NO. 42398-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GUY RALPH,

Appellant.

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Statutes

Other Authorities

A. ASSIGNMENTS OF ERROR

1. The convictions for robbery and taking a motor vehicle violate the Fifth Amendment prohibition on double jeopardy.

2. The State failed to prove each alternative means of witness tampering.

3. The State presented insufficient evidence to prove the comparability of a prior Oregon conviction for inclusion in Mr. Ralph's offender score.

4. The sentencing court erred in imposing discretionary costs and fees.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Although the State may bring, and the factfinder may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Appellant Guy Ralph was convicted of both robbery and taking a motor vehicle based on evidence that he punched the victim in the face and took his truck. Must the conviction for taking a motor vehicle be vacated?

2. Where multiple alternative means of committing a crime are submitted to the jury, the State must present sufficient evidence to prove each means beyond a reasonable doubt. Otherwise, the

conviction must be reversed. In this case, two alternative means of committing witness tampering were presented to the jury, but the State failed to prove one alternative means. Where there was no unanimity instruction and no special verdict form indicating the jury convicted only based on the proven means, must the witness tampering conviction be reversed and remanded for a new trial?

3. Under the Sentencing Reform Act and the Due Process Clause, the State bears the burden of proving the comparability of an out-of-state conviction by a preponderance of the evidence. Here, the State presented evidence of an Oregon conviction for unauthorized use of a vehicle, but the Oregon statute is broader than Washington's taking a motor vehicle statute, and the State did not present evidence that Mr. Ralph admitted the facts necessary to find the conduct fell within Washington's statute or that those facts were proved to a jury beyond a reasonable doubt. Did the sentencing court err in including the Oregon conviction in Mr. Ralph's offender score?

4. Courts may not impose costs on defendants unless they have a present or future ability to pay. Here, the court imposed discretionary costs and fees upon Mr. Ralph, without making either an oral or written finding that he had the present or future ability to

pay, and even though the evidence showed Mr. Ralph has no assets or income and, as his attorney said, "is the very definition of indigency." Did the sentencing court err in ordering Mr. Ralph to pay discretionary fees and costs?

C. STATEMENT OF THE CASE

Appellant Guy Ralph helped Leroy Hampton move a truckload of belongings to his new home. 7/19/11 RP 34-35. According to Mr. Hampton, after they dropped the items off at the new house and started driving away, Mr. Ralph told him to "pull over or he would beat his face in." 7/19/11 RP 36. After Mr. Hampton pulled over and the two got out of the truck, Mr. Ralph punched Mr. Hampton and took his truck. 7/19/11 RP 38.

Mr. Ralph was arrested and booked into jail. He wrote a letter to his sister asking her to have a friend write a letter to the defense attorney saying Mr. Hampton dropped him off at her house on the day in question. CP 98-99.

The State charged Mr. Ralph with second-degree robbery, second-degree taking a motor vehicle, third-degree theft, and witness tampering. CP 92-93. Both the robbery and taking a motor vehicle charge were based on the conduct described above. The theft charge was based on an allegation that in addition to taking

the truck, Mr. Ralph took other items belonging to Mr. Hampton. 7/20/11 RP 130-31. However, the jury acquitted Mr. Ralph on the theft count. CP 48.

At sentencing, the State "concede[d] that the likelihood is the robbery and the taking of motor vehicle would merge for purposes of sentencing since he was found not guilty of theft third." 8/1/11 RP 4. Mr. Ralph said, "there's no question that the merger of the robbery and car theft is appropriate." 8/1/11 RP 5. The court nevertheless entered convictions for both robbery and taking a motor vehicle, and sentenced him for both crimes. CP 7, 10.

At sentencing, Mr. Ralph objected to the inclusion of an Oregon conviction for unauthorized use of a vehicle in his offender score, pointing out that he was charged under a prong that does not exist in the relevant Washington statute. 8/1/11 RP 10-11. The court counted the conviction anyway, and sentenced Mr. Ralph to concurrent terms of 50 months for robbery, 26 months for taking a motor vehicle, and 33 months for witness tampering. CP 10.

When the court asked about imposing discretionary costs and fees, Mr. Ralph's attorney said, "my client is indigent. ... my client is the very definition of indigency. No assets, no income. He's clearly indigent." 8/1/11 RP 19. The court nevertheless

imposed discretionary sheriff's and attorney's fees in addition to the mandatory assessments. CP 13.

Mr. Ralph appeals. CP 6.

D. ARGUMENT

1. The convictions for robbery and taking a motor vehicle violate double jeopardy.

The jury found Mr. Ralph took the victim's truck by use of force. For this single incident, Mr. Ralph was convicted of both robbery and taking a motor vehicle. The two convictions violate Mr. Ralph's Fifth Amendment right to be free from double jeopardy, requiring vacation of the conviction for taking a motor vehicle.

a. A defendant's right to be free from double jeopardy is violated if he is convicted of two offenses that are identical in fact and law.

The Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9. These clauses protect defendants against "prosecution oppression." State v. Womac, 160 Wn.2d 643, 650,

160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, Washington courts apply the "same evidence" test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Id.; State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. Freeman, 153 Wn.2d at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). Courts evaluate the elements "as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777.

Although the State may bring, and the factfinder may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Id. at 770. The double jeopardy clause

bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. Rutledge, 517 U.S. at 302; Calle, 125 Wn.2d at 775. Where two convictions violate double jeopardy, the court must vacate the conviction on the lesser offense. Womac, 160 Wn.2d at 656; State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). "To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction." State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

This Court reviews de novo the question of whether multiple convictions violate double jeopardy. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

b. The robbery and taking a motor vehicle convictions are identical in fact and law because the jury twice convicted Mr. Ralph of taking the victim's truck by use of force.

Neither the robbery statute nor the taking a motor vehicle statute expressly authorizes multiple convictions for a single act. RCW 9A.56.190; RCW 9A.56.075. Accordingly, the two convictions violate double jeopardy because they are identical in fact and law. See Hughes, 166 Wn.2d at 682. The robbery statute provides, in relevant part:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190. The taking a motor vehicle statute provides, in relevant part:

> A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another....

RCW 9A.56.075(1).

In this case, the jury convicted Mr. Ralph of robbery for taking the victim's truck by the use of force. The jury also convicted Mr. Ralph of taking a motor vehicle for taking the victim's truck. In other words, the latter crime was a subset of the former. Because the taking of the truck was already punished as an essential element of the crime of robbery, the additional conviction for taking a motor vehicle violates the Fifth Amendment prohibition on double jeopardy. See Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (convictions for robbery and felony murder predicated on robbery violated double jeopardy); Turner, 169

Wn.2d at 452 (convictions for first-degree robbery and second-degree assault for same act of force violated double jeopardy).

c. The remedy is vacation of the conviction for taking a motor vehicle.

"[W]hen faced with multiple convictions for the same conduct, courts 'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.'" Turner, 169 Wn.2d at 463 (quoting State v. Trujillo, 112 Wn. App. 390, 393, 49 P.3d 935 (2002)). Mr. Ralph's conviction for taking a motor vehicle must be vacated and stricken from the judgment and sentence. Id.; Womac, 160 Wn.2d at 656. This is necessary even though the sentences are concurrent because the conviction itself has potential adverse collateral consequences. Id. at 657 (citing Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)). Accordingly, Mr. Ralph asks this Court to remand with instructions to vacate the conviction on count two by striking it from the judgment and sentence.

2. The conviction for witness tampering should be reversed because the State failed to prove each alternative means presented to the jury.

a. The State must prove every alternative means presented to the jury.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

"In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged." State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Although unanimity is not required as to the means by which the crime was committed, substantial evidence must support each alternative means presented to the jury. Id. "In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a

reasonable doubt." Id. at 410-11. "[If] the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." State v. Ortega Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) (emphasis added).

b. A new trial should be granted because the State failed to prove Mr. Ralph attempted to induce a person to withhold information from a law enforcement agency but this alternative means was presented to the jury.

Witness tampering is an alternative means crime. RCW 9A.72.120(1); State v. Lobe, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007). In this case, the jury was instructed on two of the alternative means: (1) attempting to induce a person to testify falsely, and (2) attempting to induce a person to withhold information from a law enforcement agency. CP 74. The State argued to the jury that Mr. Ralph committed both alternative means. 7/20/11 RP 131, 150.

However, the State presented insufficient evidence to prove the second alternative means, attempting to induce a person to withhold information from a law enforcement agency. The State introduced into evidence a letter Mr. Ralph wrote to his sister in which he asked her to ask Emily Beadle to write a statement saying

"that on the morning of the 27th of February Leroy Hampton picked me and Denise up around 1AM and dropped us off around 4AM." CP 98. He directed that the statement be sent to his lawyer. CP 99. This letter constitutes sufficient evidence of witness tampering by attempting to induce a person to testify falsely, but insufficient evidence of attempting to induce a person to withhold information from a law enforcement agency. Because insufficient evidence was presented on one of the alternative means presented to the jury, reversal is required. Ortega Martinez, 124 Wn.2d at 708; Lobe, 140 Wn. App. at 906-07.

Other cases are instructive. In Fernandez, for example, the defendants were convicted of operating a drug house. State v. Fernandez, 89 Wn. App. 292, 294, 948 P.2d 872 (1997). The statute at issue provided:

> It is unlawful for any person ... knowingly to keep or maintain any ... dwelling ... which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

Id. at 299 (citing RCW 69.50.402(a)(6)). In other words, there were two alternative means of committing the crime: maintaining a dwelling (1) where people use drugs, or (2) to sell or store drugs.

