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Court of Appeals
Division I
State of Washington

No. 73563-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY LYNN MARTIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

In this prosecution for identity theft, the jury was instructed the State must prove Tiffany Martin committed the crime by knowingly obtaining, possessing, or transferring a means of identification or financial information of another person with the intent to commit a crime. But the jury was not instructed it must unanimously agree as to which means Ms. Martin used to commit the crime. Because the jury did not provide a particularized finding as to which means it relied upon, and the State did not present sufficient evidence to prove each of the means beyond a reasonable doubt, the convictions must be reversed.

In addition, the police searched the car in which Ms. Martin was riding without probable cause to believe the car was used in the commission of a felony or to believe the car contained contraband. Thus, the search was unlawful and the evidence found in the car must be suppressed.

B. ASSIGNMENTS OF ERROR

1. Ms. Martin's constitutional right to a unanimous jury verdict was violated because the State did not present sufficient evidence to

prove one of the alternative means of committing the crime that was submitted to the jury.

2. The evidence was insufficient to prove each alternative contained in the to-convict jury instructions.

3. The police search of the car in which Ms. Martin was riding violated her state and federal constitutional right to be free from unlawful seizures and searches.

4. Given Ms. Martin's indigency, this Court should not impose appellate costs if the State substantially prevails.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If the jury is instructed on multiple alternative means of committing a crime, but the State does not present sufficient evidence to prove each means beyond a reasonable doubt, the defendant's constitutional right to jury unanimity is violated unless the jury is instructed it must unanimously agree as to a particular means. Was Ms. Martin's constitutional right to jury unanimity violated where the jury was instructed on multiple means but the State did not present sufficient evidence to prove each of the means and the jury was not instructed it must be unanimous as to the means?

2. Under the law of the case doctrine, the State bears the burden to prove every element contained in the to-convict jury instruction. Here, the to-convict instructions stated the State must prove beyond a reasonable doubt that Ms. Martin knowingly obtained, possessed, or transferred means of identification or financial information belonging to other people. Is the evidence insufficient where the State did not prove Ms. Martin transferred the means of identification or financial information?

3. Police officers may search a person's automobile if they have probable cause to believe the car was used in commission of a felony, or probable cause to believe the car contains contraband. Here, police officers observed some cell phones, flashlights, screwdrivers, purses and wallets inside a car in which Ms. Martin was riding. The officers were also aware that the driver of the car had previously been convicted of identity theft. But the officers did not observe any contraband inside the car. Was the information available to the officers insufficient to establish probable cause to search the car?

4. Given that the trial court found Ms. Martin is indigent and unable to pay discretionary legal financial obligations, and Ms.

Martin's indigency is presumed to continue throughout review, should this Court disallow appellate costs if the State substantially prevails?

D. STATEMENT OF THE CASE

On April 4, 2014, at around 1 a.m., Bellevue police officers were dispatched to a "suspicious circumstances" call at a Shell gas station. RP 20. Two witnesses reported seeing a man standing by the trunk of a car in the parking lot, removing purses from the trunk and placing items from inside the purses into a plastic bin at his feet and throwing other items into a garbage can. RP 21-22, 29-30. The witnesses later told the police that when the man saw officers arriving, he picked up the bin and put it in the trunk and tried to close the trunk but could not. RP 29-30.

Officer Jacob Childers was the first officer to respond. RP 23. As he drove by the gas station initially, he saw two people digging around in the back seat of a dark sedan. RP 86. When he parked and walked toward the car, he saw a man standing at the back of the car with the trunk open and a woman sitting in the back seat. RP 89. Officer Childers could see several purses and wallets inside the trunk, stacked on top of a plastic bin. RP 89-90, 102. Inside the cab of the car he saw three or four cell phones, flashlights, screwdrivers, two

wallets and a laptop bag. RP 94, 102-03. He also saw several knives in the car, including one within the woman's reach, which he seized for safety purposes. RP 93. Officer Childers said flashlights, screwdrivers, and knives are commonly found in the cars of people engaged in the crime of vehicle prowling or even burglary. RP 94.

