No. 32684-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DENNIS WAYNE JUSSILA,
Defendant/Appellant.

APPEAL FROM THE KLICKITAT COUNTY SUPERIOR COURT
Honorable Randall Krog, Judge Pro Tem

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Court Rules

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the conviction of second degree theft.

2. There was insufficient evidence to support the convictions of theft of a firearm.

3. There was insufficient evidence to support the convictions of first degree unlawful possession of a firearm.

4. There was insufficient evidence to support the conviction of first degree burglary.

5. The record does not support the finding Mr. Jussila has the current or future ability to pay the imposed legal financial obligations.

6. The court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Was Defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove beyond a reasonable doubt the additional elements of the crimes of theft of a firearm and first degree unlawful possession of a firearm as instructed?[1]

[1] Assignment of Error Nos. 2, 3.

2. Was Defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove beyond a reasonable doubt the elements of the crimes of first degree burglary, theft of a firearm, and first degree unlawful possession of a firearm?[2]

3. Was Defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove beyond a reasonable doubt the elements of the crime of second degree theft?[3]

4. Should the finding of ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where the finding is not supported in the record?[4]

5. Does a trial court abuse its discretion in imposing discretionary costs where it does not take Defendant's financial resources into account nor consider the burden it would impose on him as required by RCW 10.01.160?[5]

[2] Assignment of Error Nos. 2, 3, 4.
[3] Assignment of Error No. 1.
[4] Assignment of Error No. 5
[5] Assignment of Error No. 6.

B. STATEMENT OF THE CASE

On March 21, 2014, Joseph Craven returned to his Goldendale, Washington home to find he'd forgotten to lock the door when he left several hours earlier. RP 71–72, 74–75, 90. His laptop computer was gone from the table it sat on and a loaded .45 automatic pistol was missing from a desk drawer. RP 75–76. Items also missing included a gold watch from his father's estate, a safe kept in a closet, a set of car keys, a $50 knife sharpener, and $250 to $300 worth of loose change in a satchel. RP 80, 82–84.

Fresh tennis shoe footprints led from Mr. Craven's back patio to the house next door, where twenty-year-old Dennis Jussila lived with his father. RP 84–85, 91–92, 96–97, 101–03, 240; CP 117. Police called the father, who arrived home and gave them permission to search his house and garage. RP 94, 96. In Mr. Jussila's bedroom they found shoes with a similar tread pattern and about 50 marijuana plants being grown inside a small tent. RP 95, 103, 105, 111, 113–14. In a spare room next to it police found a pried-open safe, later identified as the one taken from Mr. Craven's house. RP 79–80, 95–96.

Mr. Jussila was charged with one count of first degree burglary, one count of second degree theft other than a firearm, seven counts of theft of a firearm, seven counts of first degree unlawful possession of a firearm, and one count of manufacturing a controlled substance–marijuana. CP 10–16.

At the jury trial, Mr. Craven testified seven rifles and a .357 magnum were missing from his back bedroom. RP 75–76, 79. Police recovered five rifles stashed in the rafters of Mr. Jussila's father's garage. RP 119, 121–22, 124. The recovered guns were not entered into evidence at trial. The .45 automatic pistol and .357 magnum guns were never found.

Mr. Craven testified he "recognized it" when shown Exhibits 7 and 9 (each captioned "photo of gun in case"), Exhibit 8 (captioned "photo of gun, case, two clips"), and Exhibit 10 (captioned "close-up of photo of gun"). When shown Exhibit 11 (captioned "photo of two guns"), he stated "That's a Browning … that is my shotgun … also above is a 30/30 rifle that was in the case with some ammunition". RP 76–77; CP 20.

> [Mr. Craven]: These items were later found next door and returned to me. And then – the – we had serial numbers on all of those rifles, and the police took them as evidence and then later returned -- …

> [Prosecutor]: Looking through those, those exhibits that I just presented to you, those are your rifles?
>
> [A]: That's correct.
>
> [Q]: Okay. And on March 21st are those the items, those rifles, that were missing from your home when you got home on March 21st?
>
> [A]: That's correct.

RP 77–78.