Id. at 300. The State did not elect a means, so even though there was sufficient evidence to find the defendants maintained a house to sell or store drugs, this Court reversed the convictions because there was insufficient evidence to support a finding that drug users resorted to the house for the purpose of using drugs. Id. This Court concluded:

> The State did not elect between the alternative means, and the general verdict form does not reveal which prong the jury used to convict. Because it may have convicted the defendants under the unsupported prong, we must reverse the defendants' convictions and remand for retrial on the drug house charges.

Id. The same is true here. The State did not elect between the alternative means, and the general verdict form does not reveal which prong the jury used to convict. Because it may have convicted Mr. Ralph on the unsupported prong, the conviction should be reversed and the case remanded for retrial on the tampering charge. Id.

In Maupin, the defendant was convicted of first-degree felony murder where the underlying felonies charged were kidnapping, rape, or attempted rape. State v. Maupin, 63 Wn. App. 887, 822 P.2d 355 (1992). This Court reversed the conviction because although the State had presented sufficient evidence of

the kidnapping predicate, it failed to present sufficient evidence of rape. Id. Because there was insufficient evidence of rape, the trial court erred in instructing the jury on that alternative means. Id. at 893-94.

This Court granted a new trial because even though no evidence was presented of sexual intercourse, this Court could not be sure the jury's verdict rested only on the kidnapping alternative and not on the rape alternative. Id. at 894. This Court noted that the problem could have been prevented by either not instructing the jury on the rape alternatives or by providing a special verdict form for the jury to delineate the bases on which it found the defendant guilty. Id. But because the jury was instructed on the unproven alternative means and was provided only a general verdict form, a new trial was required. Id.

Similary here, the State failed to prove Mr. Ralph committed witness tampering by inducing a person to withhold information from law enforcement, but because the jury was instructed on the unproven alternative means and was provided only a general verdict form, a new trial is required. Id. On remand, only the false testimony alternative may be presented to the jury. Fernandez, 89 Wn. App. at 300.

3. The sentencing court erred in calculating the offender score, requiring remand for resentencing.

Over Mr. Ralph's objections, the sentencing court included an incomparable out-of-state conviction in Mr. Ralph's offender score. The sentence should be vacated and the case remanded for resentencing.

a. The State bears the burden of proving a defendant's offender score by a preponderance of the evidence.

The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a

defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

b. The State failed to prove Mr. Ralph's Oregon conviction for unauthorized use of a vehicle is comparable to the Washington crime of taking a motor vehicle; accordingly, the Oregon conviction should not have been counted in the offender score.

The Oregon crime of unauthorized use of a vehicle is not legally comparable to Washington's crime of taking a motor vehicle. State v. Jackson, 129 Wn. App. 95, 107-08, 117 P.3d 1182 (2005). The Oregon statute provides:

> 1) A person commits the crime of unauthorized use of a vehicle when:
>
> (a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner;
>
> (b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose; or
>
> (c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

Or. Rev. Stat. § 164.135(1). In contrast, Washington's taking a motor vehicle statute provides:

> A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

RCW 9A.56.075(1). The elements of the Washington crime are "(1) taking or driving away without the owner's permission, (2) a motor vehicle (3) intentionally." State v. Mathers, 77 Wn. App. 487, 492, 891 P.2d 738 (1995).

The Oregon statute "cover[s] a broader range of activity than the Washington statute that prohibits 'taking a motor vehicle without permission.'" Jackson, 129 Wn. App. at 107. Indeed, "the purpose of the language 'takes, operates, exercises control over, rides in, or otherwise uses' is to prohibit not only the taking or driving of another's vehicle without permission, but, also, to prohibit any unauthorized use of the vehicle." Mathers, 77 Wn. App. at 492 (quoting State v. Cox, 96 Or. App. 473, 772 P.2d 1385, 1387, review denied, 308 Or. 315, 779 P.2d 618 (1989)).

Where crimes are not legally comparable, it is very difficult for the State to prove factual comparability. As the Lavery Court explained:

> Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. In Lavery, the Supreme Court held the State failed to prove by a preponderance of the evidence that the defendant's federal robbery conviction was comparable to a Washington robbery conviction, because the State did not present evidence that the defendant had admitted or stipulated to the necessary facts, or that those facts had been proved to a jury. Id.

The same is true here. The State presented the indictment and judgment for the Oregon crime, showing that Mr. Ralph pled guilty, but neither document contains an admission to facts that would constitute the Washington crime of taking a motor vehicle. CP 26-31. Indeed, the indictment alleged not that Mr. Ralph "took or drove away" another person's vehicle, as would be required in Washington, but that he "did unlawfully and knowingly exercise

control over a vehicle...". CP 26. Thus, even if the State had presented evidence that Mr. Ralph pleaded guilty to the crime "as charged," they would have failed to prove comparability. The Oregon conviction should not have been included in Mr. Ralph's offender score.

