

FILED
October 28, 2016
Court of Appeals
Division I
State of Washington

No. 75047-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CORY JAMES BROOKS,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. **ASSIGNMENTS OF ERROR** 1

B. **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** 1

C. **STATEMENT OF THE CASE**..... 2

D. **ARGUMENT**..... 9

1. The evidence was insufficient to prove beyond a reasonable doubt that Brooks participated in the burglary 9

2. The trial court abused its discretion in permitting Detective Ainsworth to opine as an “expert” that the marks left on the laptop computer were made by a gloved hand 13

a. Detective Ainsworth was not an “expert” in determining whether a mark on an object was made with a gloved hand 15

b. Detective Ainsworth’s testimony was not helpful to the jury because an ordinary person would understand that a person wearing gloves who touches an object does not leave a typical ridged fingerprint 16

c. Allowing the detective to testify as an “expert” unduly influenced the jury, requiring reversal..... 18

c. Any request that costs be imposed on Brooks for this appeal should be denied because he does not have the present or likely future ability to pay them..... 20

E. **CONCLUSION** 22

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3 10

U.S. Const. amend. XIV 10

Washington Cases

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313
(1999)..... 14, 15, 16, 17, 18, 20

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 10

State v. Groth, 163 Wn. App. 548, 261 P.3d 183 (2011) 14, 16

State v. Hummel, __ Wn. App. __, 2016 WL 6084101 (No. 72068-6-I,
Oct. 17, 2016) 11

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)..... 20

State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007) 18, 20

United States Supreme Court Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 10

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560
(1979)..... 10, 13

Statutes

RCW 10.73.160(1)..... 20

RCW 9A.52.020 11

Rules

ER 702	14, 16, 18
RAP 15.2(f).....	21

A. ASSIGNMENTS OF ERROR

1. The State did not prove the elements of the crime beyond a reasonable doubt, in violation of constitutional due process.

2. The trial court abused its discretion in allowing the police detective to testify as an “expert.”

3. If the State substantially prevails, this Court should decline to award appellate costs due to Brooks’s inability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Alan Bain saw two men leave the scene of a burglary but neither he nor any other witness identified appellant Cory Brooks as one of the suspects. Brook Downs pled guilty to the burglary but did not identify Brooks as his accomplice. The only physical evidence tying Brooks to the crime was a glove found inside the car left at the scene that had Brooks’s DNA on it. The State did not prove when the DNA was deposited nor whether Brooks used the glove during the burglary. Did the State fail to prove beyond a reasonable doubt that Brooks was guilty of first degree burglary?

2. Before a court may allow a police officer to provide an “expert” opinion in favor of the State, the State must show the officer qualifies as an expert and the proposed testimony would be helpful to

the trier of fact. Here, the officer testified he had no particular training or education in determining whether a mark left on an object was made by a gloved hand. Also, whether a gloved hand would leave a smudge rather than a ridged fingerprint on the dusty surface of an object is within the general understanding of an ordinary person. Did the trial court abuse its discretion in permitting the officer to testify as an “expert” and opine that the smudge left on the object was made by a gloved hand?

3. Where Brooks is indigent and unable to pay legal financial obligations, should this Court deny appellate costs if the State substantially prevails?

C. STATEMENT OF THE CASE

Alan Bain lives in a house off of Ash Way in Everett. RP 151. On the morning of July 29, 2014, he left the house to do some grocery shopping. RP 152-53. No one else was home. RP 152-53.

Bain returned to the house at around 10 a.m. RP 153. When he pulled into the driveway, he saw a Hyundai Elantra parked in the neighbor’s driveway. RP 153, 288. He thought this was odd because the car looked too beat up to belong to someone who would visit his neighbor. RP 154. Bain opened the garage door and heard a door that

led from the garage into the house open and then slam shut. RP 154. He thought someone must be inside the house. RP 155. He walked out of the garage and pulled out his phone to call 911. RP 155.

Bain then saw two white men, aged 21 to 23, come around from behind his house and run toward the Hyundai parked in the neighbor's driveway. RP 155. They were carrying Bain's pillow cases, which appeared to be full of items taken from the house. RP 155. The men entered the car, one sitting in the driver's seat and the other in the front passenger seat. RP 157.

Bain was angry and ran toward the car. RP 156. He reached through the driver's window, grabbed the steering wheel, and said, "Stop, I'm going to call the police." RP 156. The driver put the car in reverse and tried to make Bain fall down by hitting trees and bushes. RP 157. According to Bain, the passenger leaned over and punched him in the eye five or six times. RP 158. Bain jerked the wheel, causing the car to hit a tree stump and stop. RP 160. Bain was thrown from the car. RP 160. The two men got out of the car and ran away. RP 161. Bain called 911. RP 162.

