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DIVISION II  
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STATE OF WASHINGTON  
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No. 46865-4-II

SUPREME COURT  
OF THE STATE OF WASHINGTON

FILED  
E MAR 29 2016 

WASHINGTON STATE  
SUPREME COURT

Thomas W. Asbach, PETITIONER

V.

STATE of Washington, Respondent

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Motion For Discretionary REVIEW

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Thomas W. Asbach  
Thomas W. Asbach

Thomas W. Asbach #998435

mee/msu e-324-U

P.O. Box 7001

MONROE, Wash. 98272

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In the Supreme Court For The State of Washington

Thomas W. Asbach, PETITIONER V. State of Washington, RESPONDANT	COA. #: 46865-4-II Superior Ct. #: 14-1-00588 -Thurston County- Petition For Discretionary REVIEW.	FILED COURT OF APPEALS DIVISION II 2016 MAR 22 PM 12:11 STATE OF WASHINGTON BY DEPUTY
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I. Identity of PETIONER

COMES now, THOMAS W. ASBACH, PETITIONER PROSE; and moves the COURT to GRANT REVIEW of the issue set forth Below.

II. RELEVANT FACTS

on the morning of 4-15-2014 around 6:40 AM. after leaving the Red Wind Casino in Olympia, Wash. with a LEAKY Radiator, I was awoke in the passenger seat of my Honda by Maria Louise Madrigal. We were sitting in the Driveway of 2726 70th Ave. Tomwater, Wash. 98501.

Maria was complaining to me that she had to pull the car over on our way Home as the car was over Heating and we needed water.

I then grabbed a milk Ballon container from behind the seat of the car and proceeded to walk up to the house, first placing the Ballon container in front of the car and opening the hood to help cool the engine.

I walked to the door of the house and Knocked to Request help with some water. Nobody answered after 5 minutes of Knocking. I then started to look for a faucet or Hose outside the house but found none, cause there was none. I walked over in front of the GARAGE looking for an outside water faucet but there was none.

I came around the front of the GARAGE and saw officer Finch walking up to the House/GARAGE, on the side of

the Garage.

After talking to officer Finch for Roughly TEN minutes and telling Him why I was there officer Barelift came walking up.

While Talking to officer Finch, officer Barelift learned I was saw coming from the front side of the garage and he started to walk around looking in the Garage twice and the house once.

It was very wet out. Wet enough that my socks, shoes and Lower pant legs were soaked from the tall grass around the property.

I was asked, if I ever entered the garage and I told both officers no.

I was arrested then for what I thought was criminal trespass because apparently the Home was Vacant but later learned at the jail I was arrested for Burglary in the second Degree, as apparently officer Finch said I told Him I had taken a Glucose meter but put it Back. The glucose meter was never found nor was it ever established Directly where I had taken it from. officer Finch Assumed the garage but NEVER stated where I said I took it from.

I never entered the Garage and I never took A glucose meter.

If I had entered the garage there most Definatly would have been wet shoe prints on the Dry Concrete floor but neither officer SAW any nor even thought to look for any. The officer, Barelift even failed to look for his own wet Footprints in the garage after entering two times.

Thomas W. Asbach  
THOMAS W. ASBACH

Dated: 3-16-16

### III. Statement of The Case

Asbach contends that the Court of Appeals (Div. 2) ruled against this court's precedent in failing to find insufficient evidence to support his Burglary conviction, as the only evidence supporting such conviction is the testimony of two officers that is entirely refuted by all other evidence submitted at the time of trial.

### IV. Argument

Ground 1,

## Ground 1

THE COURT OF APPEALS (Div. 2) ERRED  
WHEN IT FOUND, THE STATE HAD  
PROVIDED SUFFICIENT EVIDENCE TO  
SUPPORT THE CLAIM OF "BURGLARY  
IN THE SECOND DEGREE.