Officer Brian Schaffer arrived soon after Officer Childers. RP 23. As he approached the car, he could see two or three purses and a backpack in the trunk. RP 26. Inside the cab of the car, he saw screwdrivers, flashlights, an empty laptop case, four cell phones, two wallets, and an empty black purse. RP 33. Officer Schafer said he thought the cell phones, wallets, bags and purses might have been stolen in vehicle prowls. RP 33, 39. He said screwdrivers were often used to pry open windows and car doors. RP 33. He thought the car likely contained stolen property and the items in the car were consistent with the crimes of vehicle prowl or identity theft. RP 39, 77.

Officer Childers contacted the man, who said his name was Jontel Jackson. RP 91. Officer Childers recognized Mr. Jackson from a previous contact in 2012. RP 83, 91. During the previous contact, officers had searched Mr. Jackson's car and found several items belonging to other people, including credit and debit cards and checks,

as well as journals containing information pertaining to other people, including names and credit and account numbers. RP 83. Mr. Jackson had been ultimately convicted of identity theft. RP 28, 36-37.

Mr. Jackson had been with a woman named Tiffany Martin during the prior contact. RP 84. On the present occasion, Officer Childers thought the woman sitting in the car looked a little like Ms. Martin but he was not sure. RP 91, 98-99. The woman said her name was Alicia Staton and she provided a birth date, address, and the last four digits of a social security number that matched that name in the database. RP 91.

Mr. Jackson said the car belonged to someone named Kevin. RP 26. The officers determined that indeed the registered owner of the car was a person named Kevin who lived nearby. RP 51. The car was not reported stolen and the officers had no reason to believe the car was stolen. RP 51.

As the officers were speaking to him, Mr. Jackson hiked up his pants and looked around, which the officers thought meant he might try to flee or fight. RP 27. The officers placed him in handcuffs and had him sit on the curb nearby, although they did not arrest him. RP 27. The officers did not believe they had probable cause to arrest either Mr.

Jackson or his companion. RP 38, 118. During a frisk, the officers determined Mr. Jackson was not carrying a weapon. RP 27.

Officer Schafer searched the nearby garbage cans but did not find anything of evidentiary value. RP 72.

Officer Schafer asked Mr. Jackson for permission to search the car but he said no. RP 39. The officers impounded the car so that they could apply for a search warrant. RP 38, 118. The decision to impound the car was based on the officers' belief there was probable cause to believe the car contained evidence of identity theft and vehicle prowling, given the presence of the purses, flashlights, cell phones, and bags, as well as Mr. Jackson's prior criminal history. RP 118. The officers did not believe the car had actually been used to commit those crimes because the car did not belong to Mr. Jackson and the officers did not know who had put those items in the car. RP 119.

Officer Schafer obtained a search warrant and searched the car later that night. RP 41. In the front seat he found a screwdriver, a flashlight, multiple cell phones, and a jacket with a wallet inside containing Mr. Jackson's identification. RP 501-02. He also found a pink wallet near the passenger seat which contained Tiffany Martin's identification and credit cards with her name on them. RP 502. One of

the cell phones also belonged to Ms. Martin. RP 542. In the glove box Officer Schafer found two credit cards with names other than Jackson or Martin. RP 504. In the back seat he found another cell phone and a leather binder and a ledger. RP 506, 568. In the trunk he found a plastic bin containing several receipts for gift cards and other purchases that had been bought with multiple different credit cards. RP 508. Also in the trunk were three cell phones, several empty purses, and several bags. RP 507-08, 515.

The binder and the ledger contained information pertaining to several different individuals, including names, addresses, social security numbers, account numbers, birth dates, checks and credit cards. RP 516; Exhibit 7. In total, the binder and the ledger contained information pertaining to about 90 different people. RP 517-39, 564. Officer Schafer tried to contact several of the individuals but was able to contact only seven or eight. RP 564.

