SUPREME COURT NO. 100548-2
COURT OF APPEALS NO. 54369-9-II

THE SUPREME COURT OFTHE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SCOTT ZIESEMER,

Petitioner.

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

The Honorable Carol Murphy, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Robert Scott Ziesemer, the appellant below, seeks review of the Court of Appeals decision State v. Ziesemer, noted at ___ Wn. App. 2d ___, 2021 WL 5783286, No. 54369-9-II (Dec. 7, 2021).[1]

B. ISSUES PRESENTED FOR REVIEW

1. Following termination from a diversion court alternative, the trial court proceeded to adjudicate Mr. Ziesemer's guilt on two counts of second degree identity theft based on stipulated facts. The stipulated facts established only Mr. Ziesemer's possession of certain identification and financial documents belonging to others and at best equivocal evidence of Mr. Ziesemer's intent. Were the trial court's findings that Mr. Ziesemer obtained, used, possessed, or transferred a means of identification or financial information of another person with an intent to commit, aid, or abet a crime

[1] In compliance with RAP 13.4(e)(9), the Court of Appeals slip opinion is appended to this petition for review and is referenced accordingly.

unsupported by substantial evidence and does the insufficiency of the evidence to support this charge require reversal of the convictions and remand for dismissal of the charges with prejudice?

2. Is the Court of Appeals decision, which acknowledges the evidence of Mr. Ziesemer's intent was "somewhat equivocal," in conflict with State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013), which holds that, for constitutional sufficiency review, criminal intent cannot be inferred from the mere possession of documents alone, thereby meriting reviewing under RAP 13.4(b)(1) and (3)?

C. STATEMENT OF THE CASE

Mr. Ziesemer entered a diversion program when he was charged with two counts of second degree identity theft, waiving his jury trial right.[2] CP 4-5, 13-17. If he failed to successfully complete the conditions of the program, he stipulated "that the

[2] Mr. Ziesemer was also charged with possession of stolen property in the second degree. CP 5. This charge was dismissed and is not at issue. RP (Jan. 16, 2020) 5; CP 28.

Prosecuting Attorney's Office may submit to this court copies of all materials which make up the law enforcement/investigating agency's reports on which this prosecution is based[.]" CP 15.

Mr. Ziesemer's participation in the diversion program was later revoked. CP 24; 1RP[3] 15.

The case proceeded to a stipulated facts bench trial per the diversion agreement, and the prosecution's materials were appended to the trial court's findings of fact and conclusions of law regarding diversion termination. CP 36-50; 2RP 6, 9. The materials consisted primarily of police reports and Mr. Ziesemer's consent form to search a vehicle. CP 38-50. The principal police reports indicated that Mr. Ziesemer consented to a search and identified his backpack. CP 44. Inside the backpack, the officer found a temporary ID card and a blank check and social security card belonging to Kimberly Hines as well as another endorsed check written by a car dealership to a

[3] Consistent with his brief in the Court of Appeals, Mr. Ziesemer uses 1RP to refer to the transcript dated January 13, 2020 and 2RP to refer to the transcript dated January 16, 2020.

car washing service. CP 45. The pertinent portions of the police report read,

> I asked Robert [Ziesemer] if he knew who Kimberly Hines was. Robert hesitated, thought about it but didn't give me an answer. I asked him again if he knew her, he said he did not. I asked him why he had Kimberly Hines['s] ID, social security card and a blank check belonging to her in his back pack. Robert said he had been arrested by Officer Rodriguez a couple weeks ago and he had also found some property belonging to Kimberly Rodriguez but he was very vague as to what had happened.
>
> I contacted TPD Officer Rodriguez by phone. He told me he recalled arresting Ziesemer . . . a couple weeks ago and that he had seized identification documents during a consent search and referred him for charges . . . .
>
> I advised Robert Ziesemer of his constitutional rights and he waived his right to silence. He told me that he had met a homeless person named Ramon who had tried to write him a check but he didn't want to take it. Ramon had also had [sic] given him the checks and the ID and social security card. He said Officer Rodriguez had already dealt with that. I tried to explain to him that Officer Rodriguez had already seized everything he found on him at the time he arrested him and had not let him keep the those [sic] documents. His answer was that "Officer Rodriguez must not have found it all" and he (Robert) had not checked his backpack for more stuff. Later he said he forgot it was in his backpack.

