expense. (CP 1-4).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Cate guilty of second degree theft, where there was insufficient evidence that the value of the property he obtained exceeded \$750.

There was insufficient evidence to support Mr. Cate's conviction of second degree theft. In order to find Mr. Cate guilty of second degree theft, the jury had to find that the property he obtained exceeded \$750 in value. The evidence presented at trial did not establish that the property obtained exceeded this required amount. A rational jury could not have found Mr. Cate guilty of second degree theft beyond a reasonable doubt. Therefore, the evidence is insufficient to support Mr. Cate's conviction of second degree theft.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff’d*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” *Id.*

To find Mr. Cate guilty of second degree theft, the jury had to find that he “wrongfully obtained or exerted unauthorized control over property of another, to wit, various tools belonging to Kevin Bowling . . . [t]hat . . . exceeded \$750 in value[.]” (CP 96; RP 251-252); *see also* RCW 9A.56.040(1)(a) (second degree theft).

Here, the evidence was insufficient that the tools Mr. Cate obtained from Mr. Bowling exceeded \$750 in value, because the State provided insufficient evidence of the market value of the tools.

For the purposes of second degree theft, “value” is defined as “the market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(21)(a); *see also* CP 99; RP 252. “Market value” means “the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction.” *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (internal quotation marks omitted) (citations omitted).

Although “evidence of the price paid for an item is entitled to great weight[,] . . . such evidence must not be too remote in time.” *State v. Ehrhardt*, 167 Wn. App. 934, 944, 276 P.3d 332 (2012) (internal citations omitted). “[V]alue need not be proved by direct evidence.” *Id.* “Rather, the jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affects its value.” *Id.*

“Evidence other than market value, such as replacement cost, is inadmissible unless it is first shown that the property has no market value.” *Id.* at 944-45 (citing *State v. Clark*, 13 Wn. App. 782, 788, 537 P.2d 820 (1975)).

In *Ehrhardt*, the defendant was charged and convicted of one count of second degree theft of two rotary hammers, a pressure washer, a box of stereo

wiring, an air compressor, and two nail guns from a shed on the victim's property. *Id.* at 937-938. At trial, the victim testified "he bought the air compressor for \$100 five or six years before trial, but that he had never used it and it was brand new." *Id.* at 938. He also testified he bought the pressure washer for \$199 within the last year, and "that he acquired the items in the stereo wiring box for well over \$200 or \$300 'over the years,' but that the items were 'just bits and parts and pieces' at that point, worth \$100." *Id.*

For the rotary hammers, the victim testified "they belonged to his employer, that they cost about \$450, and that they were about three years old." *Id.* For the nail guns, the victim testified they "belonged to his employer, that they cost 'in the \$230 range' each, and that they were also about three years old." *Id.*

On appeal, the defendant argued there was insufficient evidence to support his second degree theft conviction, because the State failed to prove the value of the items stolen exceeded \$750. *Id.* at 944-47. The Court of Appeals agreed and reversed his conviction. *Id.* The Court reasoned that because the victim testified the air compressor and the pressure washer were "essentially new," the jury could find the original cost of these items was their current market value. *Id.* at 945. The Court further reasoned that the victim's testimony regarding the items in the stereo wiring box could also establish their current market value, because the victim testified "about the contemporaneous value of the items[.]" *Id.*

However, the Court found insufficient evidence of the current market value of the rotary hammers and nail guns, that would allow the jury to include these items in order to find the value of the items stolen exceeded \$750. *Id.* at 945-46. The Court reasoned the victim “did not testify about the condition of the rotary hammers and nail guns.” *Id.* at 945. The Court stated the victim “testified only as to what the tools ‘cost,’ not what they were then worth in their used condition.” *Id.* at 945-46.

The Court also reasoned “the State presented no direct evidence and insufficient circumstantial evidence of the condition or depreciation of the tools from which the jury could infer their market value.” *Id.* at 946. The Court further reasoned “[n]or did the State present evidence that the tools had no market value, which would have permitted the State to rely on evidence of their replacement cost.” *Id.*; see also *State v. Morley*, 119 Wn. App. 939, 942-45, 83 P.3d 1023 (2004) (holding that evidence of a used generator’s retail price, new, is insufficient to support the value element of an attempted first degree theft conviction, where the State did not present any direct evidence of the generator’s market value as a used piece of equipment).

