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Court of Appeals
Division I
State of Washington

NO. 74315-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES CHRISTOPHER LANGSTON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. During the investigation of a reported cell phone theft, police contacted the defendant and his girlfriend because they matched the suspects' descriptions. After they admitted involvement in the incident, police attempted to identify them. The defendant gave a false name, date of birth, and social security number. The court granted a subsequent defense motion to suppress any further statements regarding the reported theft, including the defendant's protestation of innocence. Did the court err when it admitted the defendant's initial statement to explain the police contact?

2. If the court erred, was the error harmless when it the evidence admitted was insignificant compared with the overwhelming evidence produced at trial, including the defendant's confessions both to police officers and on the stand?

II. STATEMENT OF THE CASE

At around 11 a.m. on a Monday at the beginning of April 2015, Eddie Lee Robinson lost his wallet on Bus 101 to Seattle. 2 RP 38. In it were his social security, ORCA, bank, EBT, and health cards. He reported the cards stolen and cancelled them the next day. 2 RP 38-42.

On April 16, three Edmonds police officers were dispatched to the Red Dragon Casino to investigate an unrelated report of a cell phone theft from a nearby AT&T store. Officer Bickar and Officer Strum contacted the defendant and his girlfriend because they matched the suspects' descriptions. The two admitted they had been involved in the incident, which led police to ask the defendant for his identification. 2 RP 47-50; 55-7.

The defendant said he was Eddie Lee Robinson, gave Robinson's date of birth, and produced Robinson's social security card. When police checked, they found that Robinson's physical description did not match the defendant. Police correctly identified the defendant when a Casino employee showed them a copy of the identification he had used to register to gamble. Id.

Police discovered that the defendant had outstanding warrants and arrested him on the warrants. In a search incident to arrest, they found in his pocket Robinson's wallet which still held Robinson's social security, EBT, health, and bank cards. 2 RP 51-2, 64, 68-70.

The defendant told the arresting officer, Officer Clark, that he did not know Robinson but had found his wallet on a bus. He said

he used Robinson's identity because he did not want to be arrested on his warrants. 2 RP 71.

The State charged the defendant with second degree identity theft committed while on community custody by using Eddie Robinson's identification and financial information to commit a crime, to wit, giving false information to law enforcement, and with second degree theft for misappropriating a lost access device, to wit, Eddie Robinson's bank card.¹ CP 78. At a CrR 3.5 hearing, three Edmonds police officers testified in detail about the reported theft and the defendant's explanation of his involvement in it, most of which was not heard at trial.

When the trial began on August 24, 2015, the defendant moved to exclude any testimony, including his statements, regarding the reported cell phone theft. CP 83-4; 2 RP 11. The State argued that the officers' and defendant's statements about the reported theft were relevant because they explained why police contacted and sought to identify the defendant. 2 RP 12.

The court ruled that responding officers could testify about the reported theft insofar as it explained their contact with the

¹ The defendant stipulated to the community custody allegation. CP __ (sub.no.50, Stipulation re: Community Custody).

defendant. It ruled that all of the defendant's statements were admissible. 2 RP 15-6.

Robinson and three Edmonds officers testified as described above. The defendant's statement regarding the reported theft was not admitted in its entirety. Instead, when the State asked about his contact with the defendant, Officer Strum testified,

So I asked him what was going on with regard to the reason why I was contacting them, and they said that they were involved with that, in addition to matching the description. So we attempted to identify the defendant....

Id. at 49. The defendant did not object. The State later asked Officer Bickar what the defendant told him about the reported theft. Defense objected and argued that additional testimony about the reported theft would confuse the jury about what charges were before it. 2 RP 56-8.

The court reconsidered its prior ruling. Because it did not want a lengthy discussion about the investigation, it sustained the objection and ruled that there had been enough testimony about the theft investigation. 2 RP 58-9, 61.

The defendant also testified. He said he had found Robinson's wallet on Bus 101 on the morning of the day before he was arrested. He said he only flipped through the wallet quickly,

saw Robinson's address, and intended to drop it off at a post office. He said he used Robinson's name, date of birth, and social security card when contacted by police because he knew he had warrants and did not want to go to jail. 2 RP 78, 79-80, 81.

On cross-examination, the defendant acknowledged that he had kept Robinson's wallet for more than a day, had gone through it, knew what cards were in it, had learned Robinson's address, knew what cards were in it, and knew the wallet was not his to keep. 2 RP 81-5.

In closing, the State argued that the evidence showed that intent to commit the crime of giving false information because the defendant had memorized Robinson's information and used it to avoid arrest. It argued that the evidence showed intent to commit second degree theft because the defendant not only stole and used Robinson's identity but also kept his wallet over the course of two days. 3 RP 131-33.

