NO. 99147-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO RUBEN MORENO,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied;

II. ISSUES

The issues that the petitioner wants to have reviewed are set out in the Petition for Review at 1-2. For purposes of this Answer, they can be paraphrased as follows:

(1) In a prosecution for burglary, is it an element that the defendant *knew* that his entry or remaining in the building was unlawful?

(2) Prior to trial, the prosecutor disclosed all evidence that could be used to impeach the defendant if he testified. Did CrR 4.7 or the trial court's order require the prosecutor to identify the portions of that evidence that *would* be used for impeachment?

(3) The statute dealing with the domestic violence penalty assessment says that "judges are encouraged to solicit input from the victim ... in assessing the ability of the convicted offender to pay the penalty." Does this statute preclude imposition of the assessment on an indigent defendant?

III. STATEMENT OF THE CASE

The facts are set out in the Court of Appeals opinion. State v. Moreno, 14 Wn. App. 2d 143, 148-52 ¶¶ 2-11, 470 P.3d 507 (2020) (slip op. at 2-6).

IV. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY HELD THAT KNOWLEDE IS NOT AN ELEMENT OF BURGLARY.

1. Since The Burglary Statutes Include An "Intent" Element That Precludes Prosecution For Innocent Conduct, There Is No Basis For Adding An Additional "Knowledge" Element.

The petitioner claims that the elements of burglary include the defendant's knowledge that his entry or remaining in a building was unlawful. Based on this claim, he contends that both the information and the jury instructions were inadequate. The Court of Appeals held that there is no such element. Moreno, 14 Wn. App. 2d at 156 ¶ 25 (slip op. at 11). This holding was correct.

To begin with, no such element appears in the statute. First degree burglary is defined in RCW 9A.52.020(1):

> 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.

A similar mental element is set out in the other burglary statutes. RCW 9A.52.025(1) (residential burglary), 9A.52.030(1) (second degree burglary).

The term "enters or remains unlawfully" is defined in RCW 9A.52.010(2):

> 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.

This definition contains no reference to a person's knowledge of his status.

In this regard, the statutory definition of burglary is significantly different from that of criminal trespass. For both degrees of trespass, the statutes require that the person "*knowingly* enters or remains unlawfully." RCW 9A.52.070(1), RCW 9A.52.080(1). In contrast, the statutory definitions of burglary contain no comparable knowledge element. This is particularly significant since the definitions of first and second degree burglary and both degrees of criminal trespass were enacted as part of the same statute — the Washington Criminal Code, Laws of 1975, 1st ex. sess., ch. 260. "When the legislature uses different words within the same statute, we recognize that a different meaning is intended." State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586

(2002); see State v. Flores, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (same rule applies to statutes relating to similar subject matter). If the legislature had intended knowledge to be an element of burglary, it would have said so, just as it did for criminal trespass.

Nor is there any common-law presumption that would justify inserting an additional element into the statute. As the defendant points out, "a statute will not be deemed to be one of strict liability where such construction would criminalize a broad range of apparently innocent behavior." State v. Anderson, 141 Wn.2d 357, 364, 5 P.3d 1247, 1251 (2000); see Rehaif v. United States, ___ U.S. ___, 139 S.Ct. 2191, 2195, 204 L.Ed.2d 594 (2019). The burglary statutes, however, are not "strict liability." Each statute contains a mental element: "intent to commit a crime against a person or property therein." In view of that element, none of them criminalizes "a broad range of apparently innocent behavior." They criminalize only guilty behavior — actions done with intent to commit a crime. There is no basis for reading these statutes as meaning anything other than what they say.

2. Although Some Cases Have Treated Trespass As A Lesser Included Offense Of Burglary, None Of Them Have Added Any "Knowledge" Element To Burglary.

The defendant points out that several cases have treated first degree criminal trespass as a lesser included offense of burglary. None of these cases, however, purport to add any elements to the burglary statute. To the extent that they discuss the mental element at all, they reflect a now-repudiated view of the relationship between "intent" and "knowledge".

The first case discussing the relationship between criminal trespass and burglary was State v. Mounsey, 31 Wn. App. 511, 643 P.2d 892 (1982). The court held that second degree criminal trespass is *not* a lesser included offense of first degree burglary. This is because the two statutes apply to different kinds of "premises." In dicta, the court said that *first* degree criminal trespass was a lesser included offense of burglary. Id. at 517-18. The court did not, however, discuss the mental elements of any of these crimes.