DUE PROCESS REQUIRES THE STATE TO PROVE EVERY ELEMENT OF A CRIME  
BEYOND A REASONABLE DOUBT. IN RE WINDSHIP, 397 U.S. 358, 364, 90  
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THE TEST ON REVIEW OF A CHALLENGE TO THE SUFFICIENCY OF THE  
EVIDENCE IS WHETHER THE SUPREME COURT CAN SAY, AFTER REVIEWING  
THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THAT  
ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL  
ELEMENTS OF THE CRIME TO HAVE BEEN ESTABLISHED BEYOND A  
REASONABLE DOUBT, STATE V. GREEN, 94 Wn. 2d 216, 221 (1980); JACKSON  
V. VIRGINIA, 443 U.S. 307, 319, 99 S. CT. 2781, 2789 (1984)

WHEN THE SUFFICIENCY OF THE EVIDENCE IS CHALLENGED IN A  
CRIMINAL CASE, ALL REASONABLE INFERENCES FROM THE EVIDENCE MUST  
BE DRAWN IN FAVOR OF THE STATE AND INTERPRETED MOST STRONGLY  
AGAINST THE DEFENDANT. STATE V. SALINAS, 119 Wn. 2d 192, 201 (1992)

A CLAIM OF INSUFFICIENT EVIDENCE ADMITS THE TRUTH OF THE STATES  
EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM  
THAT EVIDENCE. STATE V. CATON, 174 Wn. 2d 239, 241 (2012)

THE STATE MUST PROVE BOTH INTENT TO COMMIT A CRIME AND UNLAWFUL  
ENTRY IN ORDER TO PROVE SECOND DEGREE BURGLARY. STATE V. HOWE, 116  
Wn. 2d 466 (1991) (CITING STATE V. STEINBECH, 101 Wn. 2d 460, 462 (1984))

Appellant (Asbach), contends that the (Div 2) court of Appeals erred when it found that the state proved a Sufficiency of the evidence, thus establishing a showing of Burglary in the second Degree. Appellant further contends that there is (no) evidence submitted by the state, showing and/or corroborating the state's Version of events regarding alleged statements made by Appellant (Asbach) and/or any physical evidence that would indicate Asbach ever entered a garage as alleged.

The Appellant (Asbach) asserts the state failed to establish that He had Entered or Remained unlawfully, or that He had any intent to commit a crime there within.

A person is Guilty of Second Degree Burglary if, "with intent to commit a crime against a person or property therein, He or she Enters or Remains Unlawfully in a Building". . . RCW 9A.52.030

A person Enters or Remains Unlawfully in or Upon premises when He or she is not then Licensed, invited, or otherwise privileged to so Enter or Remain.

Asbach Asserts that the testimonies provided at the trial by the two officers failed to establish sufficient evidence; Due to the Lack of corroborating evidence to support them in the abundance of evidence to refute them, there is insufficient evidence to convict Him of Second Degree Burglary.

First, Asbach points to the Testimony of officer Finch. Finch Testified that "[HE] could not see the entire Door, so [HE] couldn't see if it was opened or closed". (VRP Vol. 1 at 124). That HE observed Damage to the Door but it was not fresh Damage. (Id. at 131). That "a male walked out of the man door". (Id at 133). That "HE did not" have anything in His Hands. (Id at 134). That the ground was "wet with Dew outside". (Id at 138).

That He confirmed that He couldn't see the door itself. (Id at 159)

That He did not go into the Garage to do "any inventory". (Id at 161-162). That Asbach stated He Didnt take anything. (Id at 163-164).

That He didnt see any "NO Trespassing" signs on the property. (Id at 167). That He did not go check to see if there was A glucose meter. (Id at 168). That it was wet enough to where... your pants legs and shoes would get wet. (Id at 172-173). That He never Looked for footprints in the Garage. (Id at 172). That Asbach... Had nothing "to be stolen on Him or in His possession." (Id)

Asbach maintains that Due to "Lack of Evidence" shown through Finches Testimonies, The state "failed to prove" He ever entered the Garage.

Second, Asbach points to the testimony of Lt. Barelift. Barelift testified that He went to the Garage where Asbach had been seen Exiting... Attempted to find this item (Glucose Meter), Because I didnt see it in His hands or at that point. (VRP Vol. II At 222).

That HE went inside the Garage to look for the Glucose meter and did not find it. (Id. At 223). That HE went into the Garage and House. (Id. at 227). Tried to find something that might stand out... Looked around to see what was going on in there. (Id). That He went inside the Garage twice while investigating the incident. (Id. at 231). That there was Dew on the Vegetation. (Id. at 232) No, He did not think of looking there for Footprints. "I did not see any Footprints". (Id. at 234) Did not write A Report (Id) Because it was His understanding that the



officer observed Him (Asbach) walking out of the Building. (Id.) There was a gallon milk container in front of the Vehicle. (Id)

Asbach maintains that Due to the "Lack of Evidence" shown through Barelifts investigation and testimony, the state "failed to prove", He ever Entered the Garage.

