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Court of Appeals
Division III
State of Washington
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No. 35918-2-III

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

STATE OF WASHINGTON,
Respondent,

v.

CORY EVANS,
Appellant.

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

The Honorable John O. Cooney

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Cory Evans was found guilty of possession of a stolen motor vehicle following a jury trial. The State presented insufficient evidence Mr. Evans knew the motorcycle he possessed was stolen. His conviction should be vacated for insufficient evidence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Evans guilty of possession of a stolen motor vehicle.
2. An award of costs on appeal against the defendant would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether there was insufficient evidence the defendant knowingly possessed a stolen motor vehicle.

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

D. STATEMENT OF THE CASE

On April 28, 2017, a police sergeant was patrolling in Spokane when he observed a male motorcyclist parked on the side of the road. RP 65-66. The motorcycle did not have a license plate. RP 66. The sergeant activated his vehicle's emergency lights and pulled in front of the motorcycle. RP 67. After the male subject attempted to evade the sergeant on motorcycle, and then by foot, the sergeant apprehended the man. RP 67-68. The sergeant identified the man as Cory Evans and

determined the motorcycle Mr. Evans was riding had been stolen. RP 68-69, 71.

The State charged Mr. Evans with possession of a stolen motor vehicle. CP 14. A jury trial was held on this sole allegation. RP 45-121.

At trial, the sergeant testified consistent with the facts above. RP 63-78. After his arrest, the sergeant interviewed Mr. Evans. RP 69-70. Mr. Evans purportedly told the sergeant he purchased the motorcycle a few weeks earlier from a friend for \$100 and he did not have any paperwork. RP 69-70. When the sergeant asked if the motorcycle could be stolen, Mr. Evans stated it could be stolen because he bought it so cheap. RP 70. Mr. Evans also refused to give the sergeant the seller's name. RP 70.

John Richardson testified at trial. RP 45-63. Richardson identified the motorcycle as the same one stolen from him months earlier. RP 46-50. Richardson said before the motorcycle was stolen, it was in "like-new" condition and "[n]othing had been changed from the factory." RP 50-51. However, once recovered, he recounted his motorcycle had been damaged from its original condition in several ways. RP 51-60. The original tool kit was missing, the original ignition had been cut out and replaced, the gas cap was damaged so that it no longer required a key to open, the battery had been replaced and the cover was missing, the original

headlights were missing, and other additional cut marks and grind marks were on the bike. RP 51-60.

Mr. Evans testified at trial as well regarding his acquisition of the motorcycle. RP 86-107. Mr. Evans said someone he knew had a motorcycle for sale, and it was torn apart and in pieces. RP 87. He testified he wanted to purchase the motorcycle because it was a decent price and he thought he could put it back together to make it work again. RP 87. He bought the bike a few weeks before the sergeant pulled him over. RP 87. He described in detail the work he put into restoring the motorcycle. RP 87-89.

Mr. Evans told the jury he originally tried to evade the sergeant on April 28th because he initially did not realize the sergeant was with law enforcement. RP 90-91. The sergeant was driving a plain gray Dodge charger, which was marked and equipped with emergency lights and a siren. RP 32, 66, 75, 90; Exhibit 13. Once stopped, Mr. Evans told the sergeant he paid \$500 for the bike, had a bill of sale, and was certain the motorcycle was not stolen. RP 91, 104. Mr. Evans stated he purchased it from an acquaintance, Darryl Carrillo. RP 92, 96. He did not receive a title with the motorcycle and it did not have a license plate. RP 89, 97.

The jury was instructed as to the elements of possession of a stolen motor vehicle. CP 75. The jury was also instructed as to the definition of “knowledge”. CP 78.

A jury found Mr. Evans guilty of possession of a stolen motor vehicle. RP 150; CP 81.

At sentencing, the trial court briefly acknowledged the large amount of Mr. Evans’ current legal financial obligations (LFOs). RP 173. The trial court only imposed mandatory fees totaling \$800. CP 101-102; RP 172.