The relationship between the mental elements was addressed in State v. Soto, 45 Wn. App. 839, 727 P.2d 999 (1986). The court held that first degree criminal trespass was a lesser included offense of second degree burglary. In reaching this

conclusion, the court recognized that the mental elements under the two statutes are different. Burglary requires intent to commit a crime against a person or property. First degree criminal trespass requires knowingly entering or remaining unlawfully in a building. The court reasoned, however, that the intent required for burglary could substitute for the knowledge required for criminal trespass. Id. at 841.

As the Court of Appeals recognized in the present case, this reasoning is flawed. Moreno, 14 Wn. App. 2d at 156 ¶ 24 (slip op, at 10-11). Under subsequent case law, intent can only substitute for knowledge if those mental states relate to the same fact. For example, an intent to assault someone does not substitute for knowledge that the victim is a law enforcement officer. State v. Atkins, 156 Wn. App. 799, 808-12 ¶¶ 27-35, 236 P.3d 897 (2010); State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). Similarly, an intent to commit a crime in a building does not substitute for knowledge that the entry is unpermitted. It is therefore possible to commit burglary (in any degree) without committing first degree criminal trespass. That could occur if a person enters or remains in a building unlawfully and with intent to commit a crime therein, but with the mistaken belief that his presence is lawful.

Later cases add nothing to Soto's analysis. Some of them simply cite to Soto. State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005); State v. Olson, 182 Wn. App. 362, 375 ¶ 39, 329 P.3d 121 (2014). One case deals with *attempted* burglary, which has different elements than the completed crime. State v. Pittman, 134 Wn. App. 376, 384 ¶ 12, 166 P.3d 720 (2006). In two other cases, the State conceded that trespass was a lesser included offense. State v. Allen, 127 Wn. App. 945, 950 ¶ 10, 113 P.3d 523 (2005); State v. Southerland, 45 Wn. App. 885, 728 P.2d 1079 (1986), rev'd in part on other grounds, 109 Wn.2d 387, 745 P.2d 33 (1987). In view of this concession, the Court of Appeals analysis in Southerland focused on the "factual prong." Southerland, 45 Wn. App. at 889. On review, this court "adopt[ed] that portion of the decision of the Court of Appeals." Id., 109 Wn.2d at 390. Since that portion of the Court of Appeals decision did not consider the "legal prong," this court did not consider it either.

The key point is that not a single one of these cases holds that knowledge is an element of burglary. Only one case (Soto) even discusses the mental states — and that case rests on the erroneous analysis that intent always substitutes for knowledge

Other cases either rely on Soto or fail to address the issue because it was conceded.

In future cases, this court may have to address whether first degree criminal trespass is a lesser included offense of burglary. In this case, that issue is not presented. Anything this court might say on that point would be dicta. For now, it is sufficient to recognize that the cases on lesser included offenses provide no basis for adding an element to the burglary statutes. The Court of Appeals holding on this point does not warrant review.

B. THE TRIAL COURT'S EXERCISE OF DISCRETION IN INTERPRETING AND ENFORCING ITS OWN DISCOVERY ORDER DOES NOT WARRANT REVIEW.

The petitioner next asks this court to review the Court of Appeals decision with regard to discovery. This issue has to do with phone calls that petitioner made from jail. Prior to trial, the prosecutor provided the defense with copies of all of the calls that were ultimately used in rebuttal. 3 RP 329. What the prosecutor did not do was identify which specific *portions* of the calls would be used. This would have been essentially impossible. As the trial court pointed out, until the petitioner testified the prosecutor "could not be certain of what his testimony would be." 3 RP 334.

By disclosing the full contents of the calls, the prosecutor complied with CrR 4.7(a)(1). In relevant part, that rule states:

> [T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
>
> ...
>
> (ii) any written or recorded statements and the substance of any oral statements made by the defendant...;
>
> ...
>
> (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial...

CrR 4.7(a)(1)(v) has been construed as requiring disclosure of evidence when there is a reasonable possibility that it may be used for impeachment. State v. Linden, 89 Wn. App. 184, 192, 947 P.2d 1284 (1997); State v. Dunivin, 65 Wn. App. 728, 733, 829 P.2d 799 (1992). The prosecutor complied with this requirement, by disclosing all of the defendant's statements and all of the recordings that could be used at trial. The rule requires *disclosure*. It does not require the prosecutor to provide a detailed account of anticipated impeachment, before the prosecutor even knows what testimony the defendant will give.