Ms. Martin was charged with eight counts of second degree identity theft. The State alleged she “did knowingly obtain, possess, use or transfer a means of identification or financial information” pertaining to each of the named individuals, “knowing that the means

of identification or financial information belonged to another person, with the intent to commit, or to aid or abet, any crime.” CP 25-27.

Before trial, the defense moved to suppress the evidence found in the car, arguing the search was conducted without probable cause.

The court denied the motion. CP 209-15; RP 181-85.

Only two of the individuals named in the information testified at trial.¹ Emily Choi testified she had been expecting a bank and credit card statement in the mail but did not receive it. RP 601. She later received a letter from the bank notifying her that her account information had been used to incur \$400 to \$500 in fraudulent charges. RP 607. A bank statement pertaining to Ms. Choi was found in the binder seized during the search of the car. Exhibit 7.

Lorik Soukiazian testified she had been expecting her paycheck in the mail but never received it. RP 650-51. Her paycheck was found in the binder in the car. RP 653; Exhibit 7.

The State presented videotaped evidence obtained from Nordstrom in Bellevue. RP 616. The videotape showed that on the evening before the police contacted Mr. Jackson at the Shell station, a

¹ For the other named individuals, Ms. Martin stipulated she did not have permission to be in possession of their means of identification or financial information. CP 729.

man and a woman attempted to purchase two necklaces totaling \$67.89 using a Mastercard belonging to Kelly Hamlett, one of the individuals named in the charging document. RP 616, 622, 629, 631. The sales associate determined the card had been reported lost or stolen and the transaction was voided. RP 625, 629. Hamlett's Nordstrom credit card statement was found in the binder in the car. Exhibit 7.

The jury was instructed they could convict Ms. Martin as either a principal or an accomplice. CP 133. The jury found her guilty of all eight counts as charged. CP 114-21.

E. ARGUMENT

1. Ms. Martin's state constitutional right to jury unanimity was violated because the jury was instructed on an alternative means of committing identity theft for which the State did not present sufficient evidence.

a. Ms. Martin had a constitutional right to a unanimous jury verdict as to the means by which she committed the crime.

Article I, section 21 requires a unanimous jury verdict in criminal cases. When the State alleges a defendant committed a crime by alternative means, and the jury is instructed on multiple means, the right to a unanimous jury requires the jury to agree unanimously on the means by which it finds the defendant committed the offense. State v.

Owens, 180 Wn.2d 90, 95, 323 P.2d 1030 (2014). If the jury returns “a particularized expression” as to the means relied upon for the conviction, the unanimity requirement is met. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). But “[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing Ortega-Martinez, 124 Wn.2d at 707-08); Owens, 180 Wn.2d at 99.

b. The jury instructions set forth three distinct alternative means of committing the crime.

An alternative means crime is one by which the criminal conduct may be proved in a variety of ways. Owens, 180 Wn.2d at 96. Determining whether a crime is an alternative means crime is a matter of statutory interpretation. Id. at 96. Generally, alternative means crimes “describe *distinct acts* that amount to the same crime.” State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Alternative means are generally set forth in the primary provision of the statute and not in definitional provisions. Owens, 180 Wn.2d at 96. That is, statutory alternative means “are not merely descriptive or definitional

of essential terms,” but “are themselves essential terms.” State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008), aff’d, 169 Wn.2d 220, 237 P.3d 250 (2010).

Identity theft is an alternative means crime. The statute provides: “[n]o person may knowingly *obtain, possess, use, or transfer* a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1) (emphasis added). The terms “obtain, possess, use, or transfer” describe distinct acts. See Peterson, 168 Wn.2d at 770. They are not merely descriptive or definitional terms but are themselves essential terms, contained in the primary provision of the statute. See Nonog, 145 Wn. App. at 812.