Here, as in *Ehrhardt* and *Morley*, the State presented no direct evidence and insufficient circumstantial evidence of the condition or depreciation of the stolen tools from which the jury could infer their market value. See *Ehrhardt*, 167 Wn. App. at 937-38, 944-47; *Morley*, 119 Wn. App. at 942-45.

Mr. Bowling did not testify to the current condition of each of the tools stolen. (RP 204-205). Although he testified “I take good care of my tools,” he could not testify as to the age of each of the tools. (RP 204); *Cf. State v. Stargel*, No. 45721-1-II, 2015 WL 1228734, at *4-5 (Wash. Ct. App. Mar. 17, 2015) (upholding a second degree theft conviction, based upon testimony regarding the stolen items’ condition at the time they were stolen).²

In addition, there were no photographs presented of the stolen tools from which the jury could use to infer the market value of the tools. (State’s Exs. 5-27); *Cf. State v. Best*, No. 45749-1-II, 2017 WL 1600278, at *2-4 (Wash. Ct. App. April 7, 2015) (upholding a second degree possession of stolen property conviction, where the jury could infer from testimony as to purchase prices of the property and photographs that the current market value of the stolen property exceeded \$750).³

The State presented the purchase price of one item, the Stihl MS170 Chainsaw. (RP 200; State’s Ex. 3). However, the purchase price of the Stihl MS170 Chainsaw was too remote in time to establish the market value of the chainsaw at the time it was stolen. *See Ehrhardt*, 167 Wn. App. at 944. The receipt shows the chainsaw was purchased on March 29, 2011, almost six years

² “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.” GR 14.1. These cases are cited as persuasive authority only.

³ *See* fn. 2 above.

before the date it was stolen. (State's Ex. 3). Further, the State presented no evidence of the current condition of the chainsaw that would allow the jury to infer the market value of the chainsaw from this purchase price. (RP 204-205).

For all of the other items of property, the State presented only the replacement cost of the items. (RP 198-199; State's Ex. 3). However, the State did not present evidence that the tools had no market value, so the State could not rely on their replacement cost to establish their market value. *See Ehrhardt*, 167 Wn. App. at 944.

In sum, the State provided insufficient evidence of the condition of the tools at the time they were taken from Mr. Bowling that would enable to jury to determine their market value. *See Ehrhardt*, 167 Wn. App. at 937-38, 944-47; *Morley*, 119 Wn. App. at 942-45; *see also State v. Williams*, 199 Wn. App. 99, 105-11, 398 P.3d 1150 (2017) (finding there was insufficient evidence of market value to support a conviction for second degree possession of stolen property, where the victim gave a "rough estimate" of the value of the stolen property, but did not describe the condition of the property when stolen, its purchase date, or its purchase price). The evidence presented, the original purchase price of the chainsaw almost six years prior to the theft, and the replacement cost of the other tools, was insufficient to establish the market value of the tools.

Should this Court reject the argument above and find that jury could consider the original purchase price of the chainsaw and the replacement values for the other tools as sufficient evidence of value for the second degree theft charge, there was still insufficient evidence that the property Mr. Cate obtained from Mr. Bowling exceeded \$750 in value.

The State alleged in the charging document that Mr. Cate obtained the following seven tools from Mr. Bowling, with a combined value exceeding \$750: (1) a Stihl MS170 Chainsaw; (2) a Dremel Max Saw; (3) a 12 Amp Skill Saw; (4) a Portable Dewalt Drill with charger; (5) a Senco Nail gun, (6) a Craftsman Corded Hammer Drill, and (7) a Drive brand compressed air impact tool. (CP 190). Of these seven charged items, the evidence presented at trial only demonstrated that Mr. Cate obtained five of these seven tools from Mr. Bowling. (RP 201-203; State's Ex. 3).

Mr. Bowling testified that State's Exhibit No. 3 included a complete list of the items missing from his shed. (RP 201; State's Ex. 3). State's Exhibit No. 3 only included a Stihl MS170 Chainsaw, a Dremel Max Saw, a Portable Dewalt Drill with charger, a Senco Nail gun, and a Craftsman Corded Hammer Drill. (State's Ex. 3). State's Exhibit No. 3 did not include a 12 Amp Skill Saw and a Drive brand compressed air impact tool. (State's Ex. 3). Instead, State's Exhibit No. 3 included a 10.0 Amp Skill Saw and an Ingersoll Rand brand 1/2 in. Drive Composite Air "Impactool," which do not match these two tools (a 12 Amp Skill

Saw and a Drive brand compressed air impact tool) alleged in the Information. (CP 190; State's Ex. 3).