Count 2 charged second degree theft other than a firearm, "to wit: an Acer laptop computer and a bag of coins, of a value exceeding $750 but not exceeding $5000." CP 10. In part, the "to-convict" instruction required the jury to find "(2) [t]hat the property exceeded $750 in value but did not exceed $5000 in value." Instruction No. 18 at CP 43.

The jury was instructed that "a person is guilty of theft of a firearm if he commits a theft of any firearm." Instruction No. 23 at CP 48. The jury was instructed that "a person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm." Instruction No 31 at CP 56.

Counts 3 through 9 charged theft of a firearm. Counts 10 through 16 charged first degree unlawful possession of a firearm. The counts each

specified make, model and serial number. CP 11–13. The corresponding theft and possession jury instructions specified the same make, model and serial number as set forth in the counts. In part, the "to convict" instructions required the jury to find the State had proved beyond a reasonable doubt:

> (Count 3 at CP 11, Instruction No. 24 at CP 49) "(1) … the defendant wrongfully obtained a firearm, a .357 caliber revolver, serial number 8002032, belonging to another;"
>
> (Count 10 at CP 13, Instruction No. 32 at CP 57) "(1) … the defendant knowingly had a firearm, a .357 caliber revolver, serial number 8002032, in his possession or control;"
>
> (Count 4 at CP 12, Instruction No. 25 at CP 50) "(1) … the defendant wrongfully obtained a firearm, a Ruger .223 caliber rifle, serial number 195-37396, belonging to another;"
>
> (Count 11 at CP 14, Instruction No. 33 at CP 58) "(1) … the defendant knowingly had a firearm, a Ruger .223 caliber rifle, serial number 195-37396, in his possession or control;"
>
> (Count 5 at CP 12, Instruction No. 26 at CP 51) "(1) … the defendant wrongfully obtained a firearm, a Marlin 30-30[6] lever action rifle, serial number 11015584, belonging to another;"
>
> (Count 12 at CP 14, Instruction No. 34 at CP 59) "(1) … the defendant knowingly had a firearm, a Marlin 30-30[7] lever action rifle, serial number 11015584, in his possession or control;"

[6] In Count 3 of the amended information, the word "caliber" is inserted between "30-30" and "lever action". CP 12.

[7] In Count 12 of the amended information, the word "caliber" is inserted between "30-30" and "lever action". CP 14.

(Count 6 at CP 12, Instruction No. 27 at CP 52) "(1) … the defendant wrongfully obtained a firearm, a Browning 12-gauge shotgun, serial number 4509S, belonging to another;"

(Count 13 at CP 14, Instruction No. 35 at CP 60) "(1) … the defendant wrongfully obtained a firearm, a Browning 12-gauge shotgun, serial number 4509S, belonging to another;"

(Count 7 at CP 12, Instruction No. 28 at CP 53) "(1) … the defendant wrongfully obtained a firearm, a Ruger 10/22 semi-automatic .22 caliber carbine rifle, serial number 232-2943[8], belonging to another;"

(Count 14 at CP 14–15, Instruction No. 36 at CP 61) "(1) … the defendant wrongfully obtained a firearm, a Ruger 10/22 semi-automatic .22 caliber carbine rifle, serial number 232-2943[9], belonging to another;"

(Count 8 at CP 13, Instruction No. 29 at CP 54) "(1) … the defendant wrongfully obtained a firearm, a Colt semi-automatic handgun, serial number DR09167, belonging to another;"

(Count 15 at CP 15, Instruction No. 37 at CP 62) "(1) … the defendant wrongfully obtained a firearm, a Colt semi-automatic handgun, serial number DR09167, belonging to another;"

(Count 9 at CP 13, Instruction No. 30 at CP 55) "(1) … the defendant wrongfully obtained a firearm, a Ruger lever-action .17 caliber rifle, serial number 620-55751, belonging to another;"

(Count 16 at CP 15, Instruction No. 38 at CP 63) "(1) … the defendant wrongfully obtained a firearm, a Ruger lever-action .17 caliber rifle, serial number 620-55751, belonging to another;"

[8] In Count 7 of the amended information, the serial number is instead "232-2947**3**". CP 13.

[9] In Count 14 of the amended information, the serial number is instead "232-2947**3**". CP 15.

The jury was instructed that "… the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Instruction No. 1 at 24.

