

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS M. CORREA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

To be constitutional, a charging document must allege the particular facts supporting the charge. A generic charging document which merely recounts the purported date of the offense is inadequate. Douglas Correa was charged with theft of a motor vehicle. The charging document did not state who owned the vehicle, the type of vehicle, or where in the State of Washington the acts occurred. Because the charging document was constitutionally defective, this Court should reverse Mr. Correa's conviction without prejudice. Additionally, the conviction should be reversed because Mr. Correa's right to present a complete defense was violated when his cross-examination of the complaining witness was erroneously limited. Alternatively, this Court should remand for a new sentencing hearing to address the issue of legal financial obligations.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment to the United States Constitution and article one, section twenty-two of the Washington Constitution, the charging document failed to inform Mr. Correa of the facts supporting the charge for theft of a motor vehicle.

2. In violation of the Sixth Amendment to the United States Constitution and article one, section twenty-two of the Washington

Constitution, Mr. Correa was deprived of his right to present a complete defense and to cross-examination.

3. In violation of the rules of evidence, the trial court erred in sustaining the State's relevance objection during Mr. Correa's cross-examination of the complaining witness.

4. Without inquiring as to ability to pay and in violation of the statutory requirements, the trial court erred in finding that Mr. Correa had the ability to pay legal financial obligations, in imposing a cost bill for the witnesses' mileage expenses upon Mr. Correa, and in finding that an award of costs on appeal against Mr. Correa may be added to the total legal financial obligations.

C. ISSUES

1. To comply with the state and federal constitutions, a charging document must both fairly inform the defendant of the facts underlying the charge and enable the defendant be able to plead double jeopardy in a future prosecution. The charging document alleging theft of a motor vehicle was generic and did not identify the owner of the motor vehicle, the type of motor vehicle, or where in the state the offense occurred. Is this charging document constitutionally deficient?

2. A defendant has a constitutional right to present a complete defense and to confrontation. Mr. Correa's defense was that he did not

intend to deprive the owner of his motorcycle, which the owner had let him borrow. Mr. Correa explained that he intended to return the bike about three days later than agreed to because the owner of the bike had once done a similar thing to him by repaying a loan three days late. He wanted the owner to understand how this had felt. The court, however, forbade Mr. Correa from inquiring into whether the owner had borrowed money from him in the past. Was Mr. Correa deprived of his right to present a complete defense and to cross-examination?

3. Without conducting the necessary inquiry into Mr. Correa's ability to pay and in violation of the statutory requirements, the trial court imposed discretionary legal financial obligations, specifically witness costs for mileage expenses. As noticed by our Supreme Court, cries for reform of broken legal financial systems demand that appellate courts exercise their discretion and address issues concerning legal financial obligations for the first time on appeal. Should this Court exercise its discretion and remand for a new hearing to address the ability of Mr. Correa to pay legal financial obligations?

D. STATEMENT OF THE CASE

With the owner's permission, Douglas Correa borrowed a motorcycle, a 2007 Kawasaki Ninja sport bike. RP 20, 30.¹ A couple of days later, he was arrested and prosecuted for theft of a motor vehicle. CP 4-6.

At trial, James Cushman, the owner of the motorcycle, testified Mr. Correa came to his door at his home in Lacey on the evening of July 11, 2014. RP 16, 18. The two men were acquaintances and spent time together at a mutual friend's house earlier that summer. RP 17. Mr. Correa, who had borrowed Mr. Cushman's motorcycle before, asked if he could borrow it again. RP 19-21, 109, 120. Mr. Cushman gave him permission, but told Mr. Correa to put gasoline in the bike and bring it back that night. RP 21. Mr. Correa gave Mr. Cushman his cell phone number. RP 22. Mr. Cushman did not give Mr. Correa his phone number. RP 32.

Mr. Correa did not bring back the motorcycle that night. RP 23. Mr. Cushman was unable to contact Mr. Correa. RP 22. A couple of days later, on July 13, 2014, Mr. Cushman, on the recommendation from his

¹ Unless otherwise noted, the "RP" citations refer to the volume containing proceedings from February 2, 3, and 11, 2015. The cover page of this volume mistakenly refers to the year as 2014 rather than 2015.

mother and stepfather, contacted the police. RP 18, 26, 33, 51, 73. After speaking with the police, Mr. Cushman, accompanied by his parents, went to a trailer park to look for the motorcycle. RP 27, 52. They found the motorcycle near a residence, but saw a man they did not know ride it away. RP 27-28. After calling the police, the rider was stopped by the police. RP 52-53, 69.