In addition, Asbach contends that officer Barelifts testimony Relies solely on the statement of officer Finch. Also that Barelifts testimony is subject to the "hearsay Rule" as He admits to not writing a report, in which this should have been challenged by Asbach's attorney at the time of Barelifts testimony.

Third, that Asbach's testimony was that He was looking for water (Id. at 268) Had a milk Gallon behind the Drivers seat and it was in front of the car because He set it there. (Id. at 269). Did not go into the Garage. (Id. at 271). That HE did not take or tell Barelift that He only took a glucose meter. (Id. at 275). There's no posting of "Keep Out" signs anywhere on the property. (Id at 279).

Mr. Asbach maintains that the state failed at the time of trial to prove that He ever Entered the Garage, Because the testimonies given and the evidence shown Do not suggest that He actually Entered.

The most important fact introduced was both officers testimonies were that the ground outside was wet. The officers testified that there was "NO Footprints" in the Garage nor that anything was found in Mr. Asbach's possession. Also the state exhibits provided of the picture of the Doorway of the Garage Did not show any marks in the vicinity of the Door. Although officer Finch testified that

He saw Asbach come out of the Garage, nothing, indicates that He actually Did see Him. In fact, the evidence shows that He "did not" & could not have seen him. Moreover, there is no evidence that Asbach ever intended to commit a crime nor did he ever possess anything in connection to this incident. The Evidence and the "Lack of Evidence" showing He never maintained possession of anything.

Nothing was ever found that supports either of the officers statements. Asbach claims there was no intent proven because the state failed to prove that Asbach was there to actually commit a crime.

HE was there to get water for His car. Evidence suggests that He was because both officers testified that there was a milk carton in front of His car, But no explanation was given by either of the officers of How it got there.

Asbach testified that it got there because He put it there because He needed water. Asbach also testified that the property gate was open and that there were no signs indicating "No Trespassing".

Nothing indicates that there was an intent to pass that Gate, to commit a crime.

Asbach asserts the Court of Appeals (Dio 2) failed to recognize the states failure to prove the elements of Second Degree Burglary.

Asbach Requests the Supreme Ct. of Washington to Dismiss the Burglary charge.

### IN THE ALTERNATIVE:

A lesser included offense exists when all of the Elements of the Lesser crime are necessary Elements of the Greater Crime. State V. Holt, 104 Wn.2d 315, 318 (1985), State V. Hodgson, 44 Wn. App. 592, 599 (1986)

If it is possible to commit the Greater offense without Having committed the lesser offense, the latter is not an included crime. State V. Roybal, 82 Wn.2d 577, 587 (1973).

Second Degree Burglary Requires the following Elements: The actor must, with the intent to commit a crime against a person or property therein, Enter or Remain Unlawfully, in a Building. State V. Bergerson, 105 Wn.2d 1, 5 (1985).

First Degree Criminal Trespass Requires the actor knowingly to Enter or Remain Unlawfully in a Building. State V. Mounsey, 31 Wn.App. 511, 517, REV. DEN. 97 Wn.2d 1028 (1982).

Second Degree Burglary Requires intent while First Degree Criminal Trespass Requires Knowledge. State V. Allen, 101 Wn.2d 355, 361 (1984)

In state V. Soto, 45 Wn. App. 839 (1986) the court indicated that intent and knowledge are culpable mental states in Hierarchy, ... Ranging from intent to criminal negligence. (citing state V. Acosta, 101 Wn.2d 612, 618 (1984))

The court implied that "when acting knowingly suffices to establish an element, the element also is established if a person acts intentionally. RCW 9A.03.010(2). Proof of a Higher mental state is necessarily proof of a lower". State V. Acosta, supra. Thus, proof of Second Degree Burglary is necessarily proof of First Degree Criminal Trespass.

Asbach maintains that due to the "Lack of Evidence" presented both by testimony and production of actual Evidence, The State of Washington has failed to prove Asbach ever entered the Garage or possessed any actual property or had the intent to do either - all necessary Elements of Burglary.