In closing, the State argued in part:

> … You're not allowed to assume things. You're allowed to base your decision on the evidence that comes from the witnesses. And the evidence is that Mr. Jussila, the defendant here, went into Mr. Craven's house and loaded up a pile load of firearms -- two that we don't have here today, a .357 and a Colt .45, which we don't have a picture of because they never found those. But what we do have is hard evidence. And that's what you have to base your decision on.
>
> We have here, starting with Count 6, a Browning shotgun. That was located in the rafters and that was identified by Mr. Cravens. (RP 200)
>
> We have a Ruger .223. Count 9 [sic]. Found in the rafters in the defendant's garage. Count 5, a Marlin 30/30. Again, that's the evidence. Found in the rafters, identified by Mr. Cravens. Ruger 10 .22 carbine. This is all evidence that you're going to be able to handle back there in the jury room. And finally, a Ruger lever action 17 caliber -- and this is Count No. 9 -- identified by Mr. Cravens as the guns taken from his home. (RP 201)
>
> The other two weapons, the two handguns not returned [sic] 'cause there were not located by the officers. (RP 201)

The jury could not decide on the two theft of handgun charges[10] and returned verdicts of not guilty on the related unlawful possession of handgun charges[11]. The jury found Mr. Jussila guilty of the fifteen remaining counts: first degree burglary, second degree theft other than a firearm, five counts of theft of a firearm, five counts of first degree unlawful possession of a firearm, and one count of manufacturing a controlled substance–marijuana. CP 72–84.

The court imposed discretionary costs of $1,500[12], mandatory costs of $700[13], and restitution of $1,420[14], for a total Legal Financial Obligation ("LFO") of $3,620. The Judgment and Sentence contained the following language:

> ¶ 2.5 LEGAL FINANCIAL OBLIGATIONS/RESTITUTION. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. …

CP 118–19.

The Court did not inquire into Mr. Jussila's financial resources or consider the burden payment of LFOs would impose on him. RP 246–54,

[10] Counts 3 and 8, CP 87, 88. The court declared a mistrial. RP 226–27.
[11] Counts 10 and 15, CP 85, 86.
[12] Fees for court-appointed attorney. CP 120.
[13] $500 victim assessment and $200 criminal filing fee. CP 120.
[14] CP 121.

255–58, 259–78, 279–82. The Court ordered Mr. Jussila to pay monthly payments of $25 towards the LFOs beginning approximately three months after the date of sentencing. CP 121. This appeal followed. CP 106–07. The court found Mr. Jussila indigent for this appeal. RP 281.

C. ARGUMENT

1. Mr. Jussila's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the additional elements of the crimes of theft of a firearm and first degree unlawful possession of a firearm as instructed in the "to convict" jury instructions.

The State failed to prove the added element in its "to convict" instructions of the respective guns' make, model and serial number, requiring dismissal of the convictions.

To-convict jury instructions must contain all the elements of the crime or else the State is relieved of its burden to prove every essential element beyond a reasonable doubt. *State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). If, in a criminal case, the State adds an unnecessary element in the to-convict instruction without objection, the added element

also becomes the law of the case and the State assumes the burden of proving it. *Id.* A criminal defendant may challenge the sufficiency of the evidence to support such added elements. *Id.* In a criminal case, evidence is sufficient to support a guilty verdict if, viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "If the reviewing court finds insufficient evidence to prove the added element, reversal is required. Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ('The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence')." *Hickman*, 135 Wn. 2d at 103 (some internal citations omitted).

A person is guilty of theft of a firearm if he or she commits a theft of any firearm. RCW 9A.56.300(1). A person is guilty of first degree unlawful possession of a firearm if he is in possession or control of any firearm after having previously been convicted of a serious offense. RCW 9.41.010(1)(a). Inclusion of a surplus phrase in the information, such as a

VIN (vehicle identification number), does not make the content of the phrase an element of the crime. *State v. McGary*, 37 Wn. App. 856, 860, 683 P.2d 1125 (1984), rev. denied 102 Wn.2d 1024 (1985); see also *State v. Serr*, 35 Wn. App. 5, 8, 664 P.2d 1301 (1983). However, when the State alleges an unnecessary fact in the information *and then incorporates the unnecessary fact into the jury instructions*, the instructions become the law of the case, and the State assumes the burden of proving the added fact. See *State v. Barringer*, 32 Wn. App. 882, 887–88, 650 P.2d 1129 (1982) (Although the crime of knowingly uttering a false prescription did not require reference that the prescription was for a controlled substance, inclusion of the reference in the information and in the instructions made it the law of the case requiring proof of the added fact); see also *State v. Worland*, 20 Wn. App. 559, 565-66, 582 P.2d 539 (1978) (Inclusion of the word willful in the information and the instructions in a prosecution for unlawful possession of a controlled substance made willfulness an element of the crime requiring proof the possession was willful).

