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NO. 36140-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CARGILL,
Appellant.

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

Spokane County Cause No. 17-1-04506-4

The Honorable Raymond F. Clary, Judge

BRIEF OF APPELLANT - AMENDED

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ISSUES AND ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to convict Mr. Cargill of possession of a stolen motor vehicle.
2. The dirt bike that Mr. Cargill possessed is not a “motor vehicle” under RCW 9A.56.068.
3. No rational jury could have found beyond a reasonable doubt that Mr. Cargill possessed a stolen “motor vehicle.”
4. The trial court erred by denying Mr. Cargill’s *Knapstad* motion to dismiss the possession of a stolen motor vehicle charge.

ISSUE 3: The car theft and possession of a stolen vehicle statutes are intended to penalize theft offenses related to “family cars” and do not apply to vehicle that are designed or purposes other than passenger transportation. Did the trial court err by denying Mr. Cargill’s motion to dismiss his possession of a stolen vehicle charge when the dirt bike at issue was designed only for recreational use and could not be legally driven on public roadways?

5. Mr. Cargill was denied his Sixth and Fourteenth Amendment right to counsel.
6. Mr. Cargill was denied his article I, section 22 right to counsel.
7. Mr. Cargill’s attorney provided ineffective assistance of counsel by failing to object to inadmissible testimony regarding a police officer’s opinion of Mr. Cargill’s credibility.
8. Police testimony providing an opinion of Mr. Cargill’s credibility was inadmissible because it invaded the province of the jury.
9. Mr. Cargill was prejudiced by his attorney’s failure to object.

ISSUE 2: Defense counsel provides ineffective assistance by unreasonably failing to object to inadmissible evidence that prejudices his/her client’s case. Did Mr. Cargill’s defense attorney provide ineffective assistance of counsel by failing to object to a police sergeant’s testimony providing his opinion that Mr. Cargill had been “deceptive” regarding the primary factual issue in the case?

10. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Cargill is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Cargill was helping a friend work on a dirt bike outside of the friend's apartment building. RP 269-70.¹ Mr. Cargill's friend had taken the dirt bike out of his garage and asked Mr. Cargill to help him get it running. RP 269-70. Mr. Cargill had assumed that the friend legally owned the bike. RP 270.

The dirt bike was a Yamaha YZ426. CP 6. It did not have a headlamp, a tail light, brake lights, rearview mirrors, a windshield, or turn signals. *See* CP 20-21; Ex. P1-P3.

Eventually, the police showed up. RP 272. Mr. Cargill was the only person outside with the dirt bike at the time. RP 272-73. The police arrested Mr. Cargill for possession of a stolen motor vehicle. RP 275.

When he was being booked into jail, the police learned that Mr. Cargill had a small amount of methamphetamine and some "shaved keys" in his possession. RP 275-76, 278. They added charges of drug possession and possession of motor vehicle theft tools. CP 74-75.

Mr. Cargill brought a *Knapstad* motion to dismiss the possession of a stolen motor vehicle charge, arguing that the dirt bike did not qualify

¹ Unless otherwise noted, all citations to the verbatim report of proceedings refer to the chronologically-numbered volumes spanning 3/2/18 through 6/12/18.

as a motor vehicle under the relevant statute and recent Supreme Court caselaw. CP 5-21.

The court denied Mr. Cargill's motion to dismiss the charge. CP 25. At the motion hearing, the judge explained that he was satisfied that a Yamaha YZ426 qualified as a motor vehicle because the judge had raced motocross in high school and that model had been a "big deal" when it came out. RP (2/1/18) 14-15. The judge also noted that many dirt bikes, including the Yamaha YZ426, cost thousands of dollars even though they are not "street legal." RP (2/1/18) 14-15.

At Mr. Cargill's trial, the police explained that the dirt bike had been reported stolen a few days before they encountered Mr. Cargill working on it. RP 223-24.

A police sergeant testified that Mr. Cargill had initially said that he did not know where the bike had come from, but that the sergeant had not believed him. RP 231. The sergeant told the jury that:

During that initial contact and questioning, I felt he was being deceptive based on no eye contact, long thought process on questions that I would ask him without immediate answers, like he was processing the questions and wanted to tell me what he wanted to tell me instead of answering the actual question I was asking him.

RP 231.

The sergeant testified that Mr. Cargill eventually admitted that he had known the bike was stolen and told them that his brother had stolen it. RP 231-32.