The defendant argued that he did not intend to commit either crime. His intent in assuming Robinson's identity was only to avoid jail. His intent was to return Robinson's wallet but he had not gotten around to it. 3 RP 143-45. Defense stressed that the

original theft investigation was unrelated to the charges before the jury. 2 RP 147-48, 149.

The jury convicted the defendant of both counts. CP 21, 22. At the time of sentencing, the 43-year old defendant had an offender score of 13 and a standard range of 43-57 months on the more serious count of identity theft. CP 3-13. Defense described the defendant as an "aging addict" who should be given his third chance to complete a DOSA. 4 RP 4-8.

The defendant said that he was done with the criminal lifestyle and was not a lost cause. Although indigent, he had no debts or expenses and assured the court he would be working when released. 4 RP 12, 18; CP __ (sub.no.54 Motion and Declaration).

The court sentenced the defendant to 45 months in prison and imposed mandatory legal financial obligations totaling \$600. CP 3-13.

III. ARGUMENT

A. THE COURT PROPERLY LIMITED TESTIMONY REGARDING THE REPORTED CELL PHONE THEFT TO THAT WHICH WAS NOT OVERLY PREJUDICIAL AND WHICH EXPLAINED THE CONTEXT OF THE CRIMES CHARGED.

Evidence is relevant if it tends to make any fact of consequence to the determination more or less probable than without the evidence. ER 401. Relevant evidence may be

excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." ER 403.

Evidentiary rulings are reviewed for an abuse of discretion. State v. Guloy, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). A court abuses its discretion when its decision is made for untenable reasons or based on untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's evidentiary decision can be affirmed on any grounds contained in the record and supported by law. State v. Grier, 168 Wn. App. 635, 644, 278 P.3d 226 (2012).

In the present case, the trial court correctly admitted limited information regarding the reported theft to statements necessary to explain the police contact with the defendant. That limited information was admitted without defense objection.

Officer Sturm testified that when he questioned the defendant about his investigation, they said, "that they were involved in that." Only then did he ask the defendant for his identification.

The defendant was charged with using Robinson's identity with the intent to commit the crime of giving false information to a

police officer. CP 78. In order to commit that crime, the defendant's false statement had to have been "relied upon by a public servant in the discharge of his or her official powers or duties." RCW 9A.76.175.

The defendant's admission to some involvement in the reported theft triggered police to ask for his identification. When officers first approached the defendant, they did so based solely on a description of a suspect. They continued to investigate only because he confirmed that he was, in fact, connected to their investigation. As Officer Strum explained,

... I asked him what was going on with regard to the reason why I was contacting them, and they said that they were involved with that, in addition to matching the description.

2 RP 48. The defendant's statement explained why officers continued to investigate, an investigation that included identifying potential suspects. Had that statement not been admitted, the jury might have been left with the impression that the police were no longer carrying out their official duties or were not entitled to ask the defendant for identification.

In Grier, the trial court admitted a defendant's statements and threats made on the night of the murder. This court

characterized the statements as res gestae evidence. 168 Wn. App. 635, 646-47. The statements were properly admitted based on ER 401's definition of relevance, that is, evidence that is generally admissible as part of the continuing events leading up to the crime. Id. at 646-47.

The same is true in the present case. The defendant's statement that he was involved with the reported theft was one event that explained the context of the current crime. It was one in a continuing series of events that led first to his contact with police and then to their request for his identification.

The defendant now claims that the evidence was more prejudicial than probative. Apparently he did not think so during the trial because he did not object. In contrast, he did object when the State posed a question to Officer Bickar that would have elicited the defendant's denial of having stolen the cell phone.

A litigant who does not object at trial does not preserve the issue for appeal. Courts have "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." Guloy, 104 Wn.2d 412, 420-21. Id. (citation omitted).

In the present case the defendant also failed to object and so waived the issue. But even if he had not, evidence that demonstrated that police were engaged in their official duties when they asking the defendant for identification was relevant to the context of the crime. Its probative value was not “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...” ER 403.

Nor could the statement have confused the issues for the jury. The only real contested issue was the defendant’s intent. Whether he was involved in another theft would not have confused the jury about whether he intended to give police false information because he admitted that he did. It could not have confused the jury about whether he had kept and used Robinson’s wallet because he admitted he had.

Additionally, officers testified that no one was arrested for the cell phone theft. Therefore, even if the defendant admitted involvement in “the incident”, the jury was informed that the involvement, whatever it was, did not lead to his arrest.

