NO. 44659-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN TURNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin

No. 12-1-04684-2

Response Brief

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2. Whether the stipulation to defendant's criminal history sufficiently proved defendant's criminal history.

3. Whether defendant's issue regarding legal financial obligations should be considered, as it is neither ripe nor preserved for review.

B. STATEMENT OF THE CASE.

1. Procedure

On December 14, 2013, the State charged Brian Turner, hereinafter "defendant," with one count of unlawful possession of a stolen vehicle, and one count of making or possessing motor vehicle theft tools. CP 1-2. Defendant's jury trial began on February 12, 2013. RP 15. The jury found defendant guilty as charged the next day. RP 102. On March 15, 2013, defendant was sentenced to the low end of the standard range for a total of 15 months in custody as well as standard legal financial obligations. CP 28-28; RP 117.

Defendant timely filed a Notice of Appeal on March 15, 2013. CP 25.

2. Facts

On November 18, 2012, Rindell Caba's vehicle was stolen. RP 23. Mr. Caba contacted Officer Ryan Hovey of the Tacoma Police Department who confirmed the theft and entered a report. RP 16, 23. The vehicle was a 1991 two door Honda Civic with the license plate number 787ZAF. RP 20.

On December 13, 2012, Lieutenant Chris Lawler of the Lakewood Police Department noticed a vehicle driving unusually fast and failing to a stop at an intersection while he was on duty. RP 30, 38. He testified that he saw a woman in the passenger seat that gave him a surprised look which was unusual. RP 38. Lieutenant Lawler ran the license plate of the vehicle and was notified that it was stolen. RP 40.

Three minutes later, Lieutenant Lawler found the vehicle parked at the Rainbow Place Apartments in Lakewood, Washington. RP 41-43. The engine was still running, and the woman he had seen earlier was still in the passenger seat. RP 45, 51. Lieutenant Lawler saw defendant walking down the breezeway of the apartments carrying a red backpack and what appeared to be alcohol bottles. RP 46-47. Defendant walked to the car and placed those items behind the driver's seat. RP 46. Lieutenant Lawler drew his weapon, announced himself, and ordered them to show their hands as defendant appeared to be getting in the driver's seat. RP 46-47. Lieutenant

Lawler testified that there were other people in the area: a maintenance crew worker and another person walking in the breezeway who didn't appear to be involved because he was not headed toward the vehicle. RP 49, 58, 60.

After defendant was taken into custody, Lieutenant Lawler checked the vehicle and noticed that the steering column was seriously damaged. RP 51. He found a screwdriver on the passenger side floor. RP 51. Defendant had no keys, bill of sale, registration or title for the vehicle, and there was no evidence that the passenger had these items. RP 52.

Mr. Caba testified that he recovered his vehicle from the impound after he was notified by the Tacoma Police Department. RP 29. He found that the hood was dented, the steering column cover was broken off, the ignition control switch and heater climate control were damaged, and that there was tape around the steering column as if it had been broken off to access the ignition. RP 26-27. He also found a bag of men's clothing and a screwdriver on the passenger side floor. RP 26-26. He did not know defendant and did not give him permission to drive his car or put things inside it. RP 25.

C. ARGUMENT.

1. IN VIEWING THE LIGHT MOST FAVORABLE TO THE STATE, THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF POSSESSION OF A STOLEN MOTOR VEHICLE AND POSSESSION OF MOTOR VEHICLE THEFT TOOLS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Salinas***, 119 Wn.2d 192, 829 P.2d 1068 (1992); ***State v. Camarillo***, 115 Wn.2d 60, 794 P.2d 850 (1990). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

a. The State presented sufficient evidence for the jury to find defendant guilty of possession of a stolen motor vehicle.

A person commits the crime of possessing a stolen motor vehicle when he or she possesses a stolen motor vehicle. RCW 9A.56.068. Possessing a stolen motor vehicle means knowingly to receive, retain, possess, conceal, or dispose of a stolen motor vehicle knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto. RCW 9A.56.068; RCW 9A.56.140(1); CP 11 (Court's instructions to the jury No. 4).

Here, the jury was instructed that in order to convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about December 13th, 2012, 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;
4. That any of these acts occurred in the State of Washington.

CP 12 (Court's Instructions to the Jury No. 5).