Because the State did not allege that Mr. Cate took a 10.0 Amp Skill Saw and an Ingersoll Rand brand 1/2 in. Drive Composite Air "Impactool," it was improper to ask the jury to consider evidence that these two tools were obtained, as proof of the second degree theft count, where it did not charge these two tools in the charging document. *See State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997) (stating "a defendant has the right to be informed of charges against him and to be tried only for offenses charged."). Evidence of stolen items not listed in the Information cannot be used to calculate value.

When the two tools allegedly obtained, but not listed in the Information, are not considered (a 10.0 Amp Skill Saw and an Ingersoll Rand brand 1/2 in. Drive Composite Air "Impactool"), at most, the evidence only shows that Mr. Cate obtained \$700.78⁴ in tools from Mr. Bowling, which does not exceed \$750 in value, as required to support a conviction for second degree theft. (CP 96, 190; RP 201, 251-252; State's Ex. 3); *see also* RCW 9A.56.040(1)(a).

⁴ \$242.80 (Stihl MS170 Chainsaw) + \$79.00 (Dremel Saw-Max) + \$199.00 (Dewalt Cordless Brushless Compact Drill) + \$99.98 (Senco Pneumatic Brad Nailer) + \$80.00 (Craftsman Corded Hammer Drill) = \$700.78. (State's Ex. 3). In addition, the total amount obtained is actually less, given that the sales receipt for the Stihl MS170 Chainsaw includes \$25.54 (\$12.59 + \$12.95) for miscellaneous items not alleged in the Information.

Based on the foregoing, a rational jury could not have found Mr. Cate guilty of second degree theft beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *see also* CP 96; RP 251-252; RCW 9A.56.040(1)(a).

His conviction for second degree theft should be reversed, and because the jury was instructed on the lesser-included offense of third degree theft, remanded for the entry of a judgment and sentence for third degree theft. *See In re the Pers. Restraint of Heidari*, 174 Wn.2d 288, 292–93, 274 P.3d 366 (2012) (remand for resentencing on a lesser included offense is appropriate only if the jury was explicitly instructed on the lesser offense); *see also* CP 77, 108-111; RP 256-259.

Issue 2: In the alternative, whether Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the admission of State’s Exhibit No. 3 as inadmissible hearsay.

Mr. Cate requests this Court consider this argument, made in the alternative, if it rejects his sufficiency of the evidence arguments presented in Issue 1 above. At trial, the restitution estimate that Mr. Bowling filled out for the prosecutor’s office was admitted into evidence as State’s Exhibit No. 3, without an objection by defense counsel. Defense counsel’s failure to object to the admission of State’s Exhibit No. 3 constituted ineffective assistance of counsel, because an objection based on hearsay would have been sustained, the result of the trial would have been different if this evidence had not been admitted, and the

decision not to object was not tactical. Therefore, Mr. Cate’s conviction for second degree theft should be reversed and remanded for a new trial.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

- (1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and
- (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “‘counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). “[S]trategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, Mr. Cate was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to State’s Exhibit No. 3, as inadmissible hearsay. State’s Ex. No. 3 is the restitution estimate Mr. Bowling filled out for the prosecutor’s office, and it includes a receipt for Mr. Bowling’s purchase of a Stihl MS170 Chainsaw and internet printouts listing the replacement costs for other tools. (RP 199-201; State’s Ex. 3).

Defense counsel’s failure to object to the admission of State’s Ex. No. 3 fell below prevailing professional norms. *See Sexsmith*, 138 Wn. App. at 509. An objection to the admission of this testimony as inadmissible hearsay would have been sustained. *See* ER 801(c); ER 802.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 802.

There is a hearsay exception for business records:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

However, the receipt for Mr. Bowling’s purchase of a Stihl MS170 Chainsaw contained in State’s Exhibit No. 3 would not be admissible under the business records exception to the hearsay rule, because there was no evidence presented at trial as to whether the receipt was made in the regular course of business, at or near the time of the purchase.