In *McGary*, the juvenile defendant was found guilty of taking a motor vehicle without permission. On appeal, McGary alleged the State failed to prove the motor vehicle taken was the one alleged in the information. The information charging McGary stated in part:

> That the respondent Richard Earl McGary, in King County, Washington, on or about 20 April 1982, did intentionally and without permission of Thomas Miller, the owner and person entitled to possession thereof, take and drive away a motor vehicle, to-wit: a 1972 Yamaha Motorcycle VIN # R–5004275, and with knowledge that such motor vehicle had been unlawfully taken did voluntarily ride in and upon such motor vehicle.

McGary, 37 Wn. App. at 859. McGary contended the State was required to prove he took "a 1972 Yamaha motorcycle VIN # R–5004275" because it must prove all facts alleged in the information even though they are not statutory elements of the crime charged. *Id.*

The owner testified he owned an inoperable 1972 Yamaha motorcycle; his aunt testified McGary took the inoperable motorcycle; and McGary testified he took the Yamaha motorcycle with loose gears. The court concluded the trier of fact could have found that McGary took the motorcycle charged in the information, because "[t]he inclusion of the VIN was merely surplusage and did not make the content of the phrase an element of the crime. *State v. Serr*, 35 Wn. App. [at 8]." *McGary*, 37 Wn. App. at 859–60. The court noted McGary's reliance on *Barringer*, supra, and *Worland*, supra, was misplaced: "Those cases stand for the proposition that when the State alleges an unnecessary fact in the information and then incorporates the unnecessary fact into the jury instructions, the instructions become the law of the case and the State assumes the burden of proving

the added fact. This [juvenile] case was tried to the judge without a jury." *McGary*, 37 Wn. App. at 860.

Unlike in *McGary*, Mr. Jussila's case *was* tried to a jury and the State alleged in the charging document the unnecessary facts of make, model and serial number and incorporated those facts into the jury instructions. The State assumed the burden of proving the added facts.

The evidence was insufficient to establish the make, model and serial number of the recovered guns. The guns themselves were not admitted into evidence. Regarding Exhibit 11 Mr. Craven identified "Browning" as the make of one gun and "30/30 rifle" as the model of another. RP 76–77. Mr. Craven also testified that seven rifles were stolen, not just five. There may have been multiple Browning or 30/30 model rifles stolen. Without attaching a model and serial number to "Browning" and a make and serial number to "30/30 rifle," the testimony did not establish beyond a reasonable doubt the requisite added element as to these two guns. Mr. Craven testified merely that he "recognized" the items in the remaining photograph exhibits. The State presented no evidence of the make, model and serial number of the remaining recovered guns.

Exhibits 7 through 11 were also insufficient to establish these attributes. The glossy photographs do not reveal a model or serial number of the depicted guns, nor do they show the maker. Although in Exhibit 10 the word "Williams" can be seen on what looks like some sort of scope attached to the gun, "Williams" does not correspond to any maker specified in the instructions. The prosecutor's purported identification of makers and/or models in its closing argument is not evidence that could properly be considered by the trier of fact.

The State's failure to prove the added element of make, model and serial number requires reversal and dismissal of the five convictions of theft of a firearm and five convictions of first degree unlawful possession of a firearm. *Hardesty,* 129 Wn.2d at 309; *Hickman,* 135 Wn. 2d at 103.