Here, Defendant does not challenge the third or fourth elements of the crime.

i. Defendant possessed the stolen vehicle.

A defendant actually possesses an item if he has physical custody of it. ***State v. Jones***, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002), ***State v. Coahran***, 27 Wn. App. 664, 668, 620 P.2d 116 (1980) (citing ***State v. Callahan***, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). He constructively possesses the item if he has dominion and control over it. *Id.*

Dominion and control can be established by circumstantial evidence. ***State v. Chavez***, 138 Wn. App. 29, 34, 156 P.3d 246 (2007) (citing ***State v. Weiss***, 73 Wn.2d 372, 375 438 P.2d 610 (1968)). In a review of whether there is sufficient evidence of dominion and control, the court looks at "the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the [prohibited items] and was thus in constructive possession of them." ***State v. Partin***, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Thus, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors. ***Partin***, 88 Wn.2d at 906; ***State v. Hagen***, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). One important factor the court has recognized is having actual dominion and control over the premises where the prohibited item is found. *See, e.g.*, ***State v. Echeverria***, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor); ***State v. Shumaker***, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (holding that dominion and control is one factor from which constructive possession may be inferred).

Here, the jury was instructed of the following:

> "Possession of a vehicle means having a vehicle in one's custody or control. It may be actual or constructive... Constructive possession occurs when there is no actual physical possession but there is dominion and control over the vehicle.... In deciding whether the defendant had dominion and control over a vehicle, you are to consider all the relevant circumstances in the case. Factors you may consider, among others, include whether the defendant had the *immediate ability to take actual possession...*"

CP 16 (Court's Jury Instructions No. 9)(emphasis added)

The State presented sufficient evidence that Defendant possessed the stolen vehicle. Defendant had physical custody, and thus actual possession of the vehicle, where he was immediately able to drive the vehicle. Defendant was getting into the driver's seat of the vehicle as the engine was running. RP 45-47, 51. Alternatively, it can be argued that

Defendant constructively possessed the vehicle because he had the immediate ability to take actual possession by simply getting into the driver's seat and driving away. In either approach, Defendant clearly possessed the vehicle.

ii. Defendant knew the vehicle was stolen.

While mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen, possession of recently stolen property, coupled with slight corroborative evidence, is sufficient to prove guilty knowledge. ***State v. Couet***, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); ***State v. Womble***, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). Corroborative evidence includes damage to the vehicle and the absence of a plausible explanation for legitimate possession. ***State v. LA***, 82 Wn. App. 275, 276, 918 P.2d 173 (1996); ***Womble***, 93 Wn. App. at 604.

Here, the jury was instructed that,

> "[a] person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact or circumstance or result.... 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."

CP 14 (Court's Jury Instruction No. 7).

In the instant case, Defendant knew the car was stolen because it was damaged such that a reasonable person would know that it was stolen. The vehicle was obviously stolen because the principle device securing the vehicle against unauthorized use, the ignition control switch, was disabled. RP 27. The vehicle was also visibly damaged such that any reasonable person would know that it was stolen: the steering column cover was broken off, and the ignition assembly switch and heater controls were damaged. RP 26-27, 51-52.

In addition to the damage, a reasonable person would know that the car was stolen from the fact that the engine was running without a key, and there was a screwdriver on the floor of the passenger side that was necessary to start the car. RP 45, 51-52. Because any reasonable person would conclude that the vehicle was stolen from its appearance, the evidence was sufficient that Defendant acted with knowledge.

The State presented sufficient evidence for the jury to conclude that defendant was in possession of Mr. Caba's stolen vehicle, and knew that it was stolen. As such, this Court should affirm defendant's conviction.

b. The State presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of possessing motor vehicle theft tools.

Pursuant to RCW 9A.56.063,

> "[a]ny person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or *commonly used* for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools."

(emphasis added)

The court considers an automobile a "premises" in deciding whether a Defendant had possession over an item. ***State v. Turner***, 103 Wn. App. 515, 520–21, 13 P.3d 234 (2000) (citing ***State v. Mathews***, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). For example, in ***Turner***, the court held that a defendant's actual control over the premises would create an inference of dominion and control over the prohibited item. ***Turner***, 103 Wn. App. at 523. It stated:

> When the sufficiency of evidence is challenged on the basis that the State has shown dominion and control only over the premises, and not over [the prohibited item], *courts correctly say that the evidence is sufficient* because dominion and control over premises raises a rebuttable inference of dominion and control over the [prohibited item].

