SUPREME COURT NO. 96127-1

NO. 34171-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY PUGH A/K/A COREY WILLIAMS,

Petitioner.

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

The Honorable Vic L. Vanderschoor, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Corey Pugh, also known as Corey Williams, the appellant below, seeks review of the Court of Appeals decision in State v. Williams, noted at 3 Wn. App. 2d 1008, 2018 WL 2018 WL 1611628, No. 34171-2-III (2018) (Appendix A), following denial of his motion for reconsideration on May 10, 2018[1] (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. The trial evidence showed that Laura Gillette paid Corey Pugh $1,800 in rent and a security deposit for her daughter, Krista Ironbear to lease property at 523 North Ely Street. The monthly rent was to be $1,000. Ms. Ironbear learned that Mr. Pugh did not own the property weeks after moving in but remained on the property for four months and paid nothing further. No evidence was presented as to her reason for eventually leaving the residence. The Court of Appeals held that the state's evidence of theft in the second degree was sufficient to sustain the conviction because Ms. Ironbear did not receive exactly what she bargained for; that is, she did not receive a secure, lawful residence. Is review appropriate under RAP 13.4(b)(1), (3), and (4) where the Court of Appeals decision conflicts with the constitutional sufficiency analysis in

[1] The denial of reconsideration was not communicated to undersigned counsel until the Court of Appeals issued the mandate on June 18, 2018. In the Court of Appeals, Pugh successfully moved to recall the mandate and extend time 30 days from the date he received actual notice to file the petition for review, to July 18, 2018.

State v. Lee[2] and relies on extraevidentiary speculation to arrive at its conclusion?

2a. During motions in limine, Mr. Pugh informed the court he would be seeking to assert abandonment as a defense to burglary. Both the state and the defense elicited testimony supporting this theory from the owner of 523 North Ely Street, who testified she had lived in her home for thirty years and left in 2013, she "guess[ed]" she was still the owner of the property, and she had no intention to return. Mr. Pugh duly requested an abandonment instruction at the close of testimony. The court summarily refused to give the instruction without explanation. Did the trial court's failure to give an abandonment instruction deprive Mr. Pugh of his right to present a legitimate abandonment defense, constituting reversible error?

2b. Should review be granted pursuant to RAP 13.4(b)(2), (3), and (4) to address the conflict in the Court of Appeals as to whether abandonment even qualifies as a defense to burglary? Compare State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005) (abandonment is defense) with State v. Olson, 182 Wn. App. 362, 329 P.3d 121 (2014) (abandonment not available defense for burglary), and State v. Jensen, 149 Wn. App. 393, 203 P.3d 393 (2009) (same).

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[2] 128 Wn.2d 151, 904 P.2d 1143 (1995).

3. During its Farretta[3] colloquy, the trial court did not inform Mr. Pugh that there are technical rules which would bind him in the presentation of his defense and that presenting a defense is not just a matter of telling one's story. The record lacked adequate evidence to establish Mr. Pugh's actual awareness of this risk. Was the trial court's colloquy inadequate and does the Court of Appeals decision conflict with City of Bellevue v. Acrey?[4]

4. Is review appropriate under RAP 13.4(b)(2), (3), and (4) because the court of appeals decision conflicts with published court of appeals decisions, the case involves significant constitutional questions, and the case concerns issues of substantial public interest that should be decided by this court?

C. STATEMENT OF THE CASE

The state charged Mr. Pugh with two counts of residential burglary and one count of second degree theft. CP 45-46. At his initial appearance, the trial court asked Mr. Pugh if he wished to be represented by an attorney and Mr. Pugh said, "No, I do not." 5RP 3.

After Mr. Pugh unsuccessfully moved to dismiss, the court proceeded to inquire as to Mr. Pugh's request to proceed pro se. 5RP 3-5.

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[3]Farretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[4] 103 Wn.2d 203, 691 P.2d 957 (1984).