Creating such a requirement would not facilitate the search for truth. Rather, it would allow defendants to tailor their testimony around gaps in the prosecutor's disclosure. If the prosecutor fails to anticipate the need for impeachment, a defendant could freely contradict his prior statements, safe in the knowledge that the jury would never learn about the contradictions.

The petitioner also claims that the prosecutor violated a pre-trial order to disclose "if it intends to use any jail phone calls by [the petitioner]." 2 CP 187. The trial court interpreted the order as only requiring disclosure of calls that would be used in the State's case-in-chief. 3 RP 334. This is consistent with the court's questions at the hearing that led to entry of the order — the court has asked whether the prosecutor was "intending in your case in chief to use any of the jail calls." 6/29 RP 45. The interpretation of an order entered in this particular case does not warrant by this court.

Even if discovery requirements were violated, the remedy would lie within the discretion of the trial court. State v. Barry, 184 Wn. App. 790, 796 ¶ 8, 339 P.3d 200 (2014). "Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998). Although the trial court here did not find a discovery

violation, it did provide relief to the defense. It excluded portions of recordings that did not contradict the defendant's testimony. 3 RP 334-35. It also recessed the case so that the defendant and defense counsel could listen to the entirety of the relevant phone calls. 3 RP 347-48.

This is comparable to the remedy that the court upheld in Linden. There, the prosecutor violated CrR 4.7 by failing to disclose impeachment evidence. The Court of Appeals nonetheless held that the trial court had properly exercised its discretion by granting "a continuance and opportunity to decide how best to counter the State's impeachment." Indeed, this approach was "particularly appropriate to the extent that it may deter defendant perjury." Linden, 89 Wn. App. at 196.

In the present case, the Court of Appeals held that the trial court had not abused its discretion in admitting portions of the phone calls. Moreno, 14 Wn. App. 2d at 161 ¶ 38 (slip op. at 16). The application of trial court discretion in this particular case does not warrant review.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A $100 DOMESTIC VIOLENCE PENALTY ASSESSMENT.

Finally, the petitioner challenges the trial court's imposition of a $100 domestic violence penalty assessment. He appears to assert that such assessment cannot be imposed on a defendant who is indigent at the time of sentencing. The governing statute contains a specific provision dealing with ability to pay:

> When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.

RCW 10.99.050(5).

The statute thus "encourages" (but does not require) courts to solicit input concerning ability to pay in deciding whether to impose the penalty. Ability to pay is not the same as indigency at the time of sentencing. Nothing in this statute precludes imposition of the penalty on indigent offenders.

In this regard, the statute is significantly different from statutes dealing with other legal financial obligations. The 2018 legislature revised the provisions dealing with several kinds of financial assessment. It precluded the imposition of some

assessments on offenders who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 6 (court costs), § 16 (conviction fee in courts of limited jurisdiction), § 17 (filing fee). The legislature did not, however, amend RCW 10.99.080. That statute remains unchanged: consideration of ability to pay is "encouraged" but not mandatory.

The reasons for this legislative decision are apparent. The amount of the assessment is small: no more than $115. The legislature could conclude that most offenders can pay that amount over a period of time. The purpose of the assessment is to fund local domestic violence advocacy, prevention, and prosecution programs. RCW 10.95.050(2). The legislature could reasonably determine that the need to protect domestic victims would, in many cases, outweigh the burden on domestic violence perpetrators of paying a small sum over a period of time, without interest. Instead of establishing a blanket rule, the legislature entrusted the decision to the discretion of judges on a case-by-case basis. This court has no reason to overturn that legislative judgment.

This case presents a particularly inappropriate forum for reviewing the trial court's exercise of discretion, since the record is incomplete. At sentencing, the court said that it had reviewed a

defense sentencing memorandum. Sent. RP 458-59. That document, however, does not appear in the record. Without knowing what information the court had about the petitioner's personal circumstances, this court cannot intelligently review the sentencing court's exercise of discretion.

V. CONCLUSION

The petition for review should be denied.

Respectfully submitted on February 2, 2021.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, FRANCISCO RUBEN MORENO, Petitioner.	No. 99147-2-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 2nd day of February, 2021, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Washington Appellate Project; wapofficemail@washapp.org; katehuber@washapp.org

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

Dated this 2nd day of February, 2021, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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