Mr. Cargill also testified at trial. RP 267-90. He admitted to possessing the drugs and shaved keys but said that he had not known that the bike was stolen. RP 275-76, 278.

He denied telling the police that he knew the bike was stolen. RP 273. Rather, he had told the police that he could help them locate some other stolen property – which his brother had stolen – in exchange for leniency. RP 275.

The jury found Mr. Cargill guilty of all three charges. CP 135-37. This timely appeal follows. CP 222.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. CARGILL OF POSSESSION OF A STOLEN MOTOR VEHICLE BECAUSE THE DIRT BIKE DOES NOT QUALIFY AS A “MOTOR VEHICLE” UNDER THE WASHINGTON SUPREME COURT’S INTERPRETATION OF THE STATUTE.

Dirt bikes are designed for “recreational use.” *See e.g. Hudnell v. Allstate Ins. Co.*, 190 Ariz. 52, 54, 945 P.2d 363, 365 (Ariz. Ct. App. 1997).

The dirt bike at issue in Mr. Cargill’s case did not have a headlamp, a tail light, brake lights, rearview mirrors, a windshield, or turn

signals. *See* CP 20-21; Ex. P1-P3. Accordingly, the bike could not be legally “operated on a public road, street, or highway.” *See* RCW 46.61.705(2) (delineating the requirements for permissible operation of an off-road motorcycle on public roads); *See also* MERRIAM-WEBSTER ONLINE DICTIONARY (2018), available at <https://www.merriam-webster.com/dictionary/dirt%20bike> (last accessed 12/13/18) (defining the term “dirt bike” as “a usually lightweight motorcycle designed for operation on unpaved surfaces”).

Under the Washington Supreme Court’s recent interpretation of the relevant statutes, the dirt bike at issue in Mr. Cargill’s case did not qualify as a “motor vehicle” under the RCW chapter related to auto theft. *See State v. Barnes*, 189 Wn.2d 492, 496–98, 403 P.3d 72 (2017). The trial court erred by denying Mr. Cargill’s *Knapstad* motion to dismiss the charge of possession of a stolen vehicle. *See State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013) (a conviction must be reversed for insufficient evidence if no rational jury could have found each element proved beyond a reasonable doubt even when the evidence is taken in the light most favorable to the state).

In order to convict Mr. Cargill of possession of a stolen motor vehicle, the state was required to prove that he knowingly possessed a

stolen motor vehicle. *See* RCW 9A.56.068; *See also State v. Tyler*, 195 Wn. App. 385, 402, 382 P.3d 699, 708 (2016), *review granted in part*, 189 Wn.2d 1016, 404 P.3d 497 (2017), and *aff'd on other grounds*, 191 Wn.2d 205, 422 P.3d 436 (2018) (regarding the knowledge requirement)

The term “motor vehicle” is not defined anywhere in the relevant statutes. *See* RCW 9A chapter 56; *Barnes*, 189 Wn.2d at 496–97. But the Washington Supreme Court undertook extensive statutory construction of the term “motor vehicle” last year in *Barnes*, limiting the meaning of that term as it applies to criminal charges for theft of a motor vehicle. *See Barnes*, 189 Wn.2d at 496-98. The *Barnes* court’s reasoning applies with equal force to Mr. Cargill’s conviction for possession of a stolen motor vehicle, which is part of the same RCW chapter and the statute for which was enacted as part of the same bill as that at issue in *Barnes*. *See* LAWS OF 2007, ch. 199; RCW 9A.56.068; RCW 9A.56.065.

The *Barnes* court held that a riding lawnmower does not qualify as a “motor vehicle” under the auto theft statute. *Id.* The *Barnes* court noted that the dictionary definitions of the terms “motor vehicle” and “automotive,” could, conceivably, include a riding lawnmower. *Id.* at 496-97. However, after looking to the legislative history and purpose of the statute, the Supreme Court held that the legislature intended it to encompass “cars and other automobiles designed for transport of people or

cargo, but not machines designed for other purposes yet capable of transporting people or cargo.” *Id.* at 496-97 (emphasis added).

The *Barnes* court relied heavily on the lengthy findings made by the legislature upon the enactment of the statutes related to auto theft and possession of a stolen vehicle. *Id.* at 497-98 (citing LAWS OF 2007, ch. 199, sec. 1). Specifically, the legislature treated the terms “motor vehicle,” “vehicle,” “car,” and “auto” as synonyms in its findings. *Barnes*, 189 Wn.2d at 497; LAWS OF 2007, ch. 199, sec. 1.

