No. 47506-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID KALAC,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Wanting to fight another inmate one-on-one, David Kalac escaped his jail cell, entered the jail cell of the other inmate, and assaulted the inmate. About two minutes after he entered the cell, officers at the jail responded and ordered the inmates to stop fighting. Mr. Kalac immediately complied. For this brief, simple assault, the State sought to convict Mr. Kalac of attempted murder, first degree burglary, and unlawful imprisonment. Rather than convict Mr. Kalac of attempted murder, the jury convicted him of the lesser offense of attempted fourth degree assault. Otherwise the jury convicted Mr. Kalac as charged. Despite being sentenced on all three counts, the court later ordered that the charge of attempted murder be dismissed without prejudice.

Because a jail inmate cannot burglarize another inmate's cell and Mr. Kalac's simple assault of the other inmate did not constitute a substantial interference with that inmate's liberty of movement, the convictions for burglary and unlawful imprisonment should be reversed for insufficient evidence. Additionally, this Court should reverse the order dismissing the charge of attempted murder without prejudice. That charge was resolved when the jury convicted Mr. Kalac of a lesser offense and, so long as that conviction stands, double jeopardy prohibits retrial on the greater offense.

B. ASSIGNMENTS OF ERROR

1. In violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and article one, section three of the Washington Constitution, the conviction for first degree burglary is not supported by sufficient evidence.

2. In violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and article one, section three of the Washington Constitution, the conviction for unlawful imprisonment is not supported by sufficient evidence.

3. In violation of the prohibition against double jeopardy under the Fifth Amendment and article one, section nine of the Washington Constitution, the trial court improperly dismissed the charge of attempted murder without prejudice.

4. In violation of the Sixth Amendment to the United States Constitution and article one, section twenty-two of the Washington Constitution, Mr. Kalac was deprived of his right to effective assistance of counsel.

C. ISSUES

1. Burglary requires proof that the defendant entered or remained unlawfully in a "building." In a multi-unit structure, such as an apartment building, each tenant has a separate privacy interest. Accordingly, each

unit is considered its own "building." Inmates in jail, however, have no legitimate privacy interest in their jail cells. Hence, jail cells do not constitute "buildings" separate from the jail itself. Mr. Kalac, an inmate at the jail, entered the cell of another inmate. Should the burglary conviction premised on this entry be reversed because a jail cell is not a "building" separate from the jail itself?

2. Burglary requires proof that the entering or remaining was unlawful. Mr. Kalac was a jail inmate. While the State presented evidence establishing that Mr. Kalac was not supposed to have been out of his cell, the State did not present evidence proving that it was unlawful for him to enter or remain in other jail cells. Did the State fail to prove the "unlawful" presence element beyond a reasonable doubt?

3. Unlawful imprisonment requires proof of restraint, meaning that the defendant substantially interfered with the victim's liberty of movement. "Substantial" means "considerable." Over the course of about two minutes, Mr. Kalac assaulted another inmate by kicking him and briefly placing him a headlock. Did the State fail to prove beyond a reasonable doubt that this brief, simple assault constituted a substantial, i.e., considerable, interference with the inmate's liberty of movement?

4. When a defendant is convicted of a lesser included offense, the prohibition against double jeopardy forbids retrial on the greater offense.

Mr. Kalac was convicted of attempted fourth degree assault, a lesser included offense of attempted first degree murder. Despite being sentenced on this conviction, the court dismissed, without prejudice, the charge of attempted murder. Did the trial court err when there was no charge left to dismiss and reprosecution would violate the prohibition against double jeopardy?

5. The trial court determined that Mr. Kalac did not have the present or future ability to pay legal financial obligations. This Court has discretion to not allow appellate costs even if the State is the substantially prevailing party. Should this Court exercise this discretion to not allow costs when the trial court ruled that Mr. Kalac lacks the ability to pay legal financial obligations?

D. STATEMENT OF THE CASE

In December 2014, David Kalac was an inmate at the Kitsap County Jail in Port Orchard. RP 591-92. He was confined to "Unit B." RP 891. This unit, like the other units in the jail, has 26 cells. RP 562. Unit B has 13 cells on two floors. RP 563. Each cell houses two inmates. RP 562. There are windows on the doors of the cells. RP 648-49. When a cell door is shut, it locks automatically. RP 659. Each cell has a speaker which can be used to communicate with an officer. RP 568-69.