CP 45.

At the stipulated facts trial, Mr. Ziesemer asserted that the state had failed to prove anything beyond Mr. Ziesemer's bare possession of the financial documents in question; in other words, there was no evidence showing that his possession was with intent to commit, aid, or abet a crime as required by the identity theft statute. 2RP 6-7. The prosecution responded that Mr. Ziesemer had stipulated that the facts were sufficient to find guilt and "he therefore stipulated to the fat that he had an intent to commit a crime." 2RP 7-8. The prosecution also argued "there's no other possible other reason why he had those documents, other than to create a crime" and analogized the situation to burglary, where merely being present in another's home raises an inference of intent to commit a crime. 2RP 8.

The trial court found Mr. Ziesemer guilty beyond a reasonable doubt, relying on his stipulation and noting, "it does not appear to me that any valid reason was ever given for Mr. Ziesemer possessing those items." 2RP 9-10; CP 36-37. The

trial court imposed a standard range sentence of three months. CP 27-28; 2RP 20-21.

Mr. Ziesemer appealed. CP 51. He raised the same argument he raised in the trial court: there was insufficient evidence to infer his intent to commit a crime from his mere possession of financial documents belonging to others and any evidence of Mr. Ziesemer's intent was patently equivocal at best. Br. of Appellant at 5-9.

The Court of Appeals acknowledged "there was no direct evidence that Ziesmer intended to commit a crime" but proceeded to infer such intent based on Mr. Ziesemer's possession of an identification card and blank check: "Ziesemer's backpack contained Hines's identification card and a blank check from her bank account. Because the identification card presumably contained Hines's signature, a reasonable inference is that Ziesemer intended to use the card to forge Hines's signature on the blank check and thereby commit crimes of forgery and theft." Ziesemer, slip op. at 5.

D. ARGUMENT IN SUPPORT OF REVIEW

The Court of Appeals decision conflicts with the constitutional sufficiency holding of State v. Vasquez that mere possession of documents does not raise an inference of intent to commit a crime, and should therefore be reviewed pursuant to RAP 13.4(b)(1) and (3)

The prosecution bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); U.S. CONST. amend XIV; CONST. art. I, § 22. Insufficiency of the state's proof requires dismissal when, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. Vasquez, 178 Wn.2d at 6. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16; accord Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911) (inferences must "logically be derived from the facts

proved, and should not be the subject of mere surmise or arbitrary assumption"). "

RCW 9.35.020(1) states, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." Mimicking the statute, the trial court found that "the defendant did knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime . . . ." CP 36.

The trial court erred because there was no unequivocal evidence beyond Mr. Ziesemer's naked possession of the documents. "In possession-with-intent crimes, we do not draw inferences of intent based on mere possession." Vasquez, 178 Wn.2d at 8. Rather, Washington courts "have consistently required the State to prove intent beyond a reasonable doubt."[4]

[4] The Vasquez court noted that the legislature has defined inferences that arise in from possession for some crimes, "but

Id. The courts may not "infer criminal intent from evidence that is patently equivocal." Id. at 14. "Rather, inferences of intent may be drawn only 'from conduct that plainly indicates such intent as a matter of logical probability.'" Id. (quoting State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)).

The materials submitted by the prosecution for the stipulated facts trial establish nothing regarding Mr. Ziesemer's intent to commit, aid, or abet any crime. They establish that he possessed an ID card, a social security card, one blank check, and one endorsed check. Mr. Ziesemer said he did not know the person whose cards he possessed and explained, apparently vaguely, that he had been arrested a couple weeks before and that officer also found property belonging to a Kimberly Rodriguez. Mr. Ziesemer also told the officer that he initially received the

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has not established any inference of intent arising from the possession of forged documents." 178 Wn.2d at 8 n.1. As with the forgery statute at issue in Vasquez, the legislature has not created inferences that arise from the mere possession of identification and financial documents in chapter 9.35 RCW for the purposes of identity theft.

checks and cards from a homeless man, that the prior arresting officer had "already dealt with" the documents or must not have found all the documents in a prior search, and later stated that he did not remember the items being in his backpack.