Bain had recently had corneal transplant surgery on his eye. RP 152. As a result, he could not see well. RP 152. The police brought

him to a show-up identification of a potential suspect they detained nearby. RP 163. Bain identified the man as one of the two burglars but it turned out he was wrong. RP 163, 251-52.

The police set up a containment of the area and conducted a thorough canine search. RP 184. The dog did not lead them to a suspect. RP 185. Nothing connected Cory Brooks to the crime at that time. RP 194.

The police entered the house and observed it was ransacked, especially in the bedroom. RP 216, 285. Drawers were open, with belongings on the floor. RP 285-86. Items were stacked up near the door, as if ready to be taken out. RP 216. The back sliding door was damaged as though by a pry bar. RP 217-18, 286. The burglars appeared to have gained entry through a window in the kitchen, which was open. RP 218.

One of the items stacked near the door was a laptop computer with a thin layer of dust on top. RP 219. Bain said the laptop had been moved. RP 219. Detective Colin Ainsworth examined the laptop and thought he saw the outline of a fingerprint with no ridge detail in the dust. RP 219. He said it looked like a “flat” mark, a “kind of

marbling.” RP 223. No photograph was taken of the laptop and it was not taken into evidence. RP 262.

The police determined the registered owner of the Hyundai was a man named Brook Downs. RP 186. The police impounded the Hyundai and searched it. RP 186, 236. Inside they found jewelry boxes, a laptop computer, and pillow cases containing items taken from Bain’s house. RP 162, 245-47, 289.

Also inside the Hyundai was a Home Depot receipt on the floor near the front passenger seat. RP 236. The Home Depot was in South Everett, about 10 minutes away from the Bain house. RP 247. The receipt was dated July 29, 2014, at 9:08 a.m. RP 237. The items purchased were a crowbar, latex-type gloves, and a flashlight. RP 237. The police found a crowbar inside the car. It had a white substance on it that was consistent with the sliding door of Bain’s house. RP 239. The police also found a box of latex-type gloves that was open, with a glove sticking out of the top as though someone had removed a glove from the box. RP 241. A flashlight still in its bubble wrap was also found in the car. RP 242.

The police obtained a copy of a security video from the Home Depot taken at the time of the purchases. RP 248, 280. The video

showed two men walking into the store, then to the tool section, then to the front cash registers, where they placed items on the belt, then out of the store. RP 307. Brooks could not be identified as one of the two men in the video.

The police found two pairs of latex-type gloves in the car, one near the driver's seat and one near the passenger seat. RP 243, 303. They sent the gloves to the lab for DNA analysis. RP 245. The forensic scientist obtained a DNA profile from both pairs of gloves. RP 333, 336, 347-48.

The DNA profile obtained from the gloves found near the driver's seat matched Brook Downs, the owner of the car. RP 340. Downs later pled guilty to first degree burglary for his role in the incident. RP 353-54.

The DNA found on the other pair of gloves matched Cory Brooks. RP 336. The DNA was found on the outside of the gloves, not the inside. RP 347-48. The scientist could not say whether the gloves had been turned inside-out before she received them. RP 350. She also could not say when the DNA was deposited, what body part it came from, or whether the DNA had been transferred to the gloves from another object. RP 343-46, 352.

The police interviewed Brooks. RP 315. He admitted he knew Downs but did not admit being involved in the burglary. RP 315, 326. When told that his DNA was on the gloves, he said he might have deposited his DNA when he helped Downs work on the Hyundai. RP 316.

The police showed a montage with a photo of Brooks to two witnesses present in the area at the time of the burglary. Neither of them could identify Brooks. RP 322-23.

Nonetheless, Brooks was charged with one count of first degree burglary. CP 71.

Prior to trial, defense moved to preclude Detective Ainsworth from opining as an “expert” that the mark left on the laptop by the door was made with a gloved hand. RP 9. The court reserved ruling on the objection. RP 11.

At trial, Detective Ainsworth testified that a person wearing gloves can leave a “distinct outline of the print” on an object, without any “ridge detail.” RP 222. The mark made by a gloved hand looks like a “flat spot,” with an “indentation” like “marbling.” RP 222. It can look like “a picture of a hand,” with “two, three, four on the surface,” as “if it’s been grabbed.” RP 222. He said he saw such

marks on the laptop, with “fingers being close together and the approximate distance you would expect the hand to be.” RP 223.