Unit B has a dayroom on the lower level, with tables, a television, and a door to the recreation yard. RP 562-63, 596. Inmates on the lower and upper levels are let out into the dayroom at different times. RP 593. Hence, an inmate confined on the upper level would not be in the dayroom at the same time as an inmate confined on the lower level, and vice versa. RP 592-93.

Mr. Kalac was confined to a cell on the lower level. RP 592. Wayne Carlson, another inmate in Unit B, was confined to a cell on the upper level. RP 592. Mr. Carlson was aware that Mr. Kalac was in the jail. RP 591-92. Mr. Carlson claimed to have shared a place with Mr. Kalac about three years earlier for about a month or two. RP 591. He did not really get along with Mr. Kalac and had not seen him since. RP 591. Mr. Kalac did not recall living with Mr. Carlson. RP 895.

Sometime before December 9, 2014, Mr. Carlson and Mr. Kalac got into a loud, heated exchange. RP 882. Mr. Kalac was locked inside his cell while Mr. Carlson was outside the cell in the dayroom. RP 882. Mr. Kalac testified he was at the window of his cell when he saw Mr. Carlson flipping him off. RP 896. Mr. Kalac, who did not remember Mr. Carlson, called him over to inquire about Mr. Carlson's gesture. RP 897.

The two had a loud and unpleasant conversation.[1] RP 596-97, 628-29, 897-99. Mr. Kalac was not happy about what Mr. Carlson said. RP 899.

Mr. Kalac decided to settle their differences by fighting Mr. Carlson. RP 898. Because the two were not out of their cells at the same time, Mr. Kalac concocted a plan to get out of his cell so he could fight Mr. Carlson one-on-one. RP 900-01.

On December 9, 2014, when Mr. Mr. Kalac returned to his cell, he placed a playing card in the locking mechanism of the door. RP 900. This made it so that the door appeared to be locked when closed, although it was not. RP 900. Mr. Kalac knew what cell Mr. Carlson was in because he could see the upper tier through the reflection on the dayroom wall. RP 900.

At about 3:30 p.m., the inmates from the upper tier were released out of their cells and allowed to be in the dayroom until 6:00 p.m. See RP 593. Mr. Carlson ate his dinner and returned to his cell, leaving the door cracked open. RP 605. Mr. Carlson's cellmate was in the dayroom. RP 605.

At about 4:58 p.m., Mr. Kalac left his cell and proceeded directly upstairs to Mr. Carlson's cell. RP 735, 917. Mr. Kalac knew that the

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[1] So as to not unfairly prejudice Mr. Kalac, the substance of this conversation and the reason for Mr. Kalac being in jail was not permitted to be disclosed to the jury. RP 23, 29-30, 471. Mr. Kalac was in jail on a charge of murder. RP 23.

guards would not be in the unit because it was after dinner service. RP 913. Because he only wanted to fight, not kill, Mr. Carlson, Mr. Kalac did not stop to retrieve available cleaning tools, including a broom and a mop ringer, which could have been used as weapons. RP 903.

Mr. Kalac entered the cell, closing the door behind him. RP 904. He pulled Mr. Carlson off of the top bunk. RP 607, 904. While the two were wrestling around, Mr. Carlson hit his head on the sink. RP 610, 908. According to Mr. Carlson, Mr. Kalac said he was going to kill him. RP 609. Mr. Carlson was able to hit the emergency button many times and called for a guard. RP 609-10. While Mr. Carlson was on the ground, Mr. Kalac kicked him and told him to get up and fight. RP 608, 611, 906. When Mr. Carlson refused, Mr. Kalac picked him up off of the floor by the neck, and placed him in a headlock. RP 612, 909.

The officer in the control room notified other officers that the emergency button for cell B-16 had sounded and asked them to investigate because he thought it might be a fight. RP 570, 575-76. Three officers responded quickly and went to the cell, arriving at 5:00 p.m. RP 576, 645, 655-56, 735. The officer in the lead saw through the window of the door that Mr. Kalac had Mr. Carlson in a headlock. RP 647. Through the door, the lead officer told them to stop fighting and ordered Mr. Kalac to get onto the ground and place his hands behind his back. RP 652, 658, 678-

79. Mr. Kalac immediately complied. RP 652. The officer then unlocked the door and entered. RP 654. The officers placed Mr. Kalac in an interview room and escorted Mr. Carlson out of the unit. RP 655, 670.