Other cases are instructive. In Thiefault, for example, the Supreme Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in Washington. State v. Thiefault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007). "[A]lthough the motion for leave to file information and the affidavit both described Thiefault's conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt." Id. at 416 n.2.

In Thomas, this Court held the State failed to prove the comparability of two California burglary convictions by a preponderance of the evidence because California's burglary statute does not require unlawful entry. State v. Thomas, 135 Wn. App. 474, 476-77, 144 P.3d 1178 (2006). The State presented

certified copies of charging documents, a judgment on plea of guilty, minutes from a jury trial, and a transcript from the sentencing hearing. This Court held the State failed to prove factual comparability even though the State's evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85.

In Ortega, this Court held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. State v. Ortega, 120 Wn. App. 165, 167, 84 P.3d 935 (2004). Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. Id. at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. Id. at 173-74. But this Court held the evidence was insufficient to prove the Texas victim was under 12 years old. Id. at 174. Because the relevant facts were not admitted or proved to a jury beyond a reasonable doubt,

the Texas conviction was not comparable to a Washington conviction and could not count as a "strike" for sentencing purposes. Id. at 167.

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Ralph admitted to the necessary facts or that the facts were proved to a jury beyond a reasonable doubt. Accordingly, the Oregon conviction should not have been counted in the offender score. This Court should vacate the sentence and remand for resentencing.

c. The sentencing court erred in imposing discretionary fees because Mr. Ralph is indigent and lacks the ability to pay.

The sentencing court imposed $1292 in legal financial obligations ("LFOs"). CP 13-14. Of that amount, $600 was for mandatory fees, but $500 was for discretionary court-appointed attorney's fees, and $192 was for discretionary sheriff's fees.

The court did not make either an oral or written finding that Mr. Ralph had the ability to pay these costs. Indeed, the checkbox in the judgment and sentence stating "the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein" is not checked. CP 10. Mr. Ralph's attorney said, "my

client is indigent. ... my client is the very definition of indigency. No assets, no income. He's clearly indigent." 8/1/11 RP 19. Thus, although the mandatory assessments were properly imposed, it was improper for the court to impose an additional $692 in discretionary costs and fees given Mr. Ralph lacks the present and future ability to pay.

Courts may not require an indigent defendant to reimburse the state for the costs unless the defendant has or will have the means to do so. State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing costs. Id. This requirement is both constitutional and statutory. Id. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Ralph because the court did not find he would have the ability to pay and substantial evidence would not support such a finding. On the contrary, the only evidence presented was that Mr. Ralph was "the very definition of indigency." 8/1/11 RP 19.

Mr. Ralph's motion to proceed in forma pauperis in the Court of Appeals showed he had no assets or income. No evidence to the contrary was presented.

This case stands in contrast to others in which this Court has affirmed the imposition of costs. In Richardson, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. State v. Richardson, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In Baldwin, this Court affirmed the imposition of costs because the Presentence Report "establishe[d] a factual basis for the defendant's future ability to pay." State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991).

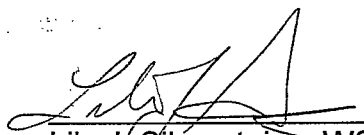
But unlike the defendant in Richardson, Ms. Ralph is not currently employed and has no employment prospects upon release. And unlike in Baldwin, the State did not submit a presentence report that established a factual basis for Mr. Ralph's future ability to pay. On the contrary, all evidence presented showed that Mr. Ralph is indigent and likely to remain so. Thus, this Court should strike the discretionary costs and fees imposed.

E. CONCLUSION

Mr. Ralph's conviction for taking a motor vehicle should be reversed because it violates the right to be free from double jeopardy. The witness tampering conviction should be reversed and remanded for a new trial because the State failed to prove both alternative means presented to the jury. In the alternative, the sentence should be vacated and the case remanded for resentencing because the Oregon conviction for unauthorized use of a vehicle was erroneously included in the offender score, and discretionary fees were improperly imposed.

DATED this 27th day of January, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 42398-7-II
	)	
GUY RALPH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN WENDT, DPA CLALLAM COUNTY PROSECUTOR'S OFFICE 223 E 4TH ST., STE 11 PORT ANGELES, WA 98362	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] GUY RALPH 791679 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JANUARY, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

January 27, 2012 - 3:49 PM

Transmittal Letter

Document Uploaded: 423987-Appellant's Brief.pdf

Case Name: STATE V. GUY RALPH

Court of Appeals Case Number: 42398-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Ann M Joyce - Email: **ann@washapp.org**

A copy of this document has been emailed to the following addresses:

bwendt@co.clallam.wa.us