The legislature found that “[t]he family car is a priority of most individuals and families.” *Id.* (citing LAWS OF 2007, ch. 199, sec.

1(1)(a)). The legislature further found that:

The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal activities.

LAWS OF 2007, ch. 199, sec. 1(1)(a).

Relying on the importance of the “family car” to Washingtonians and on the fact that auto theft rates had risen in the years preceding 2007 even while other property crimes declined, the legislature adopted the statutes to provide heftier penalties for theft and possession of stolen “motor vehicles” than for other types of theft or possession of stolen property. *Id.* at sec. 1(1)(b).

Reyling on the legislature’s focus on the “family car,” the *Barnes* court applied the cannon that appellate courts must “consistent with other relevant statutory language, construe a general term so as to further [the statute’s] specific purpose. *Barnes*, 189 Wn.2d at 498 (citing *Yates v. United States*, 135 S.Ct. 1074, 1080, 191 L.Ed.2d 64 (2015)).

Accordingly, the Supreme Court held the trial court properly dismissed the auto theft charge in *Barnes* because, “Barnes did not attempt to steal a ‘family car,’ nor is the riding lawn mower he attempted to take a comparable investment to a family car.” *Id.*

In short, the *Barnes* court held that, in enacting the statute under which Mr. Cargill was convicted, the legislature “explicitly indicated it intended to focus this statute on cars and other automobiles.” *Id.*

The dirt bike at issue in Mr. Cargill’s case is neither a car nor an “automobile.” See MERRIAM-WEBSTER ONLINE DICTIONARY (2018); available at <https://www.merriam-webster.com/dictionary/automobile> (last accessed 12/21/18) (defining “automobile” as “a usually four-wheeled automotive vehicle designed for passenger transportation”).

The dirt bike cannot be legally driven on a public roadway because it does not have lights, a windshield, or turn signals. See RCW 46.61.705(2); Ex. P1-P3.

Nor is the dirt bike a “family car” or “a comparable investment to a family car.” *Barnes*, 189 Wn.2d at 498. Like the riding lawnmower in *Barnes*, the dirt bike is capable of transporting people but is “designed for other purposes.” *Id.* at 496-97. Specifically, the dirt bike is designed for recreation, not transportation. *See Hudnell*, 190 Ariz. at 54.

The trial court judge relied heavily on the idea that the specific dirt bike at issue in Mr. Cargill’s case was expensive, selling for about \$8,000 when it came out in 2000 or 2001. RP (2/1/18) 15.² But there is, of course, a statutory scheme criminalizing possession of stolen property, with increasing penalties based on the value of the stolen property. *See* RCW 9A.56.150-170. Mr. Cargill should have been charged under those statutes.

Applying the Supreme Court’s statutory construction analysis in *Barnes*, no rational jury could have found beyond a reasonable doubt that Mr. Cargill possessed a stolen “motor vehicle” when he worked on the dirt bike. *Barnes*, 189 Wn.2d at 496-98; *Chouinard*, 169 Wn. App. at 899. Mr. Cargill’s conviction for possession of a stolen motor vehicle must be reversed. *Id.*

² There was no evidence regarding the resale value of the dirt bike in 2018. *See* RP (2/1/18) generally.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO IMPERMISSIBLE TESTIMONY RELAYING A POLICE SERGEANT’S OPINION THAT MR. CARGILL HAD LIED ABOUT WHETHER HE KNEW THAT THE DIRT BIKE WAS STOLEN, WHICH WAS THE KEY FACTUAL ISSUE FOR THE JURY.

A police sergeant testified at Mr. Cargill’s trial and provided a direct opinion regarding whether Mr. Cargill had been truthful during their interaction. RP 231. The sergeant told the jury that:

During that initial contact and questioning, I felt he was being deceptive based on no eye contact, long thought process on questions that I would ask him without immediate answers, like he was processing the questions and wanted to tell me what he wanted to tell me instead of answering the actual question I was asking him.

RP 231.

That testimony was inadmissible because it constituted improper opinion testimony regarding the veracity of the accused. *State v. Kirkman*, 159 Wn.2d 918, 927–28, 155 P.3d 125 (2007).