Asbach maintains that this court should, in the alternative, agree that the court of Appeals (Div 2) erred and find that there is not sufficient evidence to support the conviction for Burglary in the Second Degree, But that there is sufficient evidence of intent to support a conviction on the lesser included offense of First Degree Criminal Trespass pursuant to the Rules announced in Soto.

Remand, with instructions to Reduce Asbach charge of Burglary in the Second Degree to Criminal Trespass in the First Degree.

## Conclusion:

The Supreme Court of Washington state should enter an order Dismissing the charge of Burglary in the Second Degree or in the alternative Reduce the Charge to First Degree criminal Trespass and Remand for Resentencing.

Dated: 3-16-16

Thomas W. Asbach  
THOMAS W. ASBACH

## Declaration:

I Thomas William Asbach, under penalty of perjury under the Laws of the state of Washington, the foregoing is true and correct to the best of my knowledge.

Dated: 3-16-16

Thomas W. Asbach  
THOMAS W. ASBACH

Certificate of Service  
CR 3.1 mailbox Rule

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

I certify that on this Date I mailed the following Document(s) to which are affixed, By U.S. mail, postage are paid to:

Dated this 16 day of March, 2016 at Monroe, Wash.

Thomas W. Asbach  
THOMAS W. ASBACH

Attached: Motion for Discretionary Review  
Ground 1.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON March 1, 2016

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ASBACH

Appellant.

No. 46865-4-II

UNPUBLISHED OPINION

MAXA, J. — Thomas Asbach appeals his conviction and sentence for second degree burglary of a detached garage. We hold that (1) the prosecutor’s closing argument did not comment on the credibility of the witnesses and therefore was not improper, (2) defense counsel was not ineffective for failing to object to the prosecutor’s closing argument, and (3) Asbach’s arguments in his statement of additional grounds (SAG) have no merit. Accordingly, we affirm Asbach’s conviction and sentence.

**FACTS**

At approximately 7:00 AM on April 15, 2014, Tumwater patrol officer Bryant Finch responded to a report of a suspicious vehicle parked at a residence. The property was overgrown and included a single family home and detached garage. The garage had rollup garage doors on one side and a regular door on an adjacent side. Finch saw a vehicle parked in the driveway.

Finch called for a second officer and walked onto the property where he could maintain a view of the house and garage doors while he waited. While Finch was waiting, he saw Marialuz Madrigal exit the garage through the side door carrying a trash bag. Finch began to speak with Madrigal, but still watched the garage. As he and Madrigal were speaking, Finch saw Asbach

exit the garage through the side door. Finch determined that Madrigal and Asbach did not live in the house. The State charged Asbach with second degree burglary.

At trial, Finch testified that Asbach initially said that he did not have permission to be on the property, but that he had taken a glucose meter from the garage. Finch stated that Asbach explained that he and Madrigal were on the property because they had been driving back from a casino and were looking for a place to have sex. Asbach purportedly told Finch that he went into the garage intending to look for vinyl records. Lieutenant Steven Barclift, who arrived on the scene in response to Finch's call, testified that Asbach said that he had heard that there were collectible records on the property. Barclift also testified that Asbach said that he was interested in finding a copy of *The White Album* by the Beatles, but that he could not find the record. Barclift heard Asbach say that he had left the glucose meter on a table inside by the door.

The property owner testified that there was a box of glucose meters in the garage as well as boxes of vinyl records. He also testified that Asbach did not have permission to be on the property.

Asbach admitted that he did not have permission to be on the property. However, he testified that he never said anything about a glucose meter, looking for a place to have sex, or looking for vinyl records. He testified that he was on the property to look for water for his overheated car. He said that he told Finch about his car problems and how he was looking for water for the car. Asbach also testified that he was never inside the garage, but that he was walking around it looking for a faucet.

Finch denied having a conversation where Asbach said that he was on the property to look for water for his overheated car. Barclift also testified that he did not hear Asbach say anything about looking for water.



During closing argument, the prosecutor argued:

[T]his case presents what the State submits are two very, very different versions of events. And I say two, because the State would submit that the officer's [sic] versions very much support each other and are consistent with each other, and so I talk about that as one version.

Verbatim Report of Proceedings (VRP) (Oct. 1, 2014) at 414. Asbach did not object to this statement.