The trial court asked Mr. Pugh if he understood he would be held to the same standards as an attorney as to his knowledge of the law, court rules, and presentation of evidence, and Mr. Pugh said "Yes, sir." 5RP 5.

The court then inquired as to Mr. Pugh's educational background. 5RP 5. Mr. Pugh stated he completed three years of college. 5RP 5. The court asked if Mr. Pugh was familiar with the rules of evidence, and Mr. Pugh said "Yes." 5RP 5. Upon further inquiry, Mr. Pugh stated he was familiar with the rules of evidence after studying criminal law and business law at Columbia Basin College. 5RP 5. The court asked Mr. Pugh if he was familiar with the Revised Code of Washington, and Mr. Pugh said "Yes, I am." 5RP 5. When asked how he was familiar with that RCW, Mr. Pugh responded, "I believe that I've had prior 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court [of Washington]." 5RP 6. The court confirmed that, when he mentioned "7.8," Mr. Pugh was referring to CrR 7.8. 5RP 6.

The trial court asked if it was Mr. Pugh's desire to represent himself. 5RP 7. Mr. Pugh responded, "Absolutely. As a secured party, I am." 5RP 7. The trial court then asked Mr. Pugh if he was familiar with the Revised Code of Washington and the elements as they relate to residential burglary. 5RP 8. Mr. Pugh responded, "As a secured party, sir, I am aware and I do object to that." 5RP 8. This exchange followed:

> THE COURT: Sir, I will have to ask you what you mean by the term secured party?
>
> MR. [PUGH]: I'm secured party in the State of Washington. My organization is secured party C. Williams LLC. I've been brought before this Court in that the Court is aware of my secured party status. Nothing further.
>
> THE COURT: All right. With that said, at this time I'm going to find that you are aware of the nature of the charge. You are aware you will be held to the same standard as would an attorney before the Court. And I will allow you to represent yourself, sir.

5RP 8.

At a later hearing, the court reminded Mr. Pugh that he would be held to the same standard as an attorney "with respect to preparation, presentation, and conduct of the case." 2RP 12-13. The court urged Mr. Pugh to be represented by an attorney. 2RP 13. At the next hearing, the court told Mr. Pugh that "one of the dangers of representing yourself . . . is that you can take a legal term of art and turn it into what may seem like a defense, when it may not in fact be a defense." 3RP 9. At no point did the court assure that Mr. Pugh understood how existing technical rules would bind him in the presentation of his cases.

The residential burglary charges arose from allegations that Mr. Pugh unlawfully entered or remained in two Kennewick homes in which he had no ownership interest, changed the locks, and rented the homes out to unsuspecting tenants. CP 3-4. He accepted a security deposit ($800) and one

month's rent ($1000) from Laura Gillette, and Ms. Gillette's daughter Krista Ironbear lived at 523 North Ely Street in Kennewick, Washington for four months. 4RP 25. The state alleged that Mr. Pugh's company, C. Williams Group LLC, filed liens on 523 North Ely Street and 2402 West Bruneau stating that the legal owners of the homes owed a debt for property management and labor performed. CP 3.

In support of its charge of residential burglary at 523 North Ely Street, the state presented Gail Timmins. Ms. Timmins testified that she "guess[ed]" she was the owner of 523 North Ely Street, that she left the home of her own free will around September 2013 with no intention of returning, and that the home was abandoned when she left it. 4RP 15-16, 22. She also testified that she thought the home was getting foreclosed on. 4RP 15. She testified that Bank of America was the mortgage holder. 4RP 16. The state did not present testimony from Bank of America. Finally, Ms. Timmins testified that she had recently received a notice from the City of Kennewick notifying her that she needed to clean up her backyard at 523 North Ely Street. 4RP 17-18.