In determining whether a statute describes alternative means, the Court considers whether a person can commit one alternative without also committing another. Owens, 180 Wn.2d at 97.

Courts have already determined that a person can commit one alternative means of identity theft without also committing another. In State v. Berry, 129 Wn. App. 59, 68-69, 117 P.3d 1162 (2005), Berry argued the evidence was not sufficient to convict him of second degree identity theft because the State did not prove he “used” the victim’s

means of identification. During a search of Berry, a police officer found credit cards, checks, and a temporary driver's license in the name of someone else. Id. at 64. Berry admitted he had purchased the credit cards, checks, and identification, and stated that although he intended to use them, he had not yet done so. Id. The Court rejected his sufficiency argument, concluding a person can commit the crime by merely obtaining or possessing someone else's means of identification with intent to commit a crime. Id. at 70. The State need not prove the person also "used" the means of identification. Id.; see also State v. Sells, 166 Wn. App. 918, 924, 271 P.3d 952 (2012), review denied, 176 Wn.2d 1001, 297 P.3d 67 (2013) ("Actual use of the means of identification is not required in order to convict.") (citing Berry, 129 Wn. App. at 70).

Berry does not address whether obtaining, possessing or using another person's means of identification are statutory alternative means but its analysis supports the conclusion that they are. The Court's holding that a person can commit the crime by merely possessing or obtaining another person's means of identification, without also using it, supports the conclusion these are separate, distinct acts and therefore

alternative means. See Owens, 180 Wn.2d at 97; Peterson, 168 Wn.2d at 770.

In addition, in this case, the State implicitly recognized that the terms “obtain, possess, use or transfer” are statutory alternative means that must each be supported by sufficient evidence if submitted to the jury. In the information, the State included all four alternative means, alleging Ms. Martin “did knowingly obtain, possess, use or transfer” a means of identification or financial information of eight individuals. CP 20-23. But in the to-convict instructions proposed by the State, the State omitted the “use” alternative. The instructions stated the State must prove beyond a reasonable doubt only that Ms. Martin “knowingly obtained, possessed, or transferred” a means of identification or financial information. CP 135-42. It is probable that the State omitted the “used” alternative from the to-convict instructions because it recognized there was insufficient evidence to prove it. The State thus implicitly recognized that “use” was a separate statutory alternative means that must be supported by sufficient evidence if included in the to-convict instructions. See Ortega-Martinez, 124 Wn.2d at 707-08.

The Legislature's intent that identity theft be an alternative means crime is apparent in the Legislature's statement of intent. That provision states:

The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer another person's means of identification or financial information. *The legislature intends to penalize for each unlawful act of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person.* The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

RCW 9.35.001 (emphasis added). This language reveals the Legislature's objective to treat each act of obtaining, possessing, using, or transferring another person's means of identification or financial information, performed with the requisite intent, as a separate, distinct punishable criminal act. Id.

- c. *In the alternative, the State assumed the burden of proving beyond a reasonable doubt that Ms. Martin knowingly obtained, possessed, **and** transferred a means of identification or financial information because all of those terms were included in the to-convict instructions.*

Under the “law of the case doctrine,” when the State does not object to a to-convict jury instruction, it assumes the burden to prove all of the elements contained in the instruction beyond a reasonable doubt, even if those elements are not required by the statute. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Under this doctrine, if the to-convict instruction sets forth different means of committing the crime and the State does not object to the instruction, the State assumes the burden of proving each of the means included in the instruction. In State v. Lillard, 122 Wn. App. 422, 434, 93 P.3d 969 (2004), Lillard was charged with possession of stolen property and the to-convict instruction stated the State must prove beyond a reasonable doubt he “knowingly received, retained, possessed, concealed, or disposed of stolen property.” In general, these terms are merely definitional and not statutory alternative means.² Id.;

² The possession of stolen property statute provides a person is guilty of the crime if he “possesses stolen property.” RCW 9A.56.150. A separate statute defines possessing stolen property as “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing

State v. Hayes, 164 Wn. App. 459, 477, 262 P.3d 538 (2011); see also Owens, 180 Wn.2d at 96 (“the alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a ‘means within a means’”) (quoting State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)). But because these alternatives were contained in the to-convict instruction, the State assumed the burden of proving each of them beyond a reasonable doubt. Lillard, 122 Wn. App. at 434-45. Applying the law of the case doctrine, the Court explained,

[b]ecause the instruction specifically listed the alternative definitions of ‘possession’ as alternative means of the offense to be proved by the State, there must be sufficient evidence to support each alternative, unless we can determine that the verdict was based on only one alternative means and that substantial evidence supports that means.

Id. (citing Hickman, 135 Wn.2d at 102).

Similarly, here, even if the Court concludes the terms “obtain, possess, or transfer” contained in the to-convict instructions are not statutory alternative means, the State nonetheless bore the burden to prove each one under the law of the case doctrine. Lillard, 122 Wn.

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.56.140.

App. at 434-45. The question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found these elements beyond a reasonable doubt. Hickman, 135 Wn.2d at 103 (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

d. The convictions must be reversed because the State did not prove beyond a reasonable doubt that Ms. Martin “transferred” a means of identification or financial information, and the jury did not return a particularized verdict as to this means.

The jury was instructed on three separate alternative means of committing identity theft. The to-convict instructions provided the State must prove beyond a reasonable doubt that Ms. Martin “knowingly obtained, possessed, or transferred” a means of identification or financial information. CP 135-42. The jury returned only a general verdict and was not instructed it must be unanimous as to which alternative it relied upon. Therefore, the conviction may be upheld only if the evidence was sufficient to prove each alternative beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 707-08. Because the State failed to prove Ms. Martin “transferred” a means of

identification or financial information, the convictions must be reversed.

As stated, “[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” Kintz, 169 Wn.2d at 552. Sufficient evidence is evidence adequate to justify a rational trier of fact to find guilt beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 708 (citing Green, 94 Wn.2d at 220; Jackson, 443 U.S. 307). The evidence is sufficient if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the elements beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 708.

The evidence is insufficient because the State did not prove Ms. Martin “transferred” any means of identification or financial information. The statute does not define “transfer.” Undefined statutory terms should be given their ordinary meaning, which may be determined by reference to a dictionary. State v. Ramirez, 62 Wn. App. 301, 309 n.7, 814 P.2d 227 (1991). The dictionary definition of “transfer” is “to cause to pass from one person or thing to another,” as well as “to carry or take from one person or place to another.” Id. at

308-09 (quoting Webster's Third New International Dictionary 2426-27 (1971)).

The State did not prove Ms. Martin “transferred” a means of identification or financial information. The evidence showed the car in which Ms. Martin was riding contained a ledger and binder that held financial and other information pertaining to other people. Exhibit 7. The State also presented a videotape showing a man and woman trying unsuccessfully to use a credit card belonging to one of the victims at a Nordstrom store. RP 616, 622, 629, 631. But the State presented no evidence to show the financial or other information was ever “transferred” from one person or place to another. Because the State did not prove this alternative means, the convictions must be reversed. Ortega-Martinez, 124 Wn.2d at 707-08.

2. The search of the car was unlawful because it was not supported by probable cause.

The Fourth Amendment provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Article I, section 7 provides “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” As with the Fourth Amendment, this “authority of law” is fulfilled by a warrant, issued

upon probable cause that is established by sworn affidavit. State v. Chenoweth, 160 Wn.2d 454, 465, 158 P.3d 595 (2007). The probable cause analysis is substantively the same under article I, section 7 and the Fourth Amendment. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