The jury found Asbach guilty of second degree burglary. Asbach did not appear for his scheduled sentencing, and the trial court issued a bench warrant. Asbach later was present for a new sentencing hearing. The parties agreed that Asbach had an offender score of 11 and a standard sentencing range of 51-68 months. The State argued for a sentence of 68 months and defense argued for a sentence of 51-53 months. The trial court imposed a sentence of 68 months and \$800 in mandatory legal financial obligations (LFOs).

Asbach appeals his conviction and sentence.

## ANALYSIS

### A. PROSECUTORIAL MISCONDUCT

Asbach argues that the prosecutor engaged in misconduct by stating that Finch's and Barclift's testimony were consistent with and supported one another. He argues that the prosecutor's comment was improper because it constituted (1) vouching, (2) bolstering, or (3) a comment on truthfulness. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). "The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility." *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d

996 (2012). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

1. Vouching

Asbach argues that the prosecutor vouched for Finch's and Barclift's credibility by asserting that they gave consistent testimony. Improper vouching occurs if the prosecutor (1) places the prestige of the government behind the witness or (2) indicates that evidence not presented at trial supports the witness's testimony. *State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). However, there is a difference between the prosecutor's personal opinion, as an independent fact, and an opinion based upon or deduced from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. *Id.* at 54.

Here, the prosecutor did not make a personal comment on Finch's and Barclift's credibility or indicate that other information not presented to the jury supported their credibility. The prosecutor indicated that he would refer to Finch's and Barclift's testimony as one version of events that he would compare against Asbach's version. He did not say or imply that he personally believed Finch and Barclift or that they must be telling the truth because their stories were consistent. The prosecutor also did not argue that Finch and Barclift should be believed based on information not presented to the jury. His argument was limited to the evidence presented at trial.

The prosecutor simply underscored how different Asbach's account of events was when compared to Finch's and Barclift's account and left it to the jury to decide which story to believe. Accordingly, the prosecutor did not improperly vouch for Finch and Barclift.

2. Bolstering

Asbach argues that the prosecutor's comment improperly bolstered the credibility of Finch and Barclift. Generally a prosecutor may not bolster a police witness's character. *State v. Jones*, 144 Wn. App. 284, 292-93, 183 P.3d 307 (2008) (finding prosecutor improperly bolstered officer's character with facts not in evidence regarding officer's usage of informants). For example, improper bolstering occurs when a prosecutor attempts to show an officer's good character through references to the officer's awards and commendations. *State v. Smith*, 67 Wn. App. 838, 844-45, 841 P.2d 76 (1992).

Here, the prosecutor did not seek to elevate Finch's and Barclift's character. Asbach seems to argue that the prosecutor bolstered the police witnesses' good character by simply pointing out that their testimony was similar. However, the similarity between Finch's and Barclift's testimony does not suggest good character. Accordingly, the prosecutor did not engage in improper bolstering.

3. Comment on Truthfulness

Asbach argues that the prosecutor's representation that Barclift's and Finch's testimony supported each other had the same effect as if the prosecutor had impermissibly asked each witness if the other was telling the truth. It is improper to ask one witness to comment on the truthfulness of another witness. *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). And testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony carries a special aura of reliability with the jury. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Here, the prosecutor never asked Finch or Barclift to comment on the veracity of any witness, and neither Finch nor Barclift expressed an opinion on the veracity of any witness.

First, the prosecutor's comment did not express any belief regarding veracity, but rather sought to express that the officers' testimony amounted to one story. Second, the comment at issue was made by the prosecutor, rather than either of the officers, and therefore the comment did not carry a special aura of reliability. Third, the jurors were instructed that they were the sole judges of witness credibility and of the value and weight of the testimony.

The prosecutor's comment did not constitute vouching, bolstering, or an improper comment on truthfulness. Accordingly, we hold that the prosecutor's comment was not improper.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Asbach argues that his defense counsel was ineffective for failing to object to the prosecutor's comment about the consistency between Finch's and Barclift's testimony. We disagree.

This court reviews claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). This court presumes that counsel's assistance was effective, until the defendant shows in the record the absence of legitimate or tactical reasons supporting counsel's conduct. *Id.* at 33-34.

Asbach's ineffective assistance claim fails because he cannot show that defense counsel's performance was deficient. As discussed above, the prosecutor's comment was not improper. Therefore, there was no basis on which defense counsel could have successfully objected.

Because there was no basis for a sustainable objection, defense counsel was objectively reasonable in deciding not to object.