Laura Gillette testified that in September of 2015, her daughter Krista Ironbear was looking for a place to live. 4RP 24. According to Ms. Gillette and Ms. Ironbear, Ms. Ironbear entered into an agreement with the C. Williams Group to lease the 523 North Ely Street property. 4RP 26, 65,

67. Ms. Gillette testified that she paid $800 as a security deposit and $1,000 for the first month's rent on behalf of her daughter. 4RP 25. The monthly rent was to be $1,000. 4RP 35. Both Ms. Gillette and Ms. Ironbear testified that Ms. Ironbear took possession of the residence right after the $1,800 was paid. 4RP 30, 67. Ms. Gillette testified that Mr. Pugh brought a stove and a refrigerator over soon after. 4RP 30. Ms. Gillette testified that she never paid anything more. 4RP 35. Ms. Ironbear testified that despite staying at the residence for four months, she never paid anything at all. 4RP 67, 68.

The jury returned guilty verdicts on Count I (residential burglary, 523 North Ely Street) and Count II (theft in the second degree), and a not guilty verdict as to Count III (residential burglary, 2402 West Bruneau). CP 81-83; 4RP 150.

Mr. Pugh appealed. CP 113-14. He argued that the stated presented insufficient evidence of theft in the second degree as no party suffered any loss and the state had not presented any evidence that Ms. Ironbear received anything less than what she bargained for, that Mr. Pugh's waiver of counsel was not knowing, voluntary, and intelligent, and that the court's failure to properly instruct the jury on abandonment was reversible error and violative of due process. Br. of Appellant at 12-31; Mot. for Reconsideration at 1-2.

The Court of Appeals acknowledged that State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995), upon which Mr. Pugh relied for his sufficiency

argument, is "analogous to the facts of his case in many respects." Appendix A at 10. The Court continued: "We might struggle with distinguishing Lee if the Supreme Court had not sharply limited its application itself, in George.[5] It described Lee as an unusual case in which the relevant parties each received 'exactly' what they were expecting or had contracted for." Appendix A at 11. Because Ms. Ironbear did not receive a "secure, lawful residence" and "she and her mother learned within a matter of weeks that Ms. Ironbear's 'landlord' was a trespasser"—facts analogous to Lee—the Court of Appeals found that Ms. Ironbear did not receive exactly what she bargained for and came to the opposite conclusion of Lee. Appendix A at 11-12. Although the court noted Ms. Ironbear moved out several months after this discovery, it did not discuss the reason for this departure, as there was no reason in evidence. Appendix A at 12.

As to Mr. Pugh's waiver of counsel, the Court of Appeals held that the record established that Mr. Pugh was aware that technical rules exist which would bind him in the presentation of his case despite not being specifically advised of any such technical rules. Appendix A at 14.

The Court of Appeals simply never addressed Mr. Pugh's argument that the trial court's failure to require the state to disprove the defense of abandonment where the facts support a theory of abandonment violates due

[5] State v. George, 161 Wn.2d 203, 164 P.3d 506 (2007).

process. Finding instead that Mr. Pugh "reads too much into *J.P.*," a published Court of Appeals decision which clearly permits a defendant to assert an abandonment defense to residential burglary, the Court of Appeals held that Mr. Pugh was permitted to argue his theory of the case to the jury by arguing that his entry was lawful. Appendix A 16-17; State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005). Without expressly disagreeing with the holding in J.P., the court noted the legislature has not identified abandonment as a defense to residential burglary and that other divisions have repeatedly held that the jury need not be instructed on abandonment as a defense to residential burglary, glossing over this apparent division split as to this significant constitutional issue. Appendix A at 15-16.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE DECISION CONFLICTS WITH THE SUFFICIENCY PRINCIPLES AT ISSUE IN *STATE V. LEE*

The Court of Appeals relied on reasoning rejected by this court in State v. Lee, 128 Wn.2d at 161-64, a case almost identical to this one.