Under Vasquez, Mr. Ziesemer's possession of the cards and checks alone is not sufficient to show an intent to commit a crime. The remaining evidence about where Mr. Ziesemer got the documents and whether a previous officer dealt with them or found them or other documents belonging to others is patently equivocal. It does not establish one way or another that Mr. Ziesemer obtained, possessed, used, or transferred a means of identification or financial document with an intent to do anything, let alone commit, aid, or abet a crime. Because mere possession does not establish this intent and because the remaining evidence is equivocal, the evidence was insufficient to support conviction.

The Court of Appeals' analysis eliminates the state's burden to prove intent, exactly as in Vasquez. Again, intent to commit a crime '"may be inferred in the defendant's conduct and

the surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.'" Vasquez, 178 Wn.2d at 8 (emphasis added) (quoting Woods, 63 Wn. App. 588, 591 821 P.2d 1235 (1991)). Even the Court of Appeals acknowledged the evidence was "somewhat equivocal." Ziesemer, slip op. at 5. Under Vasquez this acknowledgment should be dispositive—evidence that is somewhat equivocal remains in the category of equivocal evidence, i.e., evidence that by definition does not indicate intent as a matter of logical probability. The Court of Appeals provided no explanation or analysis for how Mr. Ziesemer's statements to police established any evidence of his intent, implicitly conceding the equivocality of the statements.

The Court of Appeals instead focused on the type of documents Mr. Ziesemer possessed to find slight corroborating evidence of Mr. Ziesemer's intent. Ziesemer, slip op. at 5. The supposedly corroborating evidence of intent was that "Ziesemer's backpack contained Hines's identification card and a blank check

from her bank account. Because the identification card presumably contained Hines's signature, a reasonable inference is that Ziesemer intended to use the card to forge Hines's signature on the blank check and thereby commit crimes of forgery and theft." Id. (emphasis added). In the possession context, Vasquez clearly warns that inferences of intent based on circumstantial evidence "must be reasonable and cannot be based on speculation." 178 Wn.2d at 16. The Court of Appeals decision openly states that it is speculating as to the existence of Ms. Hines's signature. It is pure conjecture in any event to conclude that a person intends to commit a crime by virtue of possessing a copy of someone's signature and her blank check. Merely possessing such documents does not establish corroborating evidence under Vasquez. The Court of Appeals decision and Vasquez cannot be reconciled, necessitating review under RAP 13.4(b)(1).

In addition, the prosecution and the trial court supported the convictions by essentially asking, "why else would Mr.

Ziesemer have these documents?" See 2RP 8 (prosecutor asserting, "there's no other possible reason why he had those documents, other than to create a crime"), 10 (trial court asserting, "it does not appear to me that any valid reason was ever given for Mr. Ziesemer possessing those items"). The Court of Appeals acknowledges this rationale in its statement of facts but its analysis does not discuss it. Ziesemer, slip op. at 3. It nevertheless endorses the same reasoning by presuming an intent to commit a crime by mere unexplained or unsatisfactorily explained possession of documents. Id. at 5.

This also directly conflicts with Vasquez, which wholly rejected why-else-would-he-have-them rationale. The Court of Appeals concluded that unexplained possession of a forged instrument showed intent to injure or defraud, asking, "And here why else would Mr. Vasquez have them?" Vasquez, 178 Wn.2d at 13. Reversing the Court of Appeals, the Supreme Court explained, "This holding whisks away the State's burden to prove intent to injure or defraud beyond a reasonable doubt, an essential

element of the crime of forgery. It presumes that persons who possess knowingly forged documents . . . intend to injure or defraud by virtue of possession alone." Id.

The Court of Appeals decision in Mr. Ziesemer's case does the same. It whisks away the state's burden by presuming that anyone who possesses a copy of someone else's ID and their blank check intends to commit a forgery or theft. Ziesemer, slip op. at 5. This is inconsistent with Vasquez's central holdings on constitutional sufficiency relating to possession-with-intent crimes. Review should be granted under RAP 13.4(b)(1).