Mr. Carlson had no problems breathing. RP 670. He suffered a laceration on his head. RP 788-89. A nurse who saw Mr. Carlson testified that no bandages or stiches were medically necessary. RP 789. Mr. Carlson's neck was visibly red. RP 792. Prior to law enforcement arriving to investigate, jail staff cleaned up the scene of the assault. RP 829-30, 867-69.

Rather than charge Mr. Kalac with simple assault, the State charged him with attempted murder in the first degree (Count I), first degree burglary (Count II), and unlawful imprisonment (Count III). CP 10-12. At trial, Mr. Kalac testified that he had only planned to fight, not kill, Mr. Carlson. RP 898, 910. In relation to the charge of attempted murder (Count I), Mr. Kalac obtained a lesser included offense instruction on attempted fourth degree assault. CP 92-94, 97, 107; RP 931, 986.

The jury convicted Mr. Kalac of first degree burglary and unlawful imprisonment. CP 110-11. The jury did not reach agreement on the charge of attempted murder and left the verdict form blank. CP 110. The jury, however, convicted Mr. Kalac of the lesser offense of attempted fourth degree assault. CP 110. Mr. Kalac was sentenced on all three

counts. CP 149. The State later obtained an order purporting to dismiss the charge of attempted murder in the first degree, described as "Count I," without prejudice. CP 172.

E. ARGUMENT

1. The evidence was insufficient to prove that Mr. Kalac committed the offense of burglary because he did not enter or remain "unlawfully" in a "building."

a. The State bears the burden to prove all the elements of an offense beyond a reasonable doubt.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. 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. In reviewing whether the State has met this burden, the appellate court analyzes "'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. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

b. An individual cell housing inmates within a jail is not a separate "building" from the jail itself.

Questions of statutory interpretation are reviewed *de novo*. State v. Conover, 183 Wn.2d 706, 355 P.3d 1093, 1096 (2015). The primary purpose is effectuate the intent of the lawmaker. Id. Intent is determined

from the statute's plain language, which considers the text, context of the statute, related provisions, amendments, and the whole statutory scheme. Id. If more than one reasonable interpretation exists, the statute is ambiguous. Id. If so, then the rule of lenity applies and the language must be construed in the defendant's favor. Id.

First degree burglary requires proof that the defendant entered or remained "unlawfully" in a "building":

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1); accord CP 98 (jury instruction). Consistent with the law, under the "to-convict" instruction, the State was required to prove "that on or about December 9, 2014, the defendant entered or remained unlawfully in a building." CP 101.[2]

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[2] The "to-convict" instruction required the State to prove:

> (1) That on or about December 9, 2014, the defendant entered or remained unlawfully in a building;
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
> (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and
> (4) That any of these acts occurred in the State of Washington.

CP 102.

Consistent with its statutory definition, the term "building" was defined for the jury to have its "ordinary meaning" and to include "any dwelling." RCW 9A.04.110(5); CP 99 (jury instruction). "Each unit of a building consisting of two or more units separately secured or occupied is a separate building." Id.

The foundational case construing this language is State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993). There, a woman invited a man into her home. Thomson, 71 Wn. App. at 636. The woman rebuffed the man's sexual advances. Id. Still, the woman permitted the man to stay in a guest room. Id. Later that night, the man broke into the woman's room and raped her. Id. The man was convicted of first degree rape, which required proof that the defendant had feloniously entered into a "building." Id.

This Court held that the woman's bedroom was not a "building" separate from the house. Id. at 646. The Court reasoned that rooms in single family houses did not qualify as "buildings" because there is a single privacy interest in the entire house:

> In the situation involving the house, each family member has a privacy interest in the entire house, and that interest is not different from the interests of other family members. Thus, it makes sense to characterize the burglarized rooms as parts of a single building.

Id. at 645. The Court further reasoned that its construction was supported by the rule of lenity. Id.