In Lee, the defendant made a residence available to tenants for a 30-day emergency period through the Red Cross, even though he did not lawfully own the property. Id. at 153-54. After learning Lee was not the lawful owner of their rental property three days after they moved in, the tenants were not evicted and in fact remained on the property for the full

thirty days for which the Red Cross had paid. Id. at 154. The tenants eventually purchased the property from the true owner in a separate transaction, though a purchasing option was not part of the original bargain. Id. This court determined there was insufficient evidence to sustain Lee's theft conviction because the tenants suffered no loss. Id. at 163-64.

Here, Mr. Pugh made a residence available to Ms. Ironbear at a rate of $1,000 per month and Ms. Ironbear's mother paid $1,800. 4RP 25, 35. After learning that Mr. Pugh was not the owner of the property "within a matter of weeks," Ms. Ironbear remained on the property for four months. 4RP 67, 68. No evidence was presented as to why she left the property, but she remained long after she learned that Mr. Pugh did not own the home and far longer than the $1,800, less than two months' rent, would have allowed her. 4RP 25, 35, 67, 68.

The Court of Appeals distinguished this set of facts from the set of facts in Lee, claiming Ms. Ironbear did not receive exactly what she contracted for; that is, she did not receive "a secure, lawful residence" because "she and her mother learned within a matter of weeks that Ms. Ironbear's 'landlord' was a trespasser." Appendix A at 11-12. This assertion is both unsupported by the record and relies on an argument which was rejected in Lee, 128 Wn.2d at 163.

In Lee, the state argued that Lee's conduct placed the unsuspecting tenants in peril and they faced possible eviction by the true owner of the property. Id. This argument was unpersuasive, however: "[The tenants] were not displaced by Lee's actions—in fact, his actions secured them the housing that both they and the Red Cross desired. Thus, Lee's acquisition of the $700 resulted in no loss either to the Red Cross or to [the tenants], as each received what they bargained for." Id. In other words, the fact that a tenant learns that her landlord is not the rightful owner of her leased premises does not somehow deprive her of lawful, secure housing if her tenancy is not actually interrupted by the fact of the trespass.

Certainly, the tenants in Lee seeking emergency housing desired a "secure, lawful residence" no less than Ms. Ironbear did. Appendix A at 11. But that fact had no bearing on the court's decision in Lee and should have no bearing on the court's decision here. Mr. Pugh's acquisition of the $1,800 resulted in no loss to Ms. Ironbear because she received exactly what she bargained for and more. As nothing in the record indicates that Ms. Ironbear was displaced by Mr. Pugh's actions, the Court of Appeals decision conflicts with the constitutional sufficiency principles at issue in Lee and merits review under RAP 13.4(b)(1) and (3).

2. THE DECISION CONFLICTS WITH *STATE V. J.P.* AND THE DIVISION SPLIT CONCERNING WHETHER ABANDONMENT IS A DEFENSE TO RESIDENTIAL BURGLARY PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION

During motions in limine, Mr. Pugh informed the court he would be seeking to assert the defense of abandonment. Both the state and the defense elicited testimony supporting a theory of abandonment from the owner of 523 North Ely Street, Gail Timmins, who testified she had lived in her home for thirty years and left in 2013, "guess[ed]" was still the owner, and had no intention to return. Consistent with his stated intent at the beginning of trial, Mr. Pugh requested an abandonment instruction at the close of testimony. The court refused to give the instruction. The trial court's failure to instruct the jury on the applicable law to allow Mr. Pugh to argue his clearly stated theory of the case is reversible error. This court should accordingly reverse and remand for a trial at which Mr. Pugh is entitled to argue his theory of the case and the state is required to prove the absence of the defense.

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. Criminal trespass is a lesser included offense of burglary and occurs when a person knowingly enters or remains unlawfully in a building. J.P., 130 Wn. App. at

895; RCW 9A.52.070. Abandonment is a defense to criminal trespass. RCW 9A.52.090(1).