2. This Court should reverse and dismiss the first degree burglary, theft of a firearm and first degree unlawful possession of a firearm convictions because the State presented insufficient evidence the guns were "firearms" under RCW 9.41.010.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v.*

Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the crime or enhancement allegation charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995); *State v. Wade*, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

The evidence was insufficient to prove that what Mr. Jussila stole and possessed were "firearms." First degree burglary requires the State to prove, among other elements, that the defendant was armed with a deadly weapon. RCW 9A.52.020. A firearm, whether loaded or unloaded, is a deadly weapon. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 365,

256 P.3d 277 (2011). To convict a defendant of theft of a firearm or unlawful possession of a firearm, the State must prove that the weapon at issue was a "firearm" as defined in RCW 9.41.010(9).[15] "Firearm" is defined as "firearm" as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(9).

For purposes of proving a gun is a "firearm," evidence must establish beyond a reasonable doubt the gun is a firearm in fact, that is, a real gun, as opposed to a gun-like replica or toy. *State v. Anderson*, 94 Wn. App. 151, 159, 971 P.2d 585 (1999), *overruled on other grounds*, 141 Wn. 2d 357, 5 P.3d 1247 (2000); *State v. Faust*, 93 Wn. App. 373, 379–81, 967 P.2d 1284 (1998); see also *State v. Pam*, 98 Wn.2d 748, 659 P.2d 454 (1983) and *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980) (distinguishing between a toy gun and a gun "in fact"). The fact that a gun is loaded supports an inference that it is operable. *State v. Anderson*, 94 Wn. App. at 163. An unloaded or temporarily inoperable firearm is still a firearm under RCW 9.41.010(9). *State v. Berrier*, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002); and see *State v. Padilla*, 95 Wn. App. 531, 535, 978

[15] RCW 9A.56.300(5) (criminalizing theft of a firearm, and referring explicitly to RCW 9.41.010); RCW 9.41.040 (criminalizing unlawful possession of a firearm, and contained in the same title and chapter as RCW 9.41.010).

P.2d 1113, rev. denied, 139 Wn.2d 1003 (1999) (holding that a gun rendered permanently inoperable is not a "firearm," but a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time is a firearm).

In *Anderson*, sufficient evidence was presented to establish "the existence of a real, operable gun in fact" where police officers testified the gun was loaded and appeared to be a real gun, the gun displayed a serial number, and the gun was admitted as an exhibit at trial. *Anderson*, 94 Wn.App. at 162–63. In *State v. McKee*, 141 Wn. App. 22, 167 P.3d 575, *rev. denied*, 163 Wn.2d 1049, 187 P.3d 751 (2008), a real gun was recovered and admitted into evidence but it did not match the rape victim's initial description and she was unable to provide a detailed description of the gun at trial. The court held there was sufficient circumstantial evidence of a real gun where the victim testified she knew the gun was real because of the weight and feel of the steel and the way the defendant was holding it, and her testimony that she saw a "peripheral something to my head" and did not bite the defendant's penis during the rape because of the gun to her head, combined with evidence the defendant had a real gun and had access to other guns. *McKee*, 141 Wn. App. at 31.

In cases where the actual weapon was not recovered, there has been testimony from eye-witnesses who were able to describe the alleged weapon in detail. In *State v. Mathe*, 35 Wn. App. 572, 668 P.2d 599 (1983), *aff'd on other grounds*, 102 Wn.2d 537, 688 P.2d 859 (1984), the court held that the State had provided sufficient proof of a real gun via circumstantial evidence consisting of the two robbery victims' detailed descriptions of the gun used by Mathe during the robberies. 35 Wn. App. at 574–75. In *State v. Bowman*, 36 Wn. App. 798, 678 P.2d 1273, *rev. denied*, 101 Wn.2d 1015 (1984), the court held the record contained sufficient circumstantial evidence to support the jury's firearm and deadly weapon findings where an eyewitness described the gun in detail and on cross-examination stated "there was no question in my mind whatsoever" that it was a real gun. *Bowman*, 36 Wn.2d at 803.

Here, the guns were not admitted into evidence and the fact-finders could not examine them. Exhibits 7 through 11 do not disclose make, model or serial numbers which might suggest one or more of the guns depicted are real guns. Officers who recovered the guns did not testify they thought the guns were real or that the guns were loaded with ammunition or appeared to be in working order or capable of firing bullets, or that police handled the guns in any special manner due to

perception of safety concerns. Mr. Craven, the guns' owner, similarly did not testify the guns were real or loaded or operable at the time they were stolen or at any prior time. He testified merely that he "recognized" the guns. The limited testimony provides no detailed descriptions from which a fact-finder could conclude beyond a reasonable doubt that the guns depicted in the exhibits were in fact real guns. The convictions for first degree burglary[16], theft of a firearm and first degree unlawful possession of a firearm must be reversed and dismissed for insufficient evidence.