The rider of the motorcycle was Robert Stanfill. RP 57. He testified that Mr. Correa had let him borrow the motorcycle earlier so that he could travel and help his daughter move. RP 59-60. When he was stopped by police, he had been on his way to the grocery store to buy dinner to cook for Mr. Correa in thanks for helping him out. RP 59, 62. Mr. Stanfill testified that Mr. Correa had told him that he was borrowing the motorcycle from a friend for three days. RP 60.

Police went to Mr. Stanfill's residence, where Mr. Correa was, and arrested him. RP 77-78. Mr. Correa told police that he had borrowed the motorcycle. RP 79. Officer Beverly Reinhold testified that Mr. Correa said that Mr. Cushman owed him money and that he was teaching him a lesson by not returning the motorcycle on time. RP 79. Mr. Correa said he was going to bring back the motorcycle later that day. RP 79.

Mr. Correa testified that he had intended to return the motorcycle after three days. RP 117. Mr. Correa stated that Mr. Cushman had

borrowed money from him before and that, rather than pay him back on time, Mr. Cushman repaid him three days late. RP 117-18. Mr. Correa's intent was not to keep the motorcycle, but to teach Mr. Cushman a lesson. RP 118. If Mr. Cushman had contacted him, Mr. Correa would have returned the motorcycle right away. RP 117.

Nikia Brown, a friend of Mr. Cushman and Mr. Correa's, testified that the three spent time at his house. RP 101. He stated that Mr. Cushman let people ride his motorcycle. RP 102. He corroborated Mr. Correa's story about Mr. Cushman borrowing money from Mr. Correa and paying it back late. RP 102, 106.

Mr. Correa was not permitted to cross-examine Mr. Cushman on the topic of whether he had ever borrowed money from Mr. Correa. RP 33, 41.

During closing, Mr. Correa argued that the State had not proved beyond a reasonable doubt that he intended to deprive Mr. Cushman of the motorcycle. RP 160. Relying in part on Mr. Correa's statement about teaching Mr. Cushman a lesson, the State argued it had proved the intent to deprive requirement. RP 154-55, 165. The jury found Mr. Correa guilty. RP 171.

E. ARGUMENT

1. Failing to allege particular facts to support the charge of theft of a motor vehicle, the charging document was constitutionally deficient.

a. To ensure defendants can adequately prepare a defense and to protect against the risk of double jeopardy, a charging document must allege facts supporting every element of the offense.

Challenges to the sufficiency of a charging document are reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. I, § 22; U.S. Const. amend. VI. “The ‘essential elements’ rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). In other words, the rule “requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.” Kjorsvik, 117 Wn.2d at 98 (emphasis added).

This rule serves two fundamental purposes. First, it helps ensure that defendants can adequately prepare a defense. Id. at 101. Second, it protects the double jeopardy rights of defendants by allowing them to

plead the first judgment as a bar to a future prosecution for the same offense. Leach, 113 Wn.2d at 688; State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965); State v. Carey, 4 Wash. 424, 432-33, 30 P. 729 (1892). Thus, to be constitutionally sufficient, a charging document must both fairly inform the defendant of the charge and enable the defendant be able to plead double jeopardy in a future prosecution. United States v. Resendiz-Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (recounting rule and holding that rule was satisfied in both respects).

When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether “the necessary facts appear in any form, or by fair construction can they be found, in the charging document” Kjorsvik, 117 Wn.2d at 105. If the necessary facts do not appear, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000).

b. The information failed to allege particular facts to support the elements of theft of a motor vehicle.

The information, which was never amended, generically recounted the essential elements of theft of a motor vehicle. CP 6. This charging

document, however, failed to allege facts supporting every element of the offense:

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crimes(s):

COUNT I –THEFT OF MOTOR VEHICLE, RCW 9A.56.065(1), RCW 9A.56.020(1)(A) – CLASS B FELONY:

In that the defendant, DOUGLAS MARK CORREA, in the State of Washington, on or about July 11, 2014, did wrongfully obtain or exert unauthorized control over the motor vehicle of another, with intent to deprive said person of such motor vehicle.