When unlawful entry or remaining is a necessary element of a crime charged and the defense of abandonment is asserted, failure to require the state to disprove the defense violates due process. The due process clause of the Fourteenth Amendment guarantees, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, section 1. This due process guaranty requires the state to prove every element necessary to constitute the crime with which a defendant is charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

When a defense negates an element of a crime, the burden is on the state to prove the absence of the defense beyond a reasonable doubt because the constitution does not allow a defendant to bear the burden of disproving an element of the crime. State v. W.R., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014); see also State v. Wiebe, 195 Wn. App. 252, 256-57, 377 P.3d 290 (2016). The abandonment defense negates the unlawful presence element of criminal trespass, so the state is required to prove the absence of the defense. City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

Because the unlawful entry or presence element of the burglary statute is the same as the unlawful entry or presence element of the criminal

trespass statute, Division Three held that the abandonment defense also applies to a charge of residential burglary. J.P., 130 Wn. App. at 895. The J.P. court looked to the reasoning in Widell, where the court held that statutory defenses to trespass, of which abandonment was one, negated the unlawful presence or entry element of trespass and placed the burden on the state to prove the absence of the defense. Id. at 895. Because the unlawful presence/entry element is a necessary element of both criminal trespass and residential burglary, the J.P. court reasoned that a statutory defense that negated one would also negate the other.[6] Id. Therefore, RCW 9A.52.090(1)'s abandonment defense applied to residential burglary. Id.

The Court of Appeals did not explain how or why the trial court's refusal to give the requested abandonment instruction where there was evidence to support it did not improperly relieve the state of its burden of proving the absence of the defense beyond a reasonable doubt. Instead, the court simply pointed out that the legislature has not specifically identified abandonment as a defense to residential burglary and cited two cases in conflict with J.P. that abandonment was not a defense to residential burglary. Appendix A at 15-16; Olsen, 182 Wn. App. 362; Jensen, 149 Wn. App. 393.

[6] While J.P. was allowed to argue abandonment as a defense to residential burglary, the defense ultimately failed. The court found that the state successfully established that the home in question was not abandoned. J.P., 130 Wn. App. at 896.

Instead of addressing the due process issue or applying J.P.'s clear holding, the Court of Appeals stated that Mr. Pugh "reads too much into J.P." Appendix A at 16. In attempting to distinguish this case from J.P., the Court of Appeals cited State v. Ponce, 166 Wn. App. 409, 269 P.3d 408 (2012), and State v. Cordero, 170 Wn. App. 351, 284 P.3d 773 (2012), but neither case supplies a basis for distinction.

In Ponce and Cordero, the Court of Appeals did not dispute J.P.'s conclusion. Instead, it held a jury need not be specifically instructed on matters that negate an element of the charged offense if the jury instructions as a whole adequately explain the law and enable the parties to argue their theory of the case. Cordero, 170 Wn. App. at 370; Ponce, 166 Wn. App. at 419-20. Mr. Ponce and Mr. Cordero argued that the jury should have been instructed that the defense of permissible entry, which negates unlawful entry, was a defense to second degree burglary after they presented evidence that they were each *invited* on the premises in question. Cordero, 170 Wn. App. at 356; Ponce, 166 Wn. App. at 411. But because the jury was provided with the statutory definition of "enters or remains unlawfully"—"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,"—the courts held that the instructions adequately apprised the jury of the law and enabled Mr. Ponce and Mr.

Cordero to argue their theories of permissible entry. Ponce, 166 Wn. App. at 420 (emphasis added); accord Cordero, 170 Wn. App. at 370. In other words, if the jury had believed the evidence presented by Mr. Ponce and Mr. Cordero that they were invited to enter or remain on the property, the instructions adequately apprised the jury of the law as it relates to such invitations, and thus the jury would be equipped to factually determine whether either defendant entered or remained on the property unlawfully.

The Court of Appeals' application of this logic to a case involving an abandonment defense is misplaced. When a defendant asserts abandonment as a defense to residential burglary, the definition of "enters and remains unlawfully" does not apprise the jury of the effect, if any, of abandonment on its finding of unlawful entry or remaining on property. Because the jury instructions here did not adequately explain the law as it pertains to abandonment, neither Ponce nor Cordero applies.