Police impoundment of a car is considered a “seizure” for constitutional purposes because it involves the governmental taking of a vehicle into its exclusive custody. State v. Coss, 87 Wn. App. 891, 898, 943 P.2d 1126 (1997). The facts of each case determine the reasonableness of an impoundment. Id. “A car may be lawfully impounded as evidence of a crime if an officer has probable cause to believe that it was stolen or used in the commission of a felony.” State v. Terrovona, 105 Wn.2d 632, 647, 716 P.2d 295 (1986). In addition, an officer who has probable cause to believe a vehicle contains contraband or evidence of a crime may seize and hold the car for the reasonable time needed to obtain a search warrant, and the car may be towed to an impound yard during seizure. State v. Huff, 64 Wn. App. 641, 653, 826 P.2d 698 (1992).

Under both the federal and state constitutions, the probable cause standard is an objective one. State v. Gaddy, 152 Wn.2d 64, 70,

93 P.3d 872 (2004); Beck v. Ohio, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). The officer's subjective belief is not determinative. Huff, 64 Wn. App. at 645. The probable cause standard is determined with reference to a reasonable person with the expertise and experience of the officer in question. See United States v. Ortiz, 422 U.S. 891, 897-98, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975); State v. Cole, 128 Wn.2d 262, 289, 906 P.2d 925 (1995), abrogated on other grounds by In re Det. of Peterson, 145 Wn.2d 789, 42 P.3d 952 (2002).

Probable cause is a quantum of evidence "less than . . . would justify . . . conviction," yet "more than bare suspicion." Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). Although a single fact in isolation may not be sufficient, probable cause may exist when that fact is read together with other facts stated in the affidavit. State v. Vickers, 148 Wn.2d 91, 110, 59 P.3d 58 (2002); State v. Tarter, 111 Wn. App. 336, 341, 44 P.3d 889 (2002).

A police officer making a probable cause determination may consider prior convictions that have probative value to the specific probable cause inquiry. Vickers, 148 Wn.2d at 111 n.51; State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001) (defendant's prior

conviction was “helpful in establishing probable cause” when the conviction was of the same general nature as the crime under investigation).

“Determinations of probable cause are made by looking at the facts and circumstances known to the officer, including that information gleaned from reasonably trustworthy sources.” Bokor v. Dep’t of Licensing, 74 Wn. App. 523, 526, 874 P.2d 168 (1994). But before an officer may impound and search a car, the facts and circumstances must amount to more than mere suspicion that evidence of criminal activity will be found. State v. Ozuna, 80 Wn. App. 684, 688-89, 911 P.2d 395 (1996). Relevant to that inquiry is whether the officer is actually aware that the car contains stolen property. Id.

The Court in Ozuna found insufficient justification for a vehicle search on conduct similar to that taken by police here. In Ozuna, a witness reported seeing two men running from near his car, and said his car’s alarm had been triggered. Id. at 686-87. An officer investigating the “vehicle prowling” report noticed a car parked on the grass nearby, apparently on an elementary school’s property, and tucked into bushes that partially hid its presence. After the officer discovered the car was registered to a person he knew had a criminal record, he decided to take

a closer look. He could see from outside the car that the unkempt condition of the car contrasted oddly with the expensive-looking briefcase and attaché case clearly visible inside. He also noted the vehicle prowling report had come from an apartment complex just across the street from where the car was found. These facts and observations led the officer to believe the car was involved in the vehicle prowl. But the Court disagreed and held the facts and circumstances did not give rise to probable cause. In particular, the Court noted (1) none of the items seen in the car had been reported stolen, (2) the person who called in the vehicle prowl report had not reported anything stolen, and (3) although the car was parked near the scene of the crime, the two men were seen running in the opposite direction. Id. at 688-89.