Id. (quoting ***State v. Cantabrana***, 83 Wn. App. 204, 208, 921 P.2d 572 (1996)) (emphasis added). A jury determines the weight of the inference created between defendant's actual control over the premises and his dominion and control over the prohibited item. ***Turner***, 103 Wn. App. at 524 (citing ***Cantabrana***, 83 Wn. App. at 209).

Here, the jury was instructed that in order "[t]o convict the defendant of the crime of making or possessing motor vehicle theft tools, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 13th day of December, 2012, the defendant made, mended, or caused to be made, used, or possessed a motor vehicle theft tool that is adapted, designed, or commonly used for the commission of motor vehicle related theft;

2. That the defendant did so under circumstances evincing an intent;

    a. to use or employ the tool, or
    b. allow the tool to be used or employed, or
    c. did so knowing the tool is intended to be used, in the commission of a motor vehicle theft; and

3. That this act occurred in the State of Washington.

CP 17. (Court's Instructions to the jury No. 10)

The State presented sufficient evidence that Defendant possessed a motor vehicle theft tool where a screwdriver was found in a place easily accessible to Defendant, and the screwdriver was necessary for him to start the car. Defendant constructively possessed the screwdriver, not only because he was in actual possession of the vehicle, but also because he could have immediately obtained actual control of the screwdriver by picking it up; either when he was loading the car or when he was getting in the driver's seat. The screwdriver was within arms reach of Defendant because it was found on the passenger side floor of such a small vehicle: a two door hatchback. RP 46, 54.

The State also presented sufficient evidence that Defendant intended to use the screwdriver to steal the car. Lieutenant Lawler testified that screwdrivers are commonly used to start stolen vehicles. RP 51.

> Q: "[I]s there any significance of a flat blade screwdriver being on the floor when you find a steering column that's been damaged in the way you described?
>
> A: Yeah. Based on my training and experience, and I've actually seen people do it, the flat blade screwdriver or some kind of a square tip try tool can be used to move the mechanism under the column to start the car.

RP 51.

The screwdriver was needed to start the car because Defendant did not have the keys, and it was clear that Defendant was about to drive the car because he was getting in the driver's seat. RP 52, 46-47. Therefore, it is a reasonable inference that Defendant intended to use the screwdriver to drive the car.

The State presented sufficient evidence for the jury to conclude that Defendant possessed the screwdriver for the purpose of stealing the vehicle. As such, this Court should affirm defendant's conviction.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE OF DEFENDANT'S PRIOR CONVICTIONS WHERE THE COURT ACCEPTED, WITHOUT OBJECTION, A STIPULATION TO DEFENDANT'S PRIOR CONVICTIONS.

The State must prove a defendant's criminal history by a preponderance of the evidence. ***State v. Ford***, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999). The trial court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

To establish the existence of a [prior] conviction, a certified copy of the judgment and sentence is the best evidence. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. In that case, comparable documents of record or trial transcripts may

suffice. ***State v. Rivers***, 130 Wn. App. 689, 698-699, 128 P.3d 608 (2005) (citing ***State v. Lopez***, 147 Wn.2d 515, 519, 55 P.3d 609 (2002)). In other words, the State must present additional evidence to carry its burden of proving the convictions by a preponderance of the evidence, if a defendant disputes the existence of a prior conviction and the State offers evidence less reliable than a certified judgment and sentence or other comparable documents. ***Rivers***, 130 Wn. App. at 701-702.

Here, defense counsel verbally stipulated to Defendant's criminal history. RP 112-113; *see also* CP 44-46. The Court accepted the stipulation for sentencing purposes despite the State's offer to submit certified copies of defendant's criminal history. RP 112-113. Prior to accepting the stipulation, the court engaged in a thorough colloquy with defense counsel to make sure there were no issues or objections. RP 112-113.

State: I would [point] out that the stipulation of prior offense that I've handed forward is not signed by the defendant or his attorney. Ms. Melby said that it's her desire not to sign it. I suggested that we set this over so I can bring the certified copies to the Court. However, I'll defer to the Court with how you want to proceed.