Mr. Pugh was entitled to an abandonment instruction under J.P., 130 Wn. App. at 895. Failure to give an instruction allowing a party to argue his theory of the case when there is evidence to support the theory is prejudicial error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). Because the Court of Appeals decision conflicts with J.P. and presents a due process issue, review is warranted under RAP 13.4(b)(2) and (3).

RAP 13.4(b)(2) and (4) review is warranted for an additional reason. J.P. directly conflicts with Olson, 182 Wn. App. at 377, and Jensen, 148 Wn. App. at 399-400, as to whether a defendant may even assert an abandonment defense to burglary. This important question, which has created a conflict in Court of Appeals decisions, should be squarely decided by Washington's highest court. RAP 13.4(b)(2), (4).

3. WHETHER A WAIVER OF COUNSEL CAN BE KNOWING, VOLUNTARY, AND INTELLIGENT WITHOUT AN ADVISEMENT THAT TECHNICAL RULES EXIST WHICH WILL BIND A DEFENDANT IN THE PRESENTATION OF HIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION AND ISSUE OF SUBSTANTIAL PUBLIC INTEREST

A waiver of counsel must be knowing, voluntary, and intelligent. Acrey, 103 Wn.2d at 208-09. The defendant should be made aware of the nature and classification of the charge, the maximum penalty upon conviction, and the dangers and disadvantages of self-representation and what the task entails. Farretta, 422 U.S. at 835. Defendants should be advised that presenting a defense requires the observance of technical rules and is not just a matter of "telling one's story." State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997). Courts are required to indulge in every reasonable presumption against finding that a defendant has waived the right to counsel. State v. Coley, 180 Wn. 2d 543, 560, 326 P.3d 702 (2014).

While a colloquy is "strongly recommend[ed] . . . as the best means of assuring that the defendant understands the risks of self-representation," where there is no colloquy, the record must indicate that the defendant is actually aware that presenting a defense requires the observance of technical rules and is not just a matter of telling one's story. Acrey, 103 Wn.2d at 211; Nordstrom, 89 Wn. App. at 741-42.

The Court of Appeals decision is difficult to square with well-established case law: the decision describes the trial court's colloquy as "extensive" yet acknowledges that the colloquy lacked the bare minimum advisements set forth in Acrey (that technical rules exist which will bind defendant in the presentation of his case). Appendix A at 13-14. The court correctly pointed out that a colloquy is strongly recommended by Acrey, not required, and that courts are permitted to look to evidence on the record to show the defendant's "actual awareness" of the risks. Appendix A at 13-14. The information relied upon by the Court of Appeals to establish actual awareness, however, was profoundly inadequate. Appendix A at 14.

First, when the trial court asked if he was familiar with the rules of evidence and the Revised Code of Washington, Mr. Pugh answered "Yes." 5RP 5. The colloquy did not involve further inquiry, such as whether Mr. Pugh was familiar with the substance of the rules or statutes, or whether, for instance, he was aware that they existed. Second, the Court of Appeals also

noted with approval that Mr. Pugh was told that he would be held to the same standards as an attorney, which Mr. Pugh said he "absolutely" understood. Appendix A at 14; 5RP 5. But Mr. Pugh was not told what those standards were. Third, the Court of Appeals relied on the fact that Mr. Pugh claimed to have taken college courses in criminal law and business law as evidence of his actual awareness that technical rules existed which would bind him in the presentation of his case. Appendix A at 14. It is unclear what, if anything, a student in a criminal law or business law class would learn about the rules of evidence.