B. THE DEFENDANT'S STATEMENT WAS OF MINOR SIGNIFICANCE AND COULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL.

An error in admitting evidence is harmless if the evidence was of minor significance compared with the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Reversal is required only when the reviewing court determines that, absent the error, there is a reasonable probability the outcome would have been different. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

In the present case, the defendant's statement of involvement with a reported cell phone theft was of minor significance. There was no explanation of what the involvement was because defense objected to any. There was no argument or suggestion that the defendant had stolen the phone or been arrested for stealing a phone.

On the other hand, the other evidence of guilt was overwhelming and virtually uncontroverted. Robinson, the officers, and the defendant testified consistently. Robinson lost his wallet on a bus. The defendant found it and kept it. He used Robinson's identity to avoid being arrested on his warrants and still, over a day later, had Robinson's wallet in his pocket. The defendant

essentially confessed, not just at the scene but also on the stand, to second degree identity theft and second degree theft. Admitting his statement regarding the cell phone theft was minor and did not affect the outcome of the trial.

C. THE COURT SHOULD IMPOSE APPELLATE COSTS.

RCW 10.73.160 authorizes the court to exercise its discretion to require an adult offender to pay appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The statute expressly applies to indigent persons and expressly provides for “recoupment of fees for court-appointed counsel.” Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

“In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.” Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs. Prior to 1995, the rules governing appellate costs in criminal cases and

civil cases were the same. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, that “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.2d 392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case and refused to award costs because the case involved not a personal consequence to either party but instead an issue of public interest. NECA, 66 Wn.2d at 23.

In Moore, the Supreme Court reversed a lower court’s judgment because the action was brought prematurely and refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal.” Moore, 65 Wn.2d at 393.

Each of those cases illustrates that the denial of appellate courts is appropriate when based on the issues and when unusual circumstances render an award inequitable. That makes practical sense since the appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The Blank court said that costs could be awarded without a prior determination of the defendant's ability to pay. Id. at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal, something to which the Legislature silently acquiesced for almost 20 years.

In State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015), the Supreme Court based its decision on the statute that governs imposition of costs at sentencing. Under that statute, "[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). The court construed the statute as requiring an individualized inquiry into the defendant's current and future ability to pay. Id.

RCW 10.73.160 contains no comparable provision. To the contrary, that statute provides that the costs “be requested in accordance with the procedures contained in Title 14 of the rule of appellate procedure.” That procedure involves no consideration of indigence. State v. Obert, 50 Wn. App. 139, 142-43, 747 P.2d 502 (1987); see State v. Nolan, 141 Wn.2d 620, 623, 8 P.3d 300 (2000). The statutory basis for the holding in Blazina is thus absent in this case. Within constitutional limits, the wisdom of imposing cost must be determined by the Legislature, not the courts. Blank, 131 Wn.2d at 252.

There is nothing unusual in this case. The issues raised were not moot and were not of public interest. Therefore, the State should be awarded costs on appeal.

This court addressed the issue of appellate costs in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Sinclair was 66 years old and sentenced to a minimum of 280 months in custody, indigent at sentencing and with no prospects that his indigence would improve. In fact, the court said there was “no realistic possibility” that Sinclair would ever be released and be able to find “gainful employment that will allow him to pay appellate costs.” Id. at 393.

The facts of the present case are entirely different. This defendant is only 43 years old, decades younger than Sinclair. Unlike Sinclair, he is going to be released, with good time credit, in a couple of years. He is certain he can obtain employment when released.

There is no basis for this court to disregard the defendant's own assessment of his future ability to pay costs. There is no evidence that he is disabled, either mentally or physically. The only apparent impediment to employment is his felony record. If the court uses that as a per se determination of future ability to pay, no indigent felon would ever be required to pay costs.

The costs sought by the State in this case are authorized by RCW 10.73.160. If the State prevails, costs should be awarded.

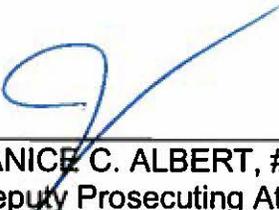
IV. CONCLUSION

Based on the foregoing, the conviction should be affirmed and costs should be awarded to the State.

Respectfully submitted on June 1, 2016.

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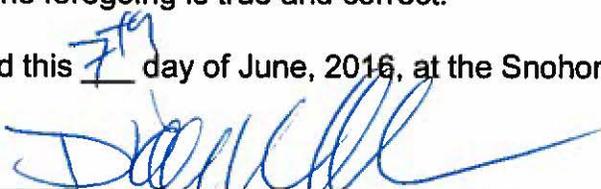
The undersigned certifies that on the 7th day of June, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and David Koch, Nielsen, Broman & Koch, kochd@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of June, 2016, at the Snohomish County Office.



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