CP 6. While the information identifies when the purported offense occurred, it is otherwise generic. It does not state (1) who owned the motor vehicle (Mr. Cushman), (2) what type of motor vehicle was stolen (a motorcycle, specifically a 2007 Kawasaki Ninja sport bike), or (3) where in the State of Washington the act happened (Thurston County). It contains no specifics on how Mr. Correa wrongfully obtained or exerted unauthorized control over “the motor vehicle of another.” The result is that the State violated Mr. Correa’s right to notice of the conduct which is alleged to have constituted the crime.

This Court’s opinion in City of Seattle v. Termain supports this conclusion. There, this Court held that a charging document alleging violation of a domestic violence order was deficient. City of Seattle v.

Termain, 124 Wn. App. 798, 800, 103 P.3d 209 (2004). Like the charging document in this case, the language was almost completely generic. Id. at 800.² Accordingly, because the charging document did not inform the defendant of the conduct constituting the offense, it was deficient:

The complaint tracks the language of the ordinance, but other than setting forth the dates of the charging period, the complaint fails to specifically identify the order claimed to be violated or the court granting the order. Further, the charging document does not contain any factual basis for the charges or identify the victim, even by using initials.

Id. at 803.

² The charging document read:

Between June 11, 2002 and June 16, 2002, in the City of Seattle, King County, Washington, the above-named defendant did commit the following offense(s):

Count 1 [or Count 2] Commit the crime of VIOLATION OF A DOMESTIC VIOLENCE ORDER by knowingly violating a restraint provision, a provision excluding him or her from a residence, workplace, school or daycare or a provision prohibiting him or her from knowingly coming within or knowingly remaining within a specified distance of a location of an order granted under Seattle Municipal Code Chapter 12A.06 by Seattle Municipal Court or of an order granted under Revised Code of Washington Chapter 10.99, Chapter 26.09, Chapter 26.10, Chapter 26.26, Chapter 26.50, Chapter 74.34 or an equivalent ordinance by a court of competent jurisdiction or knowingly violating a provision of a foreign protection order specifically indicating that a violation will be a crime issued by a court having jurisdiction over him or her and the person protected by the order and the matter under the law of the state, territory, possession, tribe or United States military tribunal, Contrary to Seattle Municipal Code Section(s): 12A.06.180–A

Termain, 124 Wn. App. at 800-01.

This case is materially distinguishable from cases upholding charging documents as merely vague. For example, in Greathouse, the defendant argued the information alleging theft in the second degree was deficient because it did not name the victim or the true owner of the property. State v. Greathouse, 113 Wn. App. 889, 900, 56 P.3d 569 (2002). The Court rejected the challenge, noting that while the information did not identify the owner of the property, it identified the property (fuel) along with the date and place of the crime. Greathouse, 113 Wn. App. at 905.³

Similarly, in Winings, this Court rejected a challenge to a charging document alleging second degree assault while armed with a deadly

³ The information read:

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MICHAEL E. GREATHOUSE and GARY L. GASTON, and each of them, of the crime of **Theft in the Second Degree**, committed as follows:

That the defendants, MICHAEL E. GREATHOUSE and GARY L. GASTON, and each of them, in King County, Washington, on or about September 16, 1996, with intent to deprive another of property, to wit: approximately 2,033 gallons of diesel fuel, did exert unauthorized control over such property belonging to another, that the value of such property did exceed \$250;

Contrary to RCW 9A.56.040(1)(a), 9A.56.020(1)(a) and 9A.08.020, and against the peace and dignity of the State of Washington.

Greathouse, 113 Wn. App. at 900-01.

weapon. State v. Winings, 126 Wn. App. 75, 80-81, 107 P.3d 141 (2005).

The document did not state the victim, the weapon used, or how the defendant used the weapon. Id. at 85.⁴ The document, however, alleged when and where the offense occurred. Id. at 86.

In contrast to Greathouse and Winings, the charging document does not identify where in the state the offense happened. And unlike Greathouse, where the document specifically identified the stolen property (fuel), the document here did not identify the type of motor vehicle. Further, neither Greathouse nor Winings analyzed whether the defendant's double jeopardy rights would be protected under the language in the charging document. As argued in detail below, the charging document did not protect Mr. Correa against a future charge for the same offense.

The State may argue that because Thurston County charged Mr. Correa with the offense, he was fairly put on notice of where the offense was committed. See Const. art. I, § 22 (right to trial in county where offense is charged to have been committed); CrR 5.1(a) (requiring that an

⁴ The information read:

In the County of Clallam, State of Washington, on or about the 24th day of March, 2003, the Defendant did assault another with a deadly weapon; in violation of RCW 9A.36.021, a Class B felony.