When Detective Ainsworth was asked if, based on his training and experience, he thought the marks left on the laptop were made by a gloved hand, defense counsel objected. RP 223-24. Counsel argued the detective was not an “expert” and his opinion was speculative because he had no training or specialized expertise in identifying a print made by a gloved hand. RP 227-29. Also, Detective Ainsworth’s opinion was not helpful to the trier of fact. RP 229-30. A person of common understanding would know that a person wearing gloves would not leave a typical fingerprint with “ridge detail” on the surface of an object. RP 229-30. The court overruled the objection, reasoning the kind of mark left by a gloved hand was not within the common knowledge of ordinary people. RP 232.

Detective Ainsworth then testified that, in his opinion, the person who left the marks on the laptop computer was wearing gloves. RP 234.

At trial, Bain, the homeowner, could not identify Brooks in the courtroom, although he said Brooks had the same general physical

characteristics as one of the suspects. RP 166. Bain also said it was possible Brooks was not involved. RP 177.

Downs testified for the State but did not identify Brooks as his accomplice. RP 354-59. He admitted participating in the burglary but could not recall anything about that day. RP 354, 357. He was in a drug-induced psychosis after ingesting heroin, methamphetamine, Xanax and alcohol. RP 354. He admitted his image was captured on the Home Depot video but he could not remember going there or who he was with. RP 358-59.

The jury found Brooks guilty of first degree burglary as charged. CP 30.

D. ARGUMENT

1. The evidence was insufficient to prove beyond a reasonable doubt that Brooks participated in the burglary.

The State did not prove beyond a reasonable doubt that Brooks was present at the burglary or participated in the crime. No witness identified him. No physical evidence tied him to the scene, other than his DNA found on a glove in the car parked outside. That evidence was not sufficient to prove Brooks's guilt beyond a reasonable doubt because the State did not prove when the DNA was deposited, or

whether it was transferred from some other object. Brooks and Downs, the owner of the car, were friends. Brooks could easily have deposited his DNA in the car at some other time. Because the State did not prove beyond a reasonable doubt that Brooks participated in the crime, the conviction must be reversed.

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Essential to the due process guaranteed by the Fourteenth Amendment is that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The critical inquiry on review of the sufficiency of the evidence is to “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Jackson, 443 U.S. at 318. “This inquiry impinges on the discretion of the fact finder ‘to the

extent necessary to guarantee the fundamental protection of due process of law’ and focuses on ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” State v. Hummel, ___ Wn. App. ___, 2016 WL 6084101, at *12 (No. 72068-6-I, Oct. 17, 2016) (quoting Jackson, 443 U.S. at 319) (emphasis in Jackson).

A properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. Hummel, 2016 WL 6084101, at *12.

Here, to prove the charged crime, the State was required to prove beyond a reasonable doubt that (1) Brooks or an accomplice entered or remained unlawfully in Bain’s house; (2) with the intent to commit the crime of theft; and (3) in immediate flight from the house, Brooks or an accomplice assaulted Bain. CP 42, 71; RCW 9A.52.020.

The evidence was not sufficient for a rational trier of fact to find Brooks was guilty of the crime. Instead, a rational trier of fact would conclude the State did not prove beyond a reasonable doubt that Brooks was present at the scene or participated in the crime.

Bain, the homeowner, could not say that Brooks was one of the men he saw up close in the Hyundai. RP 152, 166. In fact, he identified someone else, who was not involved in the crime, as a suspect. RP 163, 251-52. Bain admitted it was possible Brooks was not involved. RP 177.

No other witness present in the area could identify Brooks as a suspect. RP 322-23.

Downs, the owner of the Hyundai, who admitted his own participation, did not identify Brooks as his accomplice. RP 354-59.

Moreover, no conclusive physical evidence tied Brooks to the scene. Brooks's DNA was found in the Hyundai, on the outside of a pair of gloves, but the State did not prove when it was deposited there. RP 343-46, 352. The State did not prove Brooks was wearing the gloves because it did not prove the DNA was found on the inside of the gloves. The forensic scientist testified she found DNA on the *outside* of the gloves and could not say whether the gloves had been turned inside-out before she received them. RP 350. Brooks could have left his DNA in the car at an earlier time and it could have transferred onto the gloves. RP 343-50. After all, he and Downs were friends. RP 357.

Brooks told the police he could have left his DNA in the car when he helped Downs fix it. RP 316, 328.

This evidence was not sufficient to persuade a rational juror of Brooks's guilt. When sufficient evidence does not support a conviction, the conviction "cannot constitutionally stand." Jackson, 443 U.S. at 317-18. Brooks's conviction must be reversed and the charge dismissed.