E. CONCLUSION

Because Mr. Ziesemer satisfies RAP 13.4(b)(1) and RAP 13.4(b)(3), the Washington Supreme Court should grant review.

DATED this 6th day of January, 2022.

Per RAP 18.17(b), I certify this document contains 2507 words.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 7, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT SCOTT ZIESEMER, Appellant.	No. 54369-9-II UNPUBLISHED OPINION

MAXA, J. – Robert S. Ziesemer appeals his convictions of two counts of second degree identity theft. He also appeals the imposition of community custody supervision fees imposed as a legal financial obligation (LFO).

We hold that (1) there was sufficient evidence to support the identity theft convictions because the evidence supported a reasonable inference that Ziesemer intended to commit a crime with the financial information he possessed; and (2) community custody supervision fees as determined by the Department of Corrections (DOC) can be imposed on an indigent defendant because those fees are not "costs" as defined in RCW 10.01.160(2), but it is unclear from the record whether the trial court intended to impose the fees.

Accordingly, we affirm Ziesemer's convictions, but we remand for the trial court to consider whether to impose community custody supervision fees.

FACTS

Ziesemer consented to a search of his vehicle. Inside the backpack on the backseat, an officer found an identification card, a social security card, and a blank check belonging to Kimberly Hines. The officer also found a check from a car dealership written to a car washing service. The State charged Ziesemer with two counts of second degree identity theft and one count of second degree possession of stolen property.

Ziesemer and the State entered into a diversion agreement that required Ziesemer to complete certain conditions and in return the State would dismiss the charges against him. The parties agreed that if Ziesemer violated the agreement, the trial court would determine Ziesemer's guilt or innocence based on the investigation supporting the charges. Ziesemer stipulated "that the facts contained within the investigation reports are sufficient for a [t]rier of fact to find me guilty of the charge(s) presently filed against me in this matter." Clerk's Papers (CP) at 15.

Ziesemer violated the terms of the diversion agreement and agreed that the matter should proceed to a stipulated facts bench trial pursuant to the parties' diversion agreement. The parties agreed that the stipulated facts were those contained in the investigation reports.

The reports indicated that when the investigating officer located the documents inside Ziesemer's backpack, he asked Ziesemer if he knew Hines. Ziesemer hesitated, but then stated that he did not know her. When asked why he had Hines's identification card, social security card and blank check in his backpack, Ziesemer gave a vague response about being arrested previously and officers finding property belonging to a Kimberly Rodriguez. When questioned further, Ziesemer said a homeless person had given him the documents and that he forgot they

were in his backpack. Ziesemer also had a lock pick at the time of his arrest. On the front passenger floorboard the officer found 55 miscellaneous keys.

The trial court found, based on the investigation reports, that nothing "further [was] necessary in order to prove the elements of identity theft in the second degree as to both counts." Report of Proceedings (RP) (Jan. 16, 2020) at 9. The court noted that it had "a role in reviewing those documents to make sure that the State has met its burden." RP (Jan. 16, 2020) at 9. The court also commented that it considered the parties' stipulation, and that Ziesemer never gave a reason to the officer for possessing the documents. The trial court found Ziesemer guilty of two counts of second degree identity theft.

The trial court imposed a standard range sentence, which included 12 months of community custody. The court also found Ziesemer indigent and stated that it was imposing only mandatory LFOs. However, as a condition of community custody, the court required Ziesemer to "pay supervision fees as determined by DOC." CP at 29.

Ziesemer appeals his convictions and the imposition of community custody supervision fees.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Ziesemer argues that the State failed to prove that he had the intent to commit second degree identity theft because the evidence showed only that he had possession of the identification card, social security card, and two checks. We disagree.