Winings, 126 Wn. App. at 81.

action be commenced in county where the offense was committed or in any county wherein an element of the offense was committed or occurred). But crimes have been charged or prosecuted in the wrong venue before. See State v. Price, 94 Wn.2d 810, 816, 620 P.2d 994 (1980) (defendant waived challenge to venue).

Moreover, this Court rejected a similar argument in a case where the language in the information charged a different person than the actual defendant. State v. Franks, 105 Wn. App. 950, 959, 22 P.3d 269 (2001). In Franks, the caption correctly recounted who the State was prosecuting, but the actual language in the charging document did not use the defendant's name. Id. The Court held that the caption only indicated that the State was initiating a lawsuit against the defendant and did not cure the defect. Id. Similar to Franks, that the prosecuting attorney for Thurston County was prosecuting Mr. Correa in Thurston County Superior Court only indicates where the charge was brought, not where the offense happened.

Because the information failed to inform Mr. Correa who owned the motor vehicle, what kind of motor vehicle it was, and where in the State of Washington the offense occurred, this Court should hold the information was deficient.

c. The language in the information failed to protect against a risk of multiple prosecutions for theft of a motor vehicle.

The information was also inadequate to protect Mr. Correa's double jeopardy rights. State v. Leach, 113 Wn.2d at 688 (recounting this rationale for the "essential elements" rule); Resendiz-Ponce, 549 U.S. at 108 (identifying as a constitutional requirement that an indictment enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense).

An early opinion from our Supreme Court is illustrative. There, the defendant was convicted of practicing medicine without a license. State v. Carey, 4 Wash. 424, 430, 30 P. 729 (1892). The court held the charging document inadequate.⁵ The court reasoned that the facts alleged

⁵ The charging document read:

Comes now C. S. Penfield, who, after being first sworn in due form of law, charges G. W. Carey with the crime of misdemeanor committed as follows: That the said G. W. Carey, on the 14th day of July, 1891, in the city and county of Spokane and state of Washington, did then and there unlawfully practice medicine within the state of Washington without having first obtained a license provided for in an act entitled 'An act to regulate the practice of medicine and surgery in the state of Washington, and to license physicians and surgeons, to punish all persons violating the provisions of this act, and to repeal all laws in conflict therewith, and declaring an emergency;' contrary to the form of the statutes . . .

Carey, 4 Wash. at 430-31.

in the charging document would be inadequate to protect the defendant's double jeopardy rights:

Supposing this defendant had seen fit to plead guilty to the indictment, and had paid the fine imposed, and had afterwards been indicted for practicing medicine on the same day, there could have been nothing in the record to show that it was not for the same offense, and no plea in bar could possibly have been made; for there would have been no way to determine that fact, unless it be concluded that a man cannot practice medicine but once in a given day, which is a conclusion unfortunately not warranted by the common experience of mankind. If defendant, Carey, practiced medicine on that day by prescribing for a fee for somebody, that fact should have been stated, with the name of the person for whom he prescribed. It is no hardship on the state to be held to this particularity, and it is nothing more than common justice that the defendant should know the particular unlawful acts he is charged with committing.

Carey, 4 Wash. at 432-33 (emphasis added).

Here, the same is true. If Mr. Correa pleaded guilty and was charged again for theft of a motor vehicle “on or about July 11, 2014,” the record would have been inadequate to protect his right against double jeopardy. Cf. Resendiz-Ponce, 549 U.S. at 108 (“the time-and-date specification in respondent’s indictment provided ample protection against the risk of multiple prosecutions for the same crime” of illegally reentering the United States). Thus, the information was constitutionally defective.

d. The remedy is reversal and dismissal of the charge without prejudice.

The remedy for reversal of a conviction for an insufficient charging document is dismissal of the charges without prejudice. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995). Because the charging document alleging theft of a motor vehicle was defective, this Court should reverse the conviction and order it dismissed without prejudice.

2. By limiting the cross-examination of the owner of the motor vehicle, the court violated Mr. Correa's right to present a complete defense and to confrontation.

a. Defendants have a constitutional right to present a complete defense and to cross-examination.

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The United States Constitution guarantees an accused person “a meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The state and federal constitutions guarantee the right to confront and cross-examine adverse witnesses. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. I, § 22.

Claimed violations of these constitutional provisions are reviewed de novo. Jones, 168 Wn.2d at 720.