"[O]nly rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation." Id. at 211. The trial court's colloquy, whether extensive or not, failed to simply advise Mr. Pugh of one of three bare minimum advisements: that technical rules existed which would bind him in the presentation of his case. The evidence from the record relied upon to establish Mr. Pugh's actual knowledge of the risk is inadequate and the Court of Appeals' finding that Mr. Pugh's waiver was knowing, voluntary, and intelligent conflicts with this court's holding in Acrey, which presents a significant constitutional question and an issue of substantial public interest, meriting review under RAP 13.4(b)(1), (3), and (4).

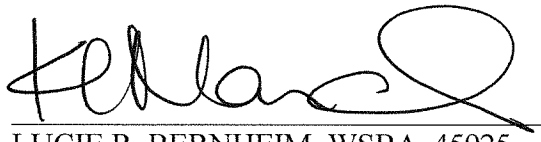
E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Mr. Pugh asks that this petition for review be granted.

DATED this 13th day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. COREY JAVON WILLIAMS, Appellant.	)	No. 34171-2-III
	)	UNPUBLISHED OPINION

SIDDOWAY, J. — Corey Javon Williams—aka Corey Javon Pugh, Sr., who asked to be addressed as Corey Pugh, Sr. in the trial below[1]—appeals, making eight assignments of error to his residential burglary and second degree theft convictions and his sentence. We find no error or abuse of discretion by the trial court and affirm.

FACTS AND PROCEDURAL BACKGROUND

In 2013, Kennewick police detective Rich Runge investigated a series of unauthorized "rentals" of homes by Corey Javon Williams. Mr. Williams had identified

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[1] We will refer to the defendant as Corey Javon Williams, notwithstanding that the trial court honored his request to be referred to during trial as Corey Pugh.

The State offered evidence at trial that the defendant uses both names. He was charged and convicted as Corey Javon Williams, which is how he is identified on the FBI's Interstate Identification Index and on the Washington Judicial Information System's defendant case history.

homes that were unoccupied for a period of time, rekeyed them, falsely represented to prospective tenants that he owned them, and then rented them out. Mr. Williams ultimately pleaded guilty to criminal trespass, four counts of second degree theft, attempted second degree theft, and third degree theft.

Following his release from prison, in September 2015, Mr. Williams, acting as a principal for his limited liability company, C. Williams Group, LLC, filed liens against two other unoccupied Kennewick residential properties and sought to rent them out. One was located at 523 North Ely Street, with title held by Joseph and Gail Timmins. The other was at 2402 West Bruneau Avenue, with title held by Catlino and Barbara Leija.

Detective Runge determined that Mr. and Mrs. Leija had been dead since at least 2013. He determined that the North Ely Street residence was being occupied by Krista Ironbear pursuant to a rental agreement offered her by the C. Williams Group, LLC in September 2015. An $800 deposit and $1,000 for the first month's rent had been paid to Mr. Williams at that time by Ms. Ironbear's mother, Laura Gillette.

The State initially charged Mr. Williams with two counts of residential burglary for his unauthorized activities at the two residences. The affidavit of probable cause filed in support of the motion for an arrest warrant stated that in a conversation with Detective Runge, Mr. Williams claimed to own the two properties by virtue of the liens he had filed against them. It stated that Mr. Williams had rented the North Ely property to Ms.

Ironbear in September 2015 and attempted to rent the Leija property to two men who paid him a deposit but then became suspicious and backed out.

When arraigned, Mr. Williams told the court he wished to proceed pro se. A *Faretta*[2] inquiry followed:

> THE COURT: Do you wish to be represented by an attorney in these matters?
> MR. WILLIAMS: No, I do not.
> THE COURT: You wish to represent yourself?
> MR. WILLIAMS: Yes.
> . . . .
> THE COURT: Well, what we will do now is go through the colloquy regarding self-representation. . . .
> . . . .
> THE COURT: Sir, you understand if you represent yourself you will be held to the same standards as an attorney?
> MR. WILLIAMS: Absolutely.
> THE COURT: You understand you will be held to the same standard as to your knowledge of the law and court rules and the presentation of evidence?
> MR. WILLIAMS: Yes, sir.
> THE COURT: All right. Sir, what is the highest grade you completed in school?
> MR. WILLIAMS: I have three years of college.
> THE COURT: Are you familiar with the rules of evidence in the State of Washington.
> MR. WILLIAMS: Yes, I am.
> THE COURT: Can you tell me how you are familiar with them?
> MR. WILLIAMS: I studied criminal law and business law at Columbia Basin College.
> THE COURT: Are you familiar with the Revised Code of Washington? In particular the Revised Code of Washington as it relates to the this [sic] charge?