The Court reasoned the outcome would be different for some multi-unit structures because the tenants would have a separate "privacy interest" from other tenants in their space:

> In the situation involving the multi-unit structure, each tenant has a privacy interest in his or her room or apartment, and that interest is separate from the interests of other tenants. Thus, it makes sense to characterize the burglarized rooms as separate "buildings." The second part of RCW 9A.04.110(5) mandates the second approach, so it is not surprising that the Legislature intended it to apply to multi-unit buildings such as hotels, apartment houses and rooming houses, but not to dwellings wholly occupied by a single tenant.

Id. The Court concluded that "RCW 9A.04.110(5) should be construed as applying to multi-unit buildings in which two or more rooms are occupied or intended to be occupied by different tenants separately, but not to dwellings wholly occupied by a single tenant." Id. at 645-46.

Following Thomson, this Court held that an evidence locker within a police station was not a separate "building" because the police station was occupied by a single tenant and was not a building consisting of multiple separately secured units. State v. Deitchler, 75 Wn. App. 134, 137, 876 P.2d 970 (1994). Similarly, separate stalls and coin boxes at a car wash were not their own "buildings" because the car wash was

"occupied by a single tenant and was not a building consisting of two or more units separately secured or occupied." State v. Miller, 90 Wn. App. 720, 729, 954 P.2d 925 (1998). In contrast, a large storage locker inside the common area of an apartment complex, used by a tenant and secured with a lock, qualified as a "building" given the separate privacy interest. State v. Miller, 91 Wn. App. 869, 870-73, 960 P.2d 464 (1998); see also State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (noting that a landlord can be guilty of burglarizing a tenant's property because the question is occupancy or possession of premises, not simple ownership).

This case is unique in that it that the structure at issue is a jail, not a house or apartment complex. Jails are where the government forcibly holds people against their will. People detained within cells inside jails do not choose to reside there. They are not tenants. When they arrive, their possessions may be seized and inventoried. See State v. Cheatam, 150 Wn.2d 626, 642, 81 P.3d 830 (2003). They may be strip searched. Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, __ U.S. __, 132 S. Ct. 1510, 1515, 182 L. Ed. 2d 566 (2012) (detainees may be required to undergo a close visual inspection while undressed); State v. Audley, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995) (statute authorizing strip searches in particular contexts was constitutional). If they are held

on a "serious offense," the government may even seize their DNA without violating the Fourth Amendment. Maryland v. King, __ U.S. __, 133 S. Ct. 1958, 1980, 186 L. Ed. 2d 1 (2013). Their calls may be recorded. State v. Modica, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008).

As for the jail cell itself, "'[n]o situation imaginable is as alien to the notion of privacy than an arrestee sitting in a jail cell.'" Cheatam, 150 Wn.2d at 638 (quoting Oles v. State, 993 S.W.2d 103, 109 (Tex. Crim. App. 1999)). In short, inmates in a Washington jail lack any privacy interest in their cells. Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); State v. Babcock, 168 Wn. App. 598, 605-06, 279 P.3d 890 (2012) (citing Hudson for proposition that inmate did not have a privacy interest in his cell). Certainly, an inmate has no right to preclude another person from entering or remaining in his or her cell. That right belongs entirely to the jail, not an inmate.

The record in this case shows that the privacy of inmates at the Kitsap County Jail was not any greater. Inmates are locked in their cells and inmates have no control over when the door to their cell is locked. RP 60-04. Calls from the jail are recorded. RP 770-76. Cameras are present. RP 563, 714. The dayroom can be viewed from the control room through a one-way mirror. RP 567, 893. Inmates, including Mr. Carlson and Mr. Kalac, have cellmates. See RP 562, 605, 879, 891. The cells have

speakers that can be used by the jailers to eavesdrop. RP 583, 598. As for the belongings inmates are permitted to keep in their cell, such as clothing, these belongings are required to be kept inside a clear bag so that guards can more easily search the cells. RP 887, 889-90.

Hence, the reasonable interpretation is that jails cells are not separate "buildings" within the meaning of the statute. But even if Mr. Kalac's interpretation of the statute is not the only reasonable interpretation, it is a reasonable one. Therefore, at the least, the statute is ambiguous, requiring application of the rule of lenity and adoption of Mr. Kalac's narrower interpretation. State v. Thomson, 71 Wn. App. at 645-46; Miller, 90 Wn. App. at 730.