3. Mr. Jussila's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the elements of the crime of second degree theft.

The law regarding insufficient evidence is set forth in the preceding argument.

A person is guilty of second degree theft if he commits theft of "[p]roperty which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value ... ." RCW 9A.56.040(1)(a). In

[16] "Remand for simple resentencing on a 'lesser included offense' … is only permissible when the jury has been explicitly instructed thereon." *In re Heidari*, 174 Wn. 2d 288, 292, 274 P.3d 366, 368 (2012), citing *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980).

Count 2 of the amended information, the State specified the property as "other than a firearm or a motor vehicle" and "to-wit: an Acer laptop computer and a bag of coins." CP 11; RCW 9A.56.020(1)(a); RCW 9A.56.040(1)(a). The jury was instructed in order to convict Mr. Jussila of second degree theft as charged, the State had to prove beyond a reasonable doubt he wrongfully obtained "property of another" exceeding $750 in value but not more than $5,000 in value. Instruction No. 18 at CP 43.

The State presented insufficient evidence that the value of a computer and bag of coins stolen in the burglary was more than $750 but did not exceed $5,000. Mr. Craven stated a dish holding loose change and a satchel or bag of the collected coins were missing. He estimated the total value of the coins at $300. RP 84. Mr. Craven also reported his laptop computer was missing, but was not asked about its value at trial. RP 75, 90. He did not identify its brand name as "Acer", as alleged in the Amended Information, and no one testified to its age or condition or monetary worth. CP 11. Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *Moore*, 7 Wn. App. 1, 499 P.2d 16. The evidence is insufficient to establish the bag of

coins and the computer had a combined threshold value of $750 as required for the crime of second degree theft.

Mr. Craven stated several additional items were missing after the burglary: a gold watch from his father's estate for which he had no idea of value, a safe kept in a closet, a set of car keys, and a $50 knife sharpener. RP 80, 82–84. Mr. Jussila was not accused of stealing these items in the Amended Information. But even if they could properly be considered by the jury, the established amount of $350 (coins and knife sharpener) and the unestablished market value of a computer, safe, car keys, and a watch described by its owner as "fairly valuable" would also require the jury to impermissibly speculate whether the value range of "more than $750 but not exceeding $5,000" had been proven beyond a reasonable doubt.

The evidence is insufficient to establish the required range of value and the second degree theft conviction must be reversed.

4. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Jussila's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review*.

Mr. Jussila did not make this argument below. However, the

Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could

have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Jussila's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a

statute, the legislation is considered to have always meant that interpretation.") (Citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Mr. Jussila's 2014 sentencing occurred before the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Jussila respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument*.

There is insufficient evidence to support the trial court's finding that Mr. Jussila has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992);

RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration

and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs."

Curry, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has "considered" Mr. Jussila's present or future ability to pay legal financial obligations. A finding must have support in the record. 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 trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' "

Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Mr. Jussila's financial resources and the potential burden of imposing LFOs on him. RP 246–54, 255–58, 259–78, 279–82. Although the parties apparently thought the recoupment for court-appointed attorney's fees should be $200, the court remarked "[defense counsel] did a substantial amount of work … in this case and I do believe that $1,500 is a reasonable" fee … ." RP 271.

What is reasonable recoupment is not the issue. Despite finding him indigent for this appeal, the Court failed to "conduct on the record an individualized inquiry into [Mr. Jussila's] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under CR 34" as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court "to reconsider the

imposition of the discretionary legal financial obligations consistent with the requirements" of *Blazina*.).

The boilerplate finding that Mr. Jussila has the present or future ability to pay LFOs is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Jussila 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

D. CONCLUSION

For the reasons stated, the convictions for first degree burglary, second degree theft, theft of a firearm and first degree unlawful possession of a firearm should be reversed and dismissed. Alternatively, the matter should be remanded to make an individualized inquiry into Mr. Jussila's current and future ability to pay before imposing LFOs.

Respectfully submitted on October 19, 2015.

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