In addition, the internet printouts listing the replacement costs for other tools are not admissible under any exception to the hearsay rule. “An unauthenticated printout obtained from the Internet does not meet the public records exception to the hearsay rule under RCW 5.44.040. Nor does it qualify as a self-authenticating document under ER 902(e).” *State v. Davis*, 141 Wn.2d 798, 854, 10 P.3d 977 (2000).

State's Exhibit No. 3 contains out-of-court statements offered to prove the truth of the matter asserted, and no hearsay exception applies that would make it admissible. *See* State's Ex. No. 3; *see also* ER 801(c); ER 802; RCW 5.45.020; *Davis*, 141 Wn.2d at 854.

Defense counsel's failure to object was not tactical. State's Exhibit No. 3 was the only evidence regarding the values of the tools obtained from Mr. Bowling. (State's Ex. 3). Without this testimony, the State could not establish an essential element of the crime of second degree second degree theft, obtaining property which exceeds \$750 in value. *See* CP 96; RP 251-52; *see also* RCW 9A.56.040(1)(a).

Had defense counsel objected to the admission of State's Exhibit No. 3, the result of the trial would have been different. *See Sexsmith*, 138 Wn. App. at 509. Without this testimony necessary to establish that the value of property obtained by Mr. Cate from Mr. Bowling exceeded \$750, the State would not have been able to prove the elements of second degree theft, but only the lesser-included offense of third degree theft. *See* RCW 9A.56.050(1) (defining third degree theft). Although Mr. Bowling testified he calculated the total value of the items missing from his shed as \$1,149.24, he obtained this estimate from the prices listed in State's Exhibit No. 3. (RP 202-203). Likewise, although Officer Schaefer testified the total was "somewhere near \$1,700," this number was also based upon the number obtained by Mr. Bowling in State's Exhibit No. 3. (RP

174-175). The evidence of the value of the tools obtained from Mr. Bowling came solely from State's Exhibit No. 3.

Mr. Cate has proven that defense counsel's failure to object to the admission State's Exhibit No. 3 constituted ineffective assistance of counsel. *See Sexsmith*, 138 Wn. App. at 509; *see also* State's Ex. 3. His conviction for second degree theft should be reversed and remanded for a new trial.

Issue 3: Whether the trial court erred in imposing a sentence consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4, where Mr. Cate was sentenced on both matters on the same day.

The trial court imposed a sentence in this case to run consecutive to the sentence in a separate case that was sentenced on the same day as this matter. Because the Sentencing Reform Act (SRA) does not authorize the imposition of consecutive sentences under these facts, the trial court erred in imposing consecutive sentences and the case should be reversed and remanded for resentencing.

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”). “The interpretation of provisions of the SRA involves questions of law that we review de novo.” *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

Subject to some exceptions, under the SRA, sentences for two or more current offenses “shall be served concurrently[,]” and “[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a); *see also State v. Smith*, 74 Wn. App. 844, 853–54, 875 P.2d 1249 (1994) (holding that “defendants who are sentenced for multiple convictions at the same proceeding must be given concurrent sentences unless the sentencing court determines that there are grounds for an exceptional sentence.”).

“While the SRA does not formally define ‘current offense,’ the term is defined functionally as convictions entered or sentenced on the same day.” *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013); *see also* RCW 9.94A.525(1) (stating “[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.”).

Here, the trial court sentenced Mr. Cate on two matters on the same day, this case and Okanogan County Superior Court No. 17-1-00039-4. (CP 39-50; RP 291-315). The trial court imposed a term of confinement in this case, and ordered this term to run consecutively with the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4. (CP 43; RP 303-304, 310-311).

The trial court erred in imposing a sentence in this case consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4.

Because the two cases were sentenced on the same day, the convictions in each case are “current offenses.” *See Finstad*, 177 Wn.2d at 507. Therefore, RCW 9.94A.589(1)(a) requires Mr. Cate’s sentences in the two cases to be served concurrently. *See State v. Miller*, No. 48548-6-II, 2017 WL 888610, at *2-3 (Wash. Ct. App. Feb. 28, 2017) (holding that the sentences in two separate cases sentenced on the same day must be served concurrently); *State v. Barclay*, Nos. 30475-2-III, 30477-9-III, 2013 WL 1694879, at *3 (Wash. Ct. App. April 18, 2013) (holding that the trial court erred in imposing consecutive sentences for two cases sentenced on the same day).⁵

In addition, consecutive sentences could not be imposed under the exceptional sentence provisions of RCW 9.94A.535, because the trial court did not follow the procedure for imposing an exceptional sentence. *See* RCW 9.94A.535; RCW 9.94A.589(1)(a); *see also Barclay*, 2013 WL 1694879, at *3 (“The trial court could not have imposed consecutive sentences under these facts without declaring an exceptional sentence.”).⁶ Specifically, an exceptional sentence may be imposed, under RCW 9.94A.535, if “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. If such a sentence is imposed, “the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535.