In sum, a jail is not truly analogous to an apartment building or hotel. Inmates do not possess a privacy interest in the cells used to hold them. Given the unique circumstances of a jail, the lack of a privacy interest by the inmates in the cells used to hold them, and the rule of lenity, this Court should hold that a jail cell is not a separate "building" within the meaning of RCW 9A.04.110(5). "Application of the burglary statute to [the] defendant's conduct was clearly outside the purpose of the Legislature." Miller, 90 Wn. App. at 730. Accordingly, Mr. Kalac's conviction for burglary should be reversed and dismissed with prejudice.

Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

c. Even if the cell qualified as a "building," the State failed to prove that Mr. Kalac "unlawfully" entered or remained in the cell.

Even assuming that the cells within the jail were separate "buildings," the State failed to prove with sufficient evidence that Mr. Kalac entered or remained "unlawfully" in the other cell. CP 102. "Unlawful presence and criminal intent must coincide for a burglary to occur." State v. Allen, 127 Wn. App. 125, 137, 110 P.3d 849 (2005) The "State must introduce evidence" to prove the unlawful presence requirement. Schneider, 36 Wn. App. at 241.

"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." RCW 9A.52.010(5); accord CP 101. Premises includes the term "building." RCW 9A.52.010(6); accord CP 100. "A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public." RCW 9A.52.010(5); accord CP 101. "If a person is privileged to enter the building, then he cannot be convicted of burglary." State v. Howe, 116 Wn.2d 466, 469, 805 P.2d 806

(1991). A privilege to enter may be limited expressly or by clear implication. State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

Here, the State did not present any evidence of any jail regulations, including any which forbade inmates from entering other cells. While the State elicited testimony establishing that Mr. Kalac was not supposed to be in Mr. Carlson's cell, this did not establish that his entering or remaining was unlawful. RP 594, 913, 917. Rather, it only established that Mr. Kalac was required to be in his cell at the time. This does not establish that Mr. Kalac was unlawfully in the other cell. See State v. Wilson, 136 Wn. App. 596, 607-08, 150 P.3d 144 (2007) (no-contact order which forbade defendant from contacting girlfriend did not make defendant's entry into home where girlfriend lived unlawful).

The State did not meet its burden to prove the unlawful presence requirement. The State simply asked the jury to presume that Mr. Kalac's presence was unlawful. "Merely asking the jury to presume a fact necessary for conviction does not satisfy the requirements of the proof beyond a reasonable doubt guarantee of the Fourteenth Amendment's due process clause." State v. Rich, 186 Wn. App. 632, 648, 347 P.3d 72 (2015), rev. granted, 183 Wn.2d 18, 355 P.3d 1153 (2015). Accordingly, the conviction should be reversed and dismissed.

2. The evidence was insufficient to prove that Mr. Kalac committed the offense of unlawful imprisonment.

a. Unlawful imprisonment requires proof of restraint, meaning that a person's movements are restrained in a manner which interferes "substantially" with his or her liberty. This requires that the interference be "considerable."

The evidence was also insufficient to prove beyond a reasonable doubt the offense of unlawful imprisonment. This offense is a lesser included offense of kidnapping. State v. Davis, 177 Wn. App. 454, 461, 311 P.3d 1278 (2013). It requires proof that the defendant "knowingly restrains another." RCW 9A.40.040. "'Restraint' is defined as a restriction of a person's movement without his or her consent and without legal authority, in a manner substantially interfering with that person's liberty." State v. Berg, 181 Wn.2d 857, 863, 337 P.3d 310 (2014) (citing RCW 9A.40.010(6)). Consistent with this definition, to find Mr. Kalac guilty of unlawful imprisonment, the State had to prove beyond a reasonable doubt that Mr. Kalac "restrained the movements of Wayne Carlson in a manner that substantially interfered with his liberty." CP 105 ("to-convict" instruction.).

The term "substantial" is not defined by statute and the term was not defined for the jury. In Robinson, a case challenging the sufficiency of the evidence to sustain a conviction for unlawful imprisonment, a

majority of this Court defined the term "substantial" (for the purposes of unlawful imprisonment), "to mean a 'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978) aff'd, 92 Wn.2d 357, 597 P.2d 892 (1979). The Court cited two out-of-state civil cases in support of this definition. Id. at 884 n.1. Applying this definition, the majority concluded that the evidence was sufficient to convict the defendant of unlawful imprisonment. The defendant had forcibly grabbed a teenage girl who was walking home from school and pulled her toward his running car. Id. at 883. The teenager fought back and was able to secure her release. Id.