Defendants have a right to present relevant evidence, but not irrelevant evidence. Id. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. All relevant evidence is admissible. ER 402. Thus, the threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

“[R]elevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.” Id. The “burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. at 622. The State must prove that its interest in excluding the prejudicial evidence outweighs the defendant’s need for the relevant information. Id.

b. Theft of a motor vehicle requires proof that the defendant intended to deprive the owner of the property.

“A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.” CP 37; accord RCW 9A.56.065(1). “Theft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to deprive that person of such property.” CP 38; accord RCW 9A.56.020(1)(a). “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 40; accord RCW 9A.08.010(1)(a).

Unlike the common law, the theft statute does not require proof of intent to “permanently” deprive. State v. Komok, 113 Wn.2d 810, 817, 783 P.2d 1061 (1989). Still, the duration of the deprivation is a circumstance bearing on a person’s intent. See State v. Walker, 75 Wn. App. 101, 107-08, 879 P.2d 957 (1994) (holding that “intent to deprive” element “implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission.”). Thus, intent to deprive means something greater than merely the temporary use of the property. 13B Wash. Prac., Criminal Law § 2606 (2014-2015 ed.) (citing Walker, 75 Wn. App. 101).

c. The trial court improperly precluded Mr. Correa from cross-examining the owner of the motorcycle on whether the owner ever borrowed money from him before. This evidence was relevant as to Mr. Correa's intent, the central issue in the case.

The trial court improperly limited Mr. Correa's cross-examination of Mr. Cushman, the owner of the motorcycle. During cross-examination, Mr. Correa inquired whether Mr. Cushman had ever borrowed money from Mr. Correa. RP 33. The State objected on relevance grounds, which the court sustained. RP 33. Shortly thereafter, Mr. Correa presented an offer of proof and the parties discussed the issue with the court. RP 38-41.

Mr. Correa's counsel represented that Mr. Cushman had once borrowed money from Mr. Correa and that Mr. Cushman had not paid him back as soon as promised. RP 38. Specifically, Mr. Cushman paid the money back about three days late. RP 38. In borrowing Mr. Cushman's motorcycle for longer than agreed to, Mr. Correa wanted Mr. Cushman to understand how this felt. RP 38. Mr. Correa planned to return the motorcycle after three days, the same time as the money. RP 38. Mr. Correa argued this was relevant because it explained why he kept the motorcycle and tended to prove that he did not intend to deprive Mr. Cushman of the motorcycle. RP 40

The State contended that this argument amounted to jury nullification. RP 38-39. The State further argued that it actually showed

that Mr. Correa had intended to deprive Mr. Cushman of the motorcycle.

RP 39. Despite admitting that this evidence was probative of intent, the State maintained the evidence was irrelevant. RP 39.

The court did not agree with the State's jury nullification argument. RP 41. Nevertheless, the court sustained the objection, ruling that whatever was in Mr. Correa's mind was irrelevant:

I am looking at the elements of the crime alleged here, and it appears to me that depriving another person of their vehicle may occur over a period of time. It's not – it doesn't require that the person in their own mind make a decision to permanently deprive the owner of their vehicle for six months or for any certain period of time. Whatever was in the mind of the defendant, I do not believe that is relevant to this jury as to what occurred in a prior transaction. The defendant is allowed to put on his defense, and I'm not indicating at this point that the defendant will not be allowed to put on his defense, but I'm not allowing the question to this witness as to a prior borrowing transaction.

RP 41.

Contrary to the trial court's ruling, the past transaction was relevant. It explained why the defendant acted as he did, which was relevant. It bore on the jury's determination on whether the State had met its burden to prove the "intent to deprive" element beyond a reasonable doubt. See Walker, 75 Wn. App. at 107-08 (holding that duration of a taking is still pertinent on "intent to deprive" requirement). Mr. Correa's defense was that he did not intend to deprive Mr. Cushman of the

motorcycle because he intended to return the motorcycle to Mr. Cushman, albeit belatedly. Thus, testimony from Mr. Cushman on whether he borrowed money from Mr. Correa was highly relevant. Cf. Jones, 168 Wn.2d at 721 (testimony on whether purported rape victim consented to sex was highly relevant and preclusion of testimony violated right to present a defense).

d. The error was not harmless beyond a reasonable doubt.