Likewise, the mere possibility that a car may contain contraband is not sufficient to justify a search. In State v. Cuzick, 21 Wn. App. 501, 502-03, 585 P.2d 485 (1978), the defendant's wife told a police officer that her husband always carried a sawed-off shotgun in his car. The officer asked the defendant, who was standing by the car, if he had any guns either on his person or in his car. When he said no, the officer asked if he could "look in the car." The defendant consented. The

officer searched the car and found a suitcase in the back seat which contained a revolver. The officer then received the defendant's consent to look inside the trunk, where he found shotgun shells but no weapon. When it was determined that the defendant had previously been convicted of a felony, he was booked and charged with unlawful possession of a firearm. The police then impounded the car and found a second pistol under the driver's seat.

The Court concluded the officer lacked probable cause to search the car. *Id.* at 504-05. First, unlike a machine gun, a sawed-off shotgun in Washington is not contraband per se, although an officer who sees a sawed-off shotgun may seize it without determining if the appropriate sections of the federal statute have been satisfied. Thus, the allegation of the possible presence of a sawed-off shotgun is "not a magical totem which permits any intrusion into a constitutionally protected area." *Id.* at 504. Second, the defendant's presence at his house, although arguably a violation of a condition of pretrial release, was itself not a crime. Finally, the officer's lack of knowledge of the defendant's prior felony conviction at the time of the search obviated any "probable cause" to believe the defendant was committing the crime of unlawful possession of a firearm. *Id.* at 504-05.

Similarly to those cases, the information known to Officer Schafer in this case was not sufficient to establish probable cause to believe the car contained contraband or was used in the commission of a felony. Officer Schafer was aware that Mr. Jackson had been seen removing purses from the trunk and placing some items from the purses into a plastic bin and other items into the garbage can, while looking around. RP 21-22, 29-30. Officer Schafer and Officer Childers also observed the inside of the trunk and the cab of the car were cluttered and contained purses, bags, wallets, cell phones, flashlights, screwdrivers, and knives. RP 26, 33, 89-94, 102-03. But none of these objects is itself contraband. None of the items had been reported stolen and, as the officers confirmed, the car itself was not stolen. RP 51. The officers observed no stolen property inside the car. Officer Schafer searched the nearby garbage cans but found nothing of evidentiary value. RP 72. Mr. Jackson was not armed and the officers were aware of no other suspicious circumstances relating to the stop, other than the fact that Mr. Jackson appeared to look around while the officers were talking to him³, and he had tried to close the trunk when he saw officers

³ The trial court specifically found that Mr. Jackson's action of hiking up his pants while talking to the officers was *not* a furtive gesture. RP 183.

arriving. RP 27, 29-30. The information was simply not sufficient to establish that a more invasive search of the car would uncover contraband. Although the officers were aware that Mr. Jackson was previously convicted of identity theft, this was not sufficient to establish probable cause given the absence of other incriminating information.

All evidence obtained as the result of an unlawful search or seizure must be suppressed. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999). Because the impoundment and search of the car was unlawful, the evidence found in the search must be suppressed.

3. Any request that costs be imposed on Ms. Martin for this appeal should be denied because the trial court determined she does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, ___ Wn. App. ___, 2016 WL 393719 (No. 72102-0-I, Jan. 27, 2016); RCW 10.73.160(1).

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 2016 WL 393719 at *6. Here, the trial court found Ms. Martin is indigent and lacks the ability to pay discretionary legal financial obligations. CP 152; Sub #122. Ms. Martin's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair, 2016 WL 393719 at *7; RAP 15.2(f). Given Ms. Martin's continued indigency, it is appropriate for this Court to exercise its discretion and disallow appellate costs should the State substantially prevail. Sinclair, 2016 WL 393719 at *7.

F. CONCLUSION

Ms. Martin's constitutional right to a unanimous jury verdict was violated because the State did not prove each alternative means submitted to the jury. Therefore, her convictions must be reversed. In addition, the impoundment and search of the car was unconstitutional, requiring that all evidence found during the search be suppressed.

Respectfully submitted this 12th day of February, 2016.

/s/ Maureen M. Cyr

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Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73563-2-I
v.)	
)	
TIFFANY MARTIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF FEBRUARY, 2016.

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