In contrast, the dissent maintained that the term has "a broader meaning than "actual" or "real." Id. at 886 (Roe, J., dissenting). The dissent reasoned that the offense "requires something more than mere assault by gripping and pulling" and that the evidence was inadequate to prove the offense. Id. at 886-87.

Our Supreme Court summarily agreed that the evidence was sufficient to convict the defendant in Robinson of unlawful imprisonment. State v. Robinson, 92 Wn.2d 357, 360, 597 P.2d 892 (1979). The court, however, did not discuss or construe the meaning of the term "substantial." Id.

Since Robinson, in context of a case involving second degree assault, our Supreme Court rejected a definition defining substantial as meaning "something having substance or actual existence." State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). Rather, the court concluded that "substantial" means "'considerable in amount, value, or worth.'" Id. at 805 (quoting Webster's Third New International Dictionary 2280 (2002)). Following McKague, this Court recently applied this definition in the context of the reckless endangerment statute, which requires proof of a "substantial" risk. Rich, 186 Wn. App. at 647.

Thus, contrary to the majority decision in Robinson, the term substantial has a broader meaning than a "real" interference with a person's liberty. Rather, it must also be a "considerable" interference.

Our Supreme Court's most recent decision on the topic of "restraint," State v. Berg, is consistent with this understanding. There, the defendant held a man at gunpoint on the ground for around 30 minutes. Berg, 181 Wn.2d at 872. Given this length of time, the evidence was sufficient to prove that the defendant "restrained" the man. Id.

b. Mr. Kalac's brief, simple assault of another inmate did not amount to substantial or considerable interference with the inmate's liberty of movement.

Here, the State contended primarily that Mr. Kalac committed the offense by restricting Mr. Carlson's liberty through physical force. RP

986-97, 1048. In contrast to Berg, however, the evidence did not establish any substantial, i.e., considerable, interference with a person's liberty of movement. Rather, it only established a simple assault lasting about two minutes. RP 735. Mr. Kalac entered the cell at 4:58 p.m. and assaulted Mr. Carlson. RP 735. During this assault, Mr. Carlson was able to hit the emergency button multiple times. RP 609. While on the floor, Mr. Kalac kicked Mr. Carlson, telling him to get up and fight. RP 611. Because Mr. Carlson refused, Mr. Kalac picked him up by the neck and placed him in a headlock. RP 612. After he was in this hold for an estimated 20 to 30 seconds, the officers arrived at the cell at 5:00 p.m. RP 614, 735. Mr. Kalac immediately released Mr. Carlson and got on the ground. RP 647, 652. This evidence did not prove beyond a reasonable doubt that Mr. Kalac restrained Mr. Carlson's movements to degree that substantially interfered with his liberty.

Mr. Kalac's closing of the cell door, which locked automatically, arguably tended to show restraint. The State initially argued this evidence was relevant, RP 986, but properly conceded in rebuttal that merely closing the door was inadequate. RP 1039. Closing the cell door was a mere annoyance which lasted only about two minutes. It was more akin to purposefully pushing an elevator button so as to force the occupant to a

floor beyond which he or she wanted to go, which this Court indicated would be insufficient to prove restraint. Robinson, 20 Wn. App. at 885.

Regardless, Mr. Carlson had no right to be outside the cell. Moreover, Mr. Carlson had intended to stay inside his cell. See RP 604, 607. Thus, it cannot be concluded that Mr. Kalac's closing of the door substantially interfered with Mr. Carlson's liberty of movement.

Consistent with recent precedent, this Court should hold that to prove restraint, more is necessary than a "real" interference with a person's liberty. Rather, the interference must be "considerable." Applying this standard, the brief, simple assault of Mr. Carlson inside the jail cell was insufficient to prove that Mr. Kalac restrained Mr. Carlson's movements in a manner that substantially interfered with his liberty. The conviction should be reversed and dismissed.

3. The conviction on the lesser offense of attempted fourth-degree assault bars any future prosecution for attempted murder on the same facts. The court improperly dismissed the charge of attempted murder without prejudice.

a. When a defendant is convicted of a lesser included offense, double jeopardy bars a later prosecution for the greater offense.