The Court: Okay. She has no problem, I assume, and I'm looking at the order for biological sample draw.

Defense Counsel:No. It's just a stipulation of criminal history, Your Honor. *We're waiving any right to appeal it if it's wrong*. We do it as part of a plea because that's a condition of the plea from the State. It's my practice,

and I assumed everyone else's we don't do it after trial.

The Court: Well, is there something wrong that you're aware of --

Defense Counsel: Not that I'm aware of.

The Court: -- on his prior record or the offender score?

Defense Counsel:No, not that I'm aware of, Your Honor.

The Court: Okay. And then I'm going to accept the stipulation. We don't actually have a stipulation, but I'm going to accept the prior record and offender score.

Defense Counsel: Thank you, Your Honor.

RP 112-113 (emphasis added)

a. Defendant waived his right to challenge the issue on appeal.

Arguments not raised in the trial court are generally not considered on appeal. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); RAP 2.5(a). Defendant raises the issue of his criminal history for the first time on appeal. Defense counsel clearly stated that Defendant's record was accurate. RP 112-113. This issue is not properly preserved for review. Defense counsel also explicitly waived the right to appeal and denied having any objections to the stipulation whatsoever. RP 112-113. As Defendant waived his right to review explicitly and by failing to object at sentencing, this Court should dismiss defendant's claim.

b. The State presented sufficient evidence of Defendant's criminal record.

The State's offered stipulation was sufficient for sentencing purposes. *See* ***State v. Huff***, 119 Wn. App. 367, 372-373, 80 P.3d 633 (2003) (defendant's stipulation was sufficient to establish prior criminal history). As demonstrated by the sentencing court's acceptance of the stipulation of prior offenses, the stipulation was sufficient to prove Defendant's criminal record. RP 113. Defendant did not dispute the existence of his prior convictions, and defense counsel found the document to be an accurate reflection of Defendant's prior record and offender score. RP 112-113. Therefore, no additional evidence was necessary to prove Defendant's convictions where the court found the stipulation to be sufficient, and there was no dispute as to Defendant's criminal record. As such, the State met its burden of proving Defendant's criminal record, and no resentencing is required.

3. DEFENDANT'S CLAIMS SHOULD BE DISMISSED WHERE THE ISSUE IS NEITHER RIPE NOR PRESERVED FOR REVIEW.

a. The issue is not preserved for appeal.

Arguments not raised in the trial court are generally not considered on appeal. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); RAP 2.5(a). For the first time on appeal, defendant raises the issue of his ability

to pay his LFOs. Defendant did not object to the imposition of LFOs at his sentencing hearing. RP 117. Because defendant did not object at any time to the imposition of LFOs or the court's finding that he had the ability to pay, the issue is not preserved for appellate review. As defendant did not properly preserve this issue for appellate review, this Court should refuse to review his claim. *See* ***State v. Lundy*** __ Wn. App. __, 308 P.3d 755 (2013); ***State v. Blazina***, 174 Wn. App. 906, 301 P.3d 492 (2013).

b. The issue is not ripe for review.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant

> or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***State v. Blank***, 131 Wn.2d 230, 930 P.2d 1213 (1997); ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d 230, 241–242.

The defendant has the burden to show indigence. *See* RCW 10.01.020; ***Lundy***, 308 Wn. App. at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the

conditions imposed under a Judgment and Sentence are essential. ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

Here, the court took Defendant's present and likely future financial resources into account as demonstrated by the language in the judgment and sentence:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 29. This language satisfies the prerequisites for imposing discretionary financial obligations.

Furthermore, the State has not attempted to collect legal financial obligations from the defendant or established when he is expected to begin repayment of these obligations. Because the State has not sought enforcement of the costs, the determination as to whether the trial court erred is not ripe for adjudication. *See* ***Lundy***, 308 P.3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, Defendant's future ability to pay is speculative. In addition, Defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, Defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

c. The trial court did not err in imposing legal financial obligations.

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. ***State v. Baldwin***, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); ***State v. Curry***, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. ***Baldwin***, 63 Wn. App. at 312. However, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. ***Baldwin***, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. *Id.; see also* ***State v. Wimbs***, 68 Wn. App. 673, 847 P.2d 8 (1993), *rev'd on other grounds by*, ***State v. McGee***, 122 Wn.2d 783, 864 P.2d 912 (1993).

Pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial. The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

As in ***Lundy***, the defendant in the present case does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. *See* RCW 9.94A.505, RCW 9.94A.753(4) and (5); ***Lundy***, at 759. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g.,* ***State v. Kuster***, 175 Wn. App. 420, 306 P.3d 1022 (2013). Therefore, in the present case, the review ultimately concerns the discretionary amount of $1000 in court appointed attorney fees and defense costs. CP 30.

The trial court's finding that a defendant has the ability to pay discretionary LFOs is reviewed under the "clearly erroneous" standard.

Lundy, 308 at 761. "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a "definite and firm conviction that a mistake has been committed." ***Lundy***, 308 at 760; citing ***Schryvers v. Coulee Cmty. Hosp.***, 138 Wn. App. 648, 654 P.3d 113 (2007)) (quoting ***Wenatchee Sportsmen Ass'n v. Chelan County***, 141 Wn.2d 169, 176 4 P.3d 123 (2000)). The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is very low. ***Lundy***, 308 at 760.

Here, Defendant argues that the trial court erred when it concluded that he had the present or future ability to pay mandatory and discretionary LFOs. Defendant relies on ***Calvin*** for the proposition that there must be evidence in the record to support the court's finding that a defendant has the ability to pay the costs imposed. ***State v. Calvin***, __ Wn. App. __ , 302 P.3d 509, 521 (2013). *See* Brief of Appellant at 20. In ***Calvin,*** the trial court's ruling was "clearly erroneous" when the trial court found that an unemployed carpenter could likely pay the LFO's in the future depends on facts and evidence. While the factual conclusion is open to debate, the Court relied upon ***Baldwin*** and ***Curry*** for the legal principles involved. ***Calvin***, 302 P.3d at 521. More importantly, Court correctly noted that the trial court need not make a finding, but only take the defendant's financial resources "into account." *Id.*

The finding to which the court in ***Calvin*** refers, is the "boilerplate" language in the judgment and sentence. *See* CP 29. The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3), and ***State v. Curry***, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in ***Calvin***, 302 P. 3d at 521, and ***Lundy***, 308 P. 3d at 760, it is unnecessary under the statute. The court has gone even further to say that the boilerplate finding is superfluous and does not warrant relief even if it is not supported by the record. ***Lundy***, 308 Wn. App. at 760, n.9; *See* ***State v. Caldera,*** 66 Wn. App. 548, 551, 832 P.2d 139 (1992). Relief is not warranted because where the court finds the imposition of costs to be "clearly erroneous," the appropriate remedy is only to strike the boilerplate finding from the judgment and sentence. *See* ***State v. Bertrand***, 165 Wn. App. 393, 405, 267 P.3d 511 (2011). As only the finding, and not the order imposing LFOs is erroneous, the imposition of costs is not affected.

Here, the trial court made the superfluous finding that Defendant had the ability to pay the discretionary $1000 imposed. CP 29. However, as the issue is not ripe for review, the Court need not determine whether or not the finding was erroneous. Should the Court choose to review the finding and determine that it was clearly erroneous, the proper remedy is only to strike the second sentence referring to the "boilerplate" finding from the judgment and sentence. The imposition of LFOs itself would be unaffected until the State seeks to enforce them.

As the language in the judgment and sentence sufficiently satisfied the requirements of RCW 10.01.160(3), and Defendant's challenge to the costs imposed is neither properly preserved nor ripe for review, this Court should affirm Defendant's conviction.

D. CONCLUSION.

The State produced sufficient evidence to convict Defendant of unlawful possession of a stolen motor vehicle and possession of motor vehicle theft tools where Defendant was getting into Mr. Caba's stolen car while the engine was running without a key, and there was a screwdriver on the passenger side floor. Further, the State met its burden of proving Defendant's convictions where the court accepted the State's offered stipulation to Defendant's prior convictions, and there was no dispute as to Defendant's criminal record. Finally, Defendant's challenge to the court costs is neither preserved nor properly before this Court. For the foregoing reasons, this Court should affirm Defendant's judgment and sentence.

DATED: November 8, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Robin Sand, Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.12.13 Theresa Kahl
Date Signature

PIERCE COUNTY PROSECUTOR

November 12, 2013 - 1:12 PM

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