The State bears the burden to prove constitutional errors harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot meet its burden. It is true that Mr. Correa and Mr. Brown, who was called by the defense, were permitted to testify about Mr. Cushman borrowing money from Mr. Correa and not returning it on time. RP 102, 117-18. Mr. Correa's out-of-court statement to a police officer to this effect was also admitted. RP 79. Still, the jury might have not believed Mr. Correa or his witness. Testimony from Mr. Cushman confirming his story would have solidified the foundation of Mr. Correa's defense. If the jury accepted Mr. Correa's story, the jury might then have entertained a reasonable doubt on whether Mr. Correa intended to deprive Mr. Cushman of the motorcycle. But if the jury simply discredited Mr.

Correa's and Mr. Brown's testimonies on this point, then the jury would have also logically rejected Mr. Correa's defense concerning intent to deprive. Thus, the error was prejudicial and this Court should reverse.

3. The trial court failed to inquire as to Mr. Correa's ability to pay legal financial obligations. This Court should remand for a new hearing.

a. Before imposing legal financial obligations, the court must inquire as to the defendant's current and future ability to pay. Appellate courts may address this issue for the first time on appeal.

Recently, our Supreme Court held that before a trial court imposes legal financial obligations (LFOs), RCW 10.01.160(3) requires that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). The court further held that Washington appellate courts have discretion to review LFOs challenged for the first time on appeal and reviewed the claims before it due to the importance of the issue:

RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *State v. Russell*, 171 Wn.2d 118, 122, 249, P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

Id. at 834-35. The court rejected the State’s argument that the ripeness doctrine precluded review of LFOs. Id. at 833 n.1. Following Blazina, this Court may properly review the issue.

b. The trial court failed to inquire as to Mr. Correa’s ability to pay legal financial obligations. This Court should exercise its discretion and remand for a new sentencing hearing.

In addition to \$800 in mandatory legal financial obligations imposed in the judgment and sentence, a separate cost bill of \$62.48 for witness fees was imposed upon Mr. Correa. CP 65; supp. CP __ (sub. no. 50). These were mileage fees for three witnesses. Supp. CP __ (sub. no. 50). The court also entered a boilerplate finding that, “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” CP 66.

The court entered another boilerplate finding that Mr. Correa had the ability or likely future ability to pay legal financial obligations. CP 64. At sentencing, however, defense counsel represented that Mr. Correa’s employment had been “very spotty” and that he had a net income of about \$1,800 during 2014. RP 187. The State did not offer any evidence as to Mr. Correa’s ability to pay and the discretionary cost bill for witnesses’ mileage fees was not discussed at sentencing. RP 179-88. Neither was

the provision about awarding costs on appeal against the defendant discussed. RP 179-88.

It appears that the witness fees were erroneously imposed. A statute provides, “No allowance of mileage shall be made to a juror or witness who has not verified his or her claim of mileage under oath before the clerk of the court on which he or she is in attendance.” RCW 10.01.140. Here, the form does not list the number of miles traveled by the witnesses. Supp. CP __ (sub. no. 50). The form also does not contain the witnesses’ signatures. Supp. CP __ (sub. no. 50). In fact, the form appears to have been filled out by the same person because the handwriting is the same. Supp. CP __ (sub. no. 50).

Regardless, under RCW 10.01.160(3) and Blazina, the trial court erred. Before imposing discretionary legal financial obligations, the court must take account of the defendant’s resources and the burden the costs will impose:

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

RCW 10.01.160(3).

Further, as interpreted by our Supreme Court in Blazina, 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, 182 Wn.2d at 837-38. 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. at 838. The court should examine whether the defendant is indigent under GR 34. Id. Accordingly, because the records did not show that the courts inquired into either defendant's ability to pay, our Supreme Court remanded for new sentencing hearings. Id. at 839.

Likewise, the trial court did not engage in the required individualized inquiry before imposing legal financial obligations and finding an ability to pay. Without such an inquiry, the imposition of discretionary LFOs, the finding of ability pay, and the finding that an award of costs on appeal may be added to the total LFOs are all erroneous. Consistent with Blazina, this Court should also remand for a new hearing.

F. CONCLUSION

The generic charging document violated Mr. Correa's constitutional right to notice of the particular facts supporting the charge of theft of a motor vehicle. The conviction should be reversed and dismissed without prejudice. The conviction should also be reversed because Mr. Correa's right to present a complete defense was violated.

Alternatively, the court should remand for a new hearing to address legal financial obligations.

DATED this 2nd day of October, 2015.

Respectfully submitted,

s/ Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 47207-4-II
)	
DOUGLAS CORREA,)	
)	
Appellant.)	

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