The State and federal constitutions prohibit double jeopardy. U.S. Const. amend. V; Const. art. I, § 9. These provisions forbid (1) a second prosecution for the same offense after acquittal, (2) a second prosecution

for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding. State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

Under these principles, "a conviction on a lesser-included offense bars subsequent trial on the greater offense." Illinois v. Vitale, 447 U.S. 410, 421, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); accord State v. Linton, 156 Wn.2d 777, 792, 132 P.3d 127 (2006) (Sanders J., concurring) ("where the jury is hung on the greater charge but convicts of the lesser included charge, and the conviction of the lesser included charge is not overturned on appeal, the conviction, once final, terminates jeopardy, and the defendant cannot be retried for the greater charge if it constitutes the same offense for double jeopardy purposes.").[3] In other words, "[i]f jeopardy attaches, prosecution for a lesser included offense will bar a later prosecution for a greater offense." State v. Culp, 30 Wn. App. 879, 881, 639 P.2d 766 (1982) (citing Vitale, 447 U.S. at 410). Thus, in Culp, the defendant could not be prosecuted for negligent homicide because the defendant had already been convicted of a lesser included offense. Id. at 880-82.

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[3] Both the lead opinion and Justice Sander's concurring opinion garnered four votes. The lead opinion, however, held there was an implied acquittal of the first degree assault and did not reach the argument that the conviction for second degree assault barred retrial on first degree assault. Linton, 156 Wn.2d at 789. The remaining justice held that the issue was resolved by the statutory prohibition against double jeopardy. Id. at 794 (Chambers, J. concurring).

b. The court improperly dismissed, without prejudice, the charge for attempted first degree murder when Mr. Kalac was convicted of a lesser included offense.

On Count I, Mr. Kalac was charged with attempted first degree murder. On this count, he obtained a lesser included offense instruction for attempted fourth-degree assault. The jury did not acquit Mr. Kalac of attempted murder, but convicted him of the lesser offense. For this count, Mr. Kalac was sentenced to 90 days of confinement (to be served concurrently with the sentences for burglary and unlawful imprisonment). CP 149. Although Mr. Kalac had already been sentenced, the State moved for an order dismissing the charge of attempted murder in the first degree, "Count I," without prejudice. CP 170. The court signed the order of dismissal without prejudice. CP 172.

The purpose of the State's action appears to be an attempt to keep alive the possibility of retrying Mr. Kalac for attempted first degree murder. Cf. State v. Turner, 169 Wn.2d 448, 452, 238 P.3d 461 (2010) (trial courts improperly tried to keep lesser vacated offenses alive); Womac, 160 Wn.2d at 647 (same). However, so long as the lesser conviction for attempted fourth degree assault stands, Mr. Kalac may not be retried on this greater offense. Vitale, 447 U.S. at 421; Culp, 30 Wn. App. at 881. If Mr. Kalac successfully appealed this conviction, then under Washington precedent he may be retried on the greater offense. See

State v. Glasmann, 183 Wn.2d 117, 119, 349 P.3d 829 (2015) (State may retry a defendant for the greater offense without violating double jeopardy when lesser offense is reversed on appeal and jury left verdict form on greater offenses blank); contra Brazzel v. Washington, 491 F.3d 976, 985 (9th Cir. 2007) (holding that such blank verdict forms constitute an implied acquittal). Here, Mr. Kalac is not challenging the conviction for attempted fourth degree assault on appeal.

Hence, once Mr. Kalac's conviction on this offense is final, the greater offense cannot be revived. Still, the State obtained an order dismissing the charge for the greater offense (Count I) without prejudice. The court erred in granting this request because Mr. Kalac was convicted and sentenced on the lesser offense (Count I). There was nothing to dismiss. It presents a false public record as to what actually happened on Count I. But most importantly, this order of dismissal without prejudice may lead the State to erroneously prosecute Mr. Kalac again for attempted murder. This danger is especially acute because there is not a statute of limitations for murder. RCW 9A.04.080(1)(a). Mr. Kalac should not be subjected to this situation again. See Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) ("the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.").

Mr. Kalac did not object to the Court's order. However, issues of double jeopardy may be raised for the first time on appeal as manifest constitutional error. State v. Strine, 176 Wn.2d 742, 751, 293 P.3d 1177 (2013); RAP 2.5(a)(3). Thus, this Court may properly consider the issue.

c. Counsel was ineffective in failing to object and in signing the agreed order of dismissal.