The trial court found Mr. Evans indigent, and entered an order of indigency, granting Mr. Evans a right to review at public expense. CP 116-117. Mr. Evans’ Report as to Continued Indigency, dated 5/22/18 and filed contemporaneously with this brief, indicates he owes approximately \$200,000 in legal financial obligations, \$16,000 in child support, that he owns no assets, and is not receiving any income. Report as to Continued Indigency.

Mr. Evans timely appeals. CP 119-120.

E. ARGUMENT

Issue 1: Whether there was insufficient evidence the defendant knowingly possessed a stolen motor vehicle.

There was insufficient evidence to support Mr. Evans' conviction for possession of a stolen vehicle. The State did not prove beyond a reasonable doubt Mr. Evans knew the motorcycle in his possession was stolen.

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). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*

“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). 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.’” *Sweany*, 162 Wn. App. at 228.

To find Mr. Evans guilty of possession of a stolen motor vehicle, the jury had to find:

- (1) That on or about April 28, 2017, the defendant knowingly possessed a stolen motor vehicle;

- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in the State of Washington.

CP 75; *see also* RCW 9A.56.068.

The jury was also instructed as to the definition of “knowledge”:

A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstances is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 78.

Here there was insufficient evidence to prove Mr. Evans knew the motorcycle was stolen. It is true the motorcycle in Mr. Evans’ possession was missing a license plate and title, and the bike was significantly damaged. RP 86-89. And perhaps Mr. Evans acknowledged to the sergeant the motorcycle could have been stolen, a fact in dispute at trial. RP 69, 93. But this acknowledgement

does not mean Mr. Evans in fact actually knew the bike to be stolen. RP 69, 93. Mr. Evans testified he purchased the motorcycle to fix it up and did not think it could be stolen. RP 87-89, 93, 104. He stated the bike was in pieces and he thought he could put the bike back together, he paid \$500 for it, and the price was “decent.” RP 86-87. The jury was “permitted but not required to find” Mr. Evans acted with information that would lead a reasonable person in the same situation to believe the motorcycle was stolen. CP 78. Under these circumstances, no evidence was presented from which the jury could determine beyond a reasonable doubt Mr. Evans knew the motorcycle was stolen.

A rational jury could not have found Mr. Evans guilty of possession of a stolen motor vehicle where there was insufficient evidence to prove he knew the motorcycle was stolen. *See Salinas*, 119 Wn.2d at 201. The conviction should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: Whether this Court should deny costs against Mr. Evans on appeal in the event the State is the substantially prevailing party.

Mr. Evans 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), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The court acknowledged Mr. Evans owed a significant amount in legal financial obligations. RP 173. An order finding Mr. Evans indigent was entered by the trial court, and there has been no known improvement to this indigent status. CP 116-117. To the contrary, Mr. Evans' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Evans remains indigent. The report as to continued indigency shows he owes \$200,000 in legal financial obligations, \$16,000 in child support, and has no source of income.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*, as discussed in the issue above. *See State v. Blazina*, 182 Wn.2d 827, 835, 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, 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, the trial court only imposed mandatory costs and entered an order of indigency, and Mr. Evans’ Report as to Continued Indigency demonstrates a continued inability to pay costs. CP 101-102, 116-117.

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. Evans met this standard for indigency. CP 116-117.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 116-117. “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.

It does not appear to be the burden of Mr. Evans to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr.

Evans' report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Evans remains indigent.

This Court is asked to deny appellate costs at this time. 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 that Mr. Evans' current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, there is a completed report as to continued indigency showing that Mr. Evans remains indigent.

Appellate costs should not be imposed in this case.

F. CONCLUSION

Mr. Evans requests his conviction for possession of a stolen motor vehicle be vacated for insufficient evidence.

Mr. Evans further respectfully requests this Court deny any of the State's requests for appellate costs.

Respectfully submitted this 25th day of June, 2018.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35918-2-III
vs.)
CORY EVANS) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 25, 2018, 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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Washington Corrections Center
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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 25th day of June, 2018.

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