2. The trial court abused its discretion in permitting Detective Ainsworth to opine as an "expert" that the marks left on the laptop computer were made by a gloved hand.

Detective Ainsworth testified that, in his opinion based on his training and experience, the marks left in the dust on the laptop computer were made by a gloved hand. RP 234. Defense counsel strenuously objected to this testimony, arguing it was speculative and based on inadequate expertise, but the court overruled the objection. RP 223-32. The court's ruling was an abuse of discretion because the detective was not an "expert" in determining whether a mark on an object was made by a gloved hand. Also, the "expert" testimony was not helpful to the jury because a person of common understanding would know that a person wearing gloves does not leave a typical ridged fingerprint on the surface of an object.

The admission of expert testimony is governed by ER 702.¹ State v. Groth, 163 Wn. App. 548, 561, 261 P.3d 183 (2011). “Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the trier of fact to understand the evidence or a fact in issue.” State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1999) (internal quotation marks and citation omitted).

Admissibility of expert testimony is decided on a case-by-case basis. Groth, 163 Wn. App. at 561. The decision to admit or exclude expert testimony is reviewed for abuse of discretion. Id. at 563.

Expert testimony is admissible only if (1) the witness qualifies as an “expert”; and (2) the expert testimony would be helpful to the trier of fact. Id. at 561-62. Here, neither of these prongs is met.

¹ ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

a. *Detective Ainsworth was not an “expert” in determining whether a mark on an object was made with a gloved hand.*

“Practical experience is sufficient to qualify a witness as an expert.” Farr-Lenzini, 93 Wn. App. at 461. “But the testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness’ area of expertise.” Id. Otherwise, it is “conjecture and speculation.” Id.

In Farr-Lenzini, on a charge of attempting to elude, a trooper was permitted to testify over objection that, based on his training and experience, the defendant was trying to get away from him, knew he was behind her, and refused to stop. Id. at 458. The Court noted the trooper had nearly twenty years experience, was a vehicle instructor trained in accident investigation, and had participated in fifty to eighty arrests for attempting to elude. Id. at 461. Therefore, he qualified as an expert for purposes of police procedures, speed, vehicle dynamics, and accident reconstruction. Id. But the record did not show the trooper was qualified to testify as an expert on the driver’s state of mind. There was no evidence he had the specialized training or experience necessary to recognize the difference between a distracted speeding driver and an eluding driver. Id. Therefore, he did not qualify as an

“expert” for purposes of expressing an opinion as to the driver’s state of mind and his opinion was not admissible under ER 702. Id.

Here, Detective Ainsworth testified he had received training in both the identification of fingerprints and the lifting of fingerprints for evidentiary purposes. RP 220. But he never received training or education in identifying what a mark made by a gloved hand looks like. RP 222-23, 227.

Although the detective had investigated cases where he had seen such marks and it turned out later the suspect was wearing gloves, this did not qualify him as an “expert” in recognizing such marks. RP 222-23, 227. Therefore, he was not an “expert” for purposes of expressing an opinion as to whether the marks on the laptop were made by a person wearing gloves. His opinion testimony was not admissible under ER 702. Farr-Lenzini, 93 Wn. App. at 461.

b. Detective Ainsworth’s testimony was not helpful to the jury because an ordinary person would understand that a person wearing gloves who touches an object does not leave a typical ridged fingerprint.

Expert testimony is helpful to the jury only if “it concerns matters beyond the common knowledge of the average layperson and is not misleading.” Groth, 163 Wn. App. at 564. “Thus, opinion

testimony explaining complex or arcane medical, psychological or technical evidence may help the jury.” Farr-Lenzini, 93 Wn. App. at 461-62. But expert testimony is not helpful to the jury if “a lay jury, relying upon its common experience and without the aid of an expert, is capable of deciding” the question at issue. Id. at 462.

In Farr-Lenzini, the Court held the trooper’s “expert” testimony that the driver was attempting to elude his police vehicle was not helpful to the trier of fact because a lay jury was capable of deciding the question by relying upon its own experience. Id.

Similarly, here, Detective Ainsworth’s testimony was not helpful to the jury because the jury was capable of deciding, by relying upon its own experience and common understanding, whether a person wearing a glove would leave a typical fingerprint on an object. Detective Ainsworth testified a person wearing gloves can leave a “distinct outline of the print” on an object, without any “ridge detail.” RP 222. Ainsworth said the mark can look like “a picture of a hand,” with “two, three, four on the surface,” as “if it’s been grabbed.” RP 22. He said he saw such a mark in the dust on the laptop computer, with “fingers being close together and the approximate distance you would expect the hand to be.” RP 223. He then was permitted to testify, over

objection, that in his opinion the person who left the marks on the computer was wearing gloves. RP 234.