Mr. Kalac's attorney not only failed to object, but he also signed the dismissal order. CP 173. Hence, the invited error doctrine arguably applies. See State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). If this Court holds that the error was waived through the actions of Mr. Kalac's counsel, the error should be examined through the lens of ineffective assistance of counsel.

Mr. Kalac has the right to effective assistance of counsel under our state and federal constitutions. U.S. Const. amend. VI; Const. art. I, § 22.[4] To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S.

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[4] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

"In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Const. art. I, § 22.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is performance falling below an objective standard of reasonableness. Id. When counsel's conduct can be characterized as legitimate strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Here, there was no strategic reason for agreeing to dismissal of the charge of attempted murder in the first degree, Count I, without prejudice. As argued, the conviction for attempted fourth degree assault (Count I) bars a second prosecution. The dismissal order, however, gives the contrary impression. As for the Strickland prejudice prong, the order without dismissal may result in the State erroneously bringing a second prosecution against Mr. Kalac for attempted first degree murder when double jeopardy prohibits this.

d. The remedy is reversal of the dismissal order with instruction that the charge be dismissed with prejudice.

The court erred in dismissing the charge of attempted first degree murder without prejudice. Mr. Kalac cannot be retried on that offense so long as the lesser conviction for attempted fourth degree assault stands. Because Mr. Kalac has not challenged this conviction, it will become final. Hence, this Court should not only reverse the order of dismissal without prejudice, but should also remand with instruction that the trial

court enter an order stating that Mr. Kalac cannot be retried on the greater charge of attempted first degree murder.

4. Any request that costs be imposed on Mr. Kalac for this appeal should be denied because the trial court determined that Mr. Kalac did not have the ability to pay legal financial obligations.

The trial court fulfilled its duty to inquire into Mr. Kalac's ability to pay legal financial obligations. See State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). The trial court found that Mr. Kalac did not have the present or future ability to pay discretionary legal financial obligations. 4/24/15RP 22. Accordingly, the court rejected the imposition of discretionary legal financial obligations, but ordered the mandatory legal financial obligations of $600 (consisting of $500 penalty assessment and $100 DNA/biological sample fee). CP 153; 4/22/15RP 22-23.

If Mr. Kalac does not substantially prevail in this appeal, the State may request appellate costs. RAP 14.2. A "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court has held that this rule allows for the appellate court itself to decide whether costs should be allowed:

> Once it is determined that the State is the substantially prevailing party, RAP 14.2 affords the appellate court

> latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000) (emphases added). This interpretation is consistent with the permissive language used by the statute authorizing the appellate courts to impose costs upon a defendant. RCW 10.73.160(1) ("The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.") (emphasis added).

"Judicial discretion" means "'a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.'" T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)). Here, an award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). Given that the trial court has determined that Mr. Kalac does not have the present or future ability to pay legal financial obligations, it makes no sense for this Court to add significant financial obligations to the judgement and sentence when the trial court found an inability to pay and waived all discretionary legal financial obligations.

Thus, exercising its discretion to reach a just and equitable result, this Court should direct that no costs will be allowed. RAP 14.2.

F. CONCLUSION

Because a cell within a jail is not a separate "building," the State failed to prove that Mr. Kalac committed a burglary. Even if it were a "building," the State failed to prove that Mr. Kalac entered or remained "unlawfully." The State also failed to prove unlawful imprisonment because Mr. Kalac's simple assault of another inmate did not result in substantial or considerable restraint of the inmate's liberty of movement. These two convictions should be reversed and dismissed. Finally, the charge of attempted murder should not have been dismissed post-trial without prejudice. That order should be reversed with instruction that refiling that charge violates double jeopardy in light of the conviction for the lesser of offense of attempted fourth degree assault.

DATED this 18th day of December, 2015.

Respectfully submitted,

/s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 47506-5-II
v.	)	
	)	
DAVID KALAC,	)	
	)	
Appellant.	)	

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[X] DAVID KALAC 352173 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

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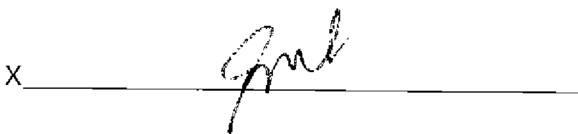
X 

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