1. Standard of Review

When evaluating the sufficiency of evidence for a conviction, we view the evidence in the light most favorable to the State and ask whether a rational trier of fact could have found the

elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). As part of the test for the sufficiency of evidence, we assume the truth of the State's evidence and all reasonable inferences drawn from the evidence. *Id*. at 106. These inferences must be drawn in the State's favor and strongly against the defendant. *Id*. And we defer to the fact finder's resolution of conflicting testimony and evaluation of the evidence's persuasiveness. *Id*. Circumstantial evidence is as equally reliable as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

2. Legal Principles

RCW 9.35.020(1) and (3) provide that a person, under circumstances that do not amount to first degree identity theft, may not "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person . . . with the intent to commit . . . any crime." To convict, the State is not required to prove actual use of the financial information or the specific crime that the defendant intended to commit. *See State v. Fedorov*, 181 Wn. App. 187, 197-98, 324 P.3d 784 (2014) (specific crime); *State v. Sells*, 166 Wn. App. 918, 924, 271 P.3d 952 (2012) (actual use).

When a crime includes possession and intent as separate elements, intent cannot be inferred from mere possession alone. *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). But evidence of possession along with some slight corroborating evidence may be sufficient to infer intent. *Id*. Intent may only be deduced " 'if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.' " *Id*. (quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)).

3. Analysis

Ziesemer argues the documents submitted by the State for the stipulated facts bench trial do not establish that Ziesemer intended to commit, aid, or abet a crime.

Here, the evidence is somewhat equivocal. However, Ziesemer's backpack contained Hines's identification card and a blank check from her bank account. Because the identification card presumably contained Hines's signature, a reasonable inference is that Ziesemer intended to use the card to forge Hines's signature on the blank check and thereby commit crimes of forgery and theft.

While there was no direct evidence that Ziesemer intended to commit a crime, we must assume the truth of all reasonable inferences drawn from the State's evidence. *Homan*, 181 Wn.2d at 106. And all that is needed to support an identity theft conviction is some slight corroborating evidence. *Vasquez*, 178 Wn.2d at 8.

Ziesemer also contends the trial court improperly relied on his stipulation that the facts were sufficient to find him guilty. Such a stipulation is not necessarily binding on the trial court. *State v. Drum*, 168 Wn.2d 23, 33-34, 225 P.3d 237 (2010). But the trial court clearly stated that its finding was based upon its review of the documents provided by the State in assessing whether it found the elements of the crime.

We hold that the State presented sufficient evidence to prove beyond a reasonable doubt that Ziesemer intended to commit a crime with the financial information that he possessed.

B. SUPERVISION FEES

Ziesemer argues that the trial court erred in imposing community custody supervision fees as determined by DOC because he is indigent. We hold that the trial court could impose

supervision fees on Ziesemer, but we remand because it is unclear whether the court intended to impose such fees.

RCW 9.94A.703(2)(d)[1] provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [DOC]." "Community custody supervision fees are discretionary LFOs because they are waivable by the court." *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020).

Ziesemer relies on RCW 10.01.160(3), which states, "The court shall not order a defendant to pay *costs* if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." (Emphasis added.) But RCW 10.01.160(2) defines "cost" as an expense specifically incurred by the State from prosecuting the defendant, administering a deferred prosecution program, or administering pretrial supervision. A community custody supervision fee does not fall within this definition of "cost." *Spaulding*, 15 Wn. App. 2d at 537. Therefore, RCW 10.01.160(3) does not preclude a court from imposing community custody supervision fees on an indigent defendant. *Id.*

We hold that the trial court could impose community custody supervision fees here even though Ziesemer was indigent. However, it is unclear whether the trial court intended to impose supervision fees. The court stated that it would impose only mandatory LFOs. This comment suggests that the court did not intend to impose discretionary supervision fees.

Because it is unclear whether the trial court intended to impose community custody supervision fees, we remand for the trial court to consider in its discretion whether to impose those fees.

[1] RCW 9.94A.703 has been amended since the events of this case transpired. Because these amendments are not material to this case, we cite to the current version of the statute.

CONCLUSION

We affirm Ziesemer's convictions, but we remand for the trial court to consider whether to impose community custody supervision fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

I concur:

LEE, C.J.

CRUSER, J. (concurring in part, dissenting in part) – I respectfully dissent from the majority's decision to remand this case for reconsideration of the community custody supervision fee based on the analysis in *State v. Starr*, 16 Wn. App. 2d 106, 109-10, 479 P.3d 1209 (2021).

I concur with the remainder of the majority's opinion.

CRUSER, J.

NIELSEN, BROMAN & KOCH, PLLC

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