⁵ *See* fn. 2 above.

⁶ *See* fn. 2 above.

Likewise, consecutive sentences were not authorized under RCW

9.94A.589(3). This statutory provision provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3) (emphasis added).

Because RCW 9.94A.589(3) expressly states that it is subject to RCW 9.94A.589(1), RCW 9.94A.589(1) controls and requires Mr. Cate's two sentences to be run concurrently, unless the trial court followed the procedures for an exceptional sentence. *See Smith*, 74 Wn. App. at 852 n.5; *see also*⁷ *Miller*, 2017 WL 888610, at *3 (concluding that RCW 9.94A.589(1) controls over RCW 9.94A.589(3) for two separate cases sentenced on the same day); *Barclay*, 2013 WL 1694879, at *3 n.5 (noting that RCW 9.94A.589(3) is not applicable to offenses sentenced on the same day).

Therefore, because two cases sentenced on the same day are current offenses, the trial court erred in imposing a sentence here consecutive to the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4, and the case should be reversed and remanded for resentencing.

⁷ See fn. 2 above.

Issue 4: Whether this Court should deny costs against Mr. Cate on appeal in the event the State is the substantially prevailing party.

Mr. Cate preemptively objects to any appellate costs being imposed against him, 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 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Cate indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 1-4, 180-181, 192; RP 8, 304-306). To the contrary, Mr. Cate's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Cate remains indigent. The report shows that Mr. Cate's financial circumstances have not improved since the date he was sentenced in this case.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 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, the 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 serious 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). 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 successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s 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 *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Cate has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Cate would be

burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); 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) (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

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 said, “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. Mr. Cate met this standard for indigency. (CP 1-4, 180-181, 192; RP 8, 304-306).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 1-4. “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) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Cate to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Cate's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Cate remains indigent.

This Court is asked to deny appellate costs at this time. 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, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency

remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Cate's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Cate remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Cate guilty of second degree theft. This conviction should be reversed and remanded for the entry of a judgment and sentence for the lesser included offense of third degree theft.

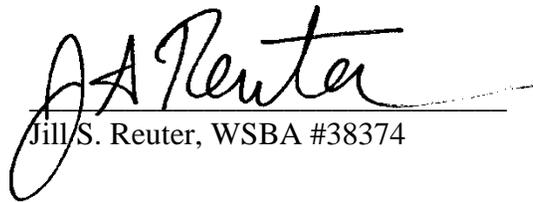
In the alternative, Mr. Cate's conviction of second degree theft should be reversed and remanded for a new trial, because Mr. Cate received ineffective assistance of counsel when defense counsel failed to object to the admission of State's Exhibit No. 3 as inadmissible hearsay.

At a minimum, the case should be reversed and remanded for resentencing, for the trial court to impose a sentence that is concurrent with, rather

than consecutive to, the sentence imposed in Okanogan County Superior Court No. 17-1-00039-4.

Mr. Cate also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 9th day of November, 2017.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

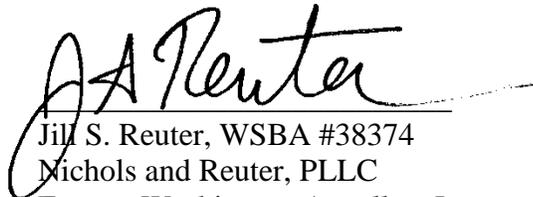
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35231-5-III
vs.)
BRANDON WILLIAM CATE)
Defendant/Appellant) PROOF OF SERVICE
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 9, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Brandon William Cate, DOC #894326
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at ldrangsholt@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 9th day of November, 2017.



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November 09, 2017 - 1:22 PM

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Appellate Court Case Title: State of Washington v. Brandon William Cate
Superior Court Case Number: 17-1-00040-8

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