Accordingly, we hold that defense counsel was not ineffective for failing to object to the prosecutor's comment during closing argument.

C. SAG CLAIMS

1. Sufficiency of the Evidence

Asbach argues that the State failed to present sufficient evidence to show that (1) he entered or remained unlawfully in the garage and (2) he had the intent to commit a crime. We disagree.

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). This court will assume the truth of the State's evidence and all reasonable inferences drawn from that evidence when evaluating whether sufficient evidence exists. *Id.* at 106. This court will also defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

The primary elements of second degree burglary are: (1) entering or remaining unlawfully in a building other than a vehicle or dwelling (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1).

Regarding the first element, Finch testified that he saw Asbach come out of the side garage door. A rational trier of fact would reasonably infer that if Finch saw Asbach exit the garage, Asbach must have entered the garage earlier. Further, the property owner and Asbach both testified that Asbach did not have permission to be on the property, making Asbach's

presence unlawful. Although Asbach testified that he was walking around the garage and never entered the garage, we defer to the trier of fact's resolution of conflicting testimony.

Regarding the second element, Finch testified that Asbach said that he took a glucose meter from the garage and also said that he was looking for vinyl records but did not find any worth taking. Barclift testified that Asbach told him he left the glucose meter in the garage and that he did not find the record that he was looking for. From those statements, a rational trier of fact could conclude that Asbach had the intent to steal property when he entered the garage.

Accordingly, we hold that the State presented sufficient evidence of second degree burglary.

## 2. Ineffective Assistance of Counsel at Sentencing

Asbach argues that his counsel was ineffective for failing to object to the State's recommendation that the trial court impose a sentence on the high end of the standard range. He argues that the State supported its recommendation with factors that would only be appropriate to consider if seeking a sentence outside of the standard range. We disagree.

As discussed above, to prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33.

Here, the standard sentencing range was 51-68 months. The State argued for a sentence of 68 months based on the fact that Asbach's offender score was two points higher than the range's minimum qualifying score of nine and that Asbach had failed to appear at his initial sentencing. Asbach asserts that his counsel should have objected because the trial court should not have considered his higher offender score unless it sought to impose an exceptional sentence and should not have considered his failure to appear because it did not relate to the underlying

crime. But Asbach provides no authority to support his claim that the trial court should not have considered those factors.

In fact, RCW 9.94A.530(1) describes the standard sentence range calculation process and provides that “[t]he court may impose any sentence within the range that it deems appropriate.” There are no specific factors for the trial court to consider when imposing a standard range sentence. Therefore, defense counsel would not have had grounds to object to the State’s argument.

Further, defense counsel presented his own argument for a 51-53 month sentence that provided a number of mitigating factors for the trial court to consider. Defense counsel argued that Asbach’s burglary conviction should be discounted because he did not actually commit a crime within the garage. Defense counsel also argued that Asbach left messages indicating that he tried to make his initial sentencing but had to walk to the courthouse on foot, and he did not appear in the following days because he was out of town visiting a friend who was shot in a hunting accident. Finally, defense counsel added that Asbach had ADHD and other mental health issues as a child that could have helped explain his markedly different memory of events at trial.

Because the trial court had the authority to consider the factors presented by the State and because defense counsel rebutted the State’s grounds and presented additional grounds in support of a lower sentence, we hold that Asbach did not receive ineffective assistance of counsel during sentencing.

### 3. Imposition of LFOs

Asbach argues that the trial court erred in imposing LFOs without considering his present or future ability to pay. We disagree.

Asbach's judgment and sentence imposes LFOs for victim assessment (\$500), criminal filing fee (\$200), and DNA collection fee (\$100). Each of those costs are statutorily mandated. RCW 7.68.035(1)(a) imposes the victim assessment, RCW 36.18.020(2)(h) imposes the criminal filing fee, and RCW 43.43.7541 requires the DNA collection fee. This means the trial court had no discretion when imposing the obligations. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 775 (2013). The requirement that the trial court consider the defendant's ability to pay applies only to *discretionary* LFOs. *See id.* at 103.


Accordingly, the trial court did not err in failing to consider Asbach's ability to pay the mandatory LFOs.


We affirm Asbach's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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MAXA, J.

We concur:

  
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MELNICK, J.

  
\_\_\_\_\_  
SUTTON, J.