Detective Ainsworth's "expert" opinion was not helpful to the jury because the jury was capable of applying its own common knowledge and experience to decide whether the marks described by Ainsworth were made by a gloved hand. Detective Ainsworth had no special training or expertise that made him better able to evaluate the facts than the jury. Admission of his "expert" opinion testimony violated ER 702.

c. Allowing the detective to testify as an "expert" unduly influenced the jury, requiring reversal.

If evidence is improperly admitted at trial, the error is harmless only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Yates, 161 Wn.2d 714, 764, 168 P.3d 359 (2007).

Improperly admitted "expert" opinion testimony is particularly prejudicial where it concerns a "core" issue in the case. Farr-Lenzini, 93 Wn. App. at 463. "[T]he closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." Id. at 459-50. "Particularly where such an opinion is expressed by

a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and thereby deny the defendant of a fair and impartial trial.” Id. at 465.

Here, Detective Ainsworth’s opinion testimony regarding the prints on the laptop concerned a “core” issue. The central issue in the case was identity. The only evidence linking Brooks to the crime was the DNA found on the glove left in the car. The State’s theory was that the burglars wore gloves, and that Brooks left his DNA on the glove while wearing it during the burglary. The State relied heavily upon Ainsworth’s testimony about the laptop to make its case. In closing argument, the prosecutor argued,

We know gloves were used in the commission of this burglary because as you heard Detective Ainsworth say what he saw on that laptop that had been put near the door while they were getting ready to steal it, what they call staging of items, that he saw what he called marbled-type fingerprints that aren’t really prints of the sense that you leave, you know, the ridges and swirls that you see on fingerprints, it’s consistent with somebody wearing a glove.

RP 382.

Moreover, Detective Ainsworth’s improperly admitted opinion testimony was particularly prejudicial because he was a government official. His opinion carried great potential to influence the jury and

thereby deny Brooks a fair and impartial trial. Farr-Lenzini, 93 Wn. App. at 465.

Detective Ainsworth's opinion testimony should have been excluded. Because the testimony was of great significance in relation to the lack of evidence linking Brooks to the crime, the error in admitting his opinion testimony requires reversal. See Yates, 161 Wn.2d at 764.

3. Any request that costs be imposed on Brooks for this appeal should be denied because he does not have the present or likely future ability to pay them.

This Court has broad 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, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (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, 192 Wn. App. at 389.

Brooks does not have a realistic ability to pay appellate costs. At sentencing, the court found Brooks was indigent and imposed only those LFOs it deemed mandatory. CP 11.

The court also entered an order authorizing Brooks to seek review at public expense and appointing public counsel on appeal. As the Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

There is no trial court record showing Brooks's financial condition has improved.

Nor is Brooks's financial situation likely to improve to the point where he will be able to pay appellate costs. Brooks must serve a substantial prison term. He received a sentence of 116 months incarceration and 18 months community custody. CP 8-9. In addition, Brooks is already saddled with significant legal financial obligations as a result of this case. In addition to the mandatory court costs totaling \$600, the court ordered him to pay \$4,605.58 in restitution. Sub #66. That bill plus accumulated interest will "be quite a millstone" around Brooks's neck and impair his ability to re-enter society successfully.

See Sinclair, 192 Wn. App. at 391. This Court should not add to that millstone by imposing appellate costs.

Because Brooks is indigent and unlikely ever to be able to pay appellate costs, this Court should exercise its discretion and decline to award costs if the State substantially prevails on appeal.

F. CONCLUSION

The State did not prove beyond a reasonable doubt that Brooks participated in the burglary. Therefore, the conviction must be reversed and the charge dismissed. In the alternative, the trial court abused its discretion in permitting the detective to testify as an “expert.” The conviction must be reversed and remanded for a new trial.

Respectfully submitted this 28th day of October, 2016.

/s/ Maureen M. Cyr

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75047-0-I
)	
CORY BROOKS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF OCTOBER, 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:

- | | | |
|---|------------------------------------|--|
| <p>[X] SETH FINE, DPA
[sfine@snoco.org]
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201</p> | <p>()
()
(X)
()</p> | <p>U.S. MAIL
HAND DELIVERY
AGREED E-SERVICE
VIA COA PORTAL</p> |
| <p>[X] CORY BROOKS
855367
MCC-WASHINGTON STATE REFORMATORY
PO BOX 777
MONROE, WA 98272</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON, THIS 28TH DAY OF OCTOBER, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711