The sergeant’s testimony told the jury that Mr. Cargill had been “deceptive” when he claimed to not have known that the dirt bike was stolen. RP 231. That issue was the primary factual issue for the jury in the case because Mr. Cargill admitted on the stand to possession of drugs and shaved keys but told the jury that he had not thought that the bike belonged to his friend. RP 275-76, 278. Indeed, defense counsel said at sentencing that Mr. Cargill’s decision to take the case to trial was based

exclusively on wanting a jury to determine whether he had had knowledge that the dirt bike was stolen. RP 351.

But Mr. Cargill’s attorney did not object to the police sergeant’s testimony that her client had been “deceptive” regarding that very issue. RP 231. Defense counsel provided Mr. Cargill with ineffective assistance of counsel.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).³

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability⁴ that counsel’s mistakes affected the outcome of the proceedings. *Id.*

³ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

⁴ A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; see also *Jones*, 183 Wn.2d at 339.

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

Evidence in which a witness provides an opinion of the veracity of the accused or of any other witness is inadmissible because it improperly invades the exclusive province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927–28, 155 P.3d 125, 131 (2007). But defense counsel can waive the issue of improper opinion testimony for appeal by failing to object at trial. *See Id.*

Improper opinion testimony from a law enforcement officer regarding another witness's veracity can be particularly prejudicial because it "carries a special aura of reliability." *Id.* at 928-29.

Courts apply a five-factor test to determine whether a statement qualifies as improper opinion testimony, looking to: (1) "the type of witness involved, (2) the nature of the testimony, (3) the nature of the charge, (4) the type of defense, and (5) the other evidence before the jury. *Id.* at 928 (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

As to the first factor, the sergeant status as a high-ranking law enforcement officer gave his testimony a "special aura of reliability,"

making it more likely that the jury would lend more credence to his assessment of Mr. Cargill's veracity than to their own. *Kirkman*, 159 Wn.2d at 928-29.

Turning to the second factor, the nature of Green's testimony directly accused Mr. Cargill of being dishonest about whether he had known that the bike was stolen. RP 231. This was a critical issue in the case because the only real factual question for the jury was whether the state had proved the knowledge requirement of the possession of a stolen vehicle charge.

As to factors four and five, the nature of the charge against Mr. Cargill and the nature of his defense made his case a matter of his word (that he had not known that the bike was stolen) against the police sergeant's word (that he had admitted to having that knowledge). The sergeant's testimony that he believed that Mr. Cargill was being "deceptive" regarding that issue went right to the heart of the primary factual issue in the case.

Green provided improper opinion testimony regarding Mr. Cargill's veracity. *Kirkman*, 159 Wn.2d at 928-29.

But Mr. Cargill's defense attorney failed to object to the inadmissible opinion evidence. RP 231. Defense counsel had no valid

tactical reason for waiving objection. Defense counsel provided deficient performance. *Hendrickson*, 138 Wn. App. at 833.

There is a substantial probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Cargill's trial. As detailed above, the police sergeant's improper opinion testimony lent an "aura of reliability" to the opinion that Mr. Cargill was lying about the primary factual issue in the case. *Kirkman*, 159 Wn.2d at 928-29. Mr. Cargill was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Cargill's defense attorney provided ineffective assistance of counsel by failing to object to highly prejudicial, inadmissible evidence relaying a police sergeant's opinion that Mr. Cargill had been untruthful about whether he knew the dirt bike was stolen. *Kirkman*, 159 Wn.2d at 927-29; *Jones*, 183 Wn.2d at 339; *Hendrickson*, 138 Wn. App. at 833. Mr. Cargill's convictions must be reversed. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS UPON MR. CARGILL BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in

advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).⁵

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court waived non-mandatory LFOs in Mr. Cargill case. CP 197-98. The trial court also found Mr. Cargill indigent at the end of the proceedings in superior court. CP 205-06.

That status is unlikely to change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk

⁵ Though the 2017 amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, appellant raises it, nonetheless, out of an abundance of caution. See RAP 14.2 (*as amended* by 2017 WASHINGTON COURT ORDER 0001).

determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Cargill's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

The state presented insufficient evidence to convict Mr. Cargill of possession of a motor vehicle. Mr. Cargill's attorney provided ineffective assistance of counsel by failing to object to inadmissible opinion testimony regarding her client's veracity. Mr. Cargill's convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Cargill who is indigent.

Respectfully submitted on March 26, 2019,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the amended brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 26, 2019.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

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