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[2] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

MR. WILLIAMS: Yes, I am.

THE COURT: Can you tell me how you are familiar with that?

MR. WILLIAMS: I believe that I've had prior 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court.

THE COURT: Supreme Court of which state, sir?

MR. WILLIAMS: Washington.

THE COURT: And when you say 7.8, you are referring to the Washington Criminal Rule 7.8?

MR. WILLIAMS: Yes, sir.

. . . .

THE COURT: Given that information, you also understand that residential burglary is a class B felony as well?

MR. WILLIAMS: I do.

THE COURT: So again subject to the same potential maximum of 10 years or a fine not to exceed $20,000. You are aware of that?

MR. WILLIAMS: Yes, sir.

THE COURT: Without agreeing that your criminal history is calculation is [sic] correct you heard [the prosecutor's] recitation of what the guideline range is believed to be in the State of Washington?

MR. WILLIAMS: Let the record reflect that I object.

THE COURT: With that in mind, is it your desire to represent yourself?

MR. WILLIAMS: Absolutely. As a secured party, I am.

. . . .

THE COURT: At this time I'm satisfied you are aware of the nature of the charge—and just to perfect the record again here, sir. You indicated you were aware of the statute with respect to theft of a motor vehicle. Are you also familiar with the Revised Code of Washington and the elements as they relate to residential burglary?

MR. WILLIAMS: As a secured party, sir, I am aware and I do object to that.

THE COURT: Sir, I will have to ask you what you mean by the term secured party?

MR. WILLIAMS: I'm secured party in the State of Washington. My organization is secured party C. Williams LLC. I've been brought before this Court in that the Court is aware of my secured party status. Nothing further.

> THE COURT: All right. With that said, at this time I'm going to find that you are aware of the nature of the charge. You are aware you will be held to the same standard as would an attorney before the Court. And I will allow you to represent yourself, sir. You understand at any time should you wish to be represented by an attorney you may make such request to the Court and you will be entitled to representation even if the Court determines that you do not have the funds to retain an attorney the court would have the authority to appoint an attorney for you at no cost to you upon your request. You understand that?
>
> MR. WILLIAMS: Yes.

Report of Proceedings (RP) (Dec. 28, 2015) at 3-9.

At a hearing on motions that took place over two weeks before trial, the court cautioned Mr. Williams further, stating:

> Mr. Williams, you will recall when I—when we went through a colloquy and I allowed you to represent yourself, I indicated to you that you would be held to the same standard as an attorney. You would be held to the same standard of knowledge of the law and the same standard with respect to preparation, presentation, and the conduct of the case. I also told you that I could not help you. . . . I urge you to be represented by an attorney.
>
> You have the right to representation by an attorney, even if you cannot afford one. And I will appoint an attorney for you at any time during these cases, if you request one.

RP (Jan. 28, 2016) at 12-13.

At the next hearing, which took place on February 11, 2016, the court cautioned Mr. Williams again, after Mr. Williams argued that the State had no "complaining witness." It told Mr. Williams, "I would respectfully submit to you one of the dangers of representing yourself, which is that you can take a legal term of art and turn it into what may seem like a defense, when it may not in fact be a defense. I don't believe that the

word 'complaining witness', at least from listening to you, has the meaning you believe it does." RP (Feb. 11, 2016) at 9.

On the Thursday before the Tuesday, February 16, 2016 trial date, the State amended the information, adding a charge of second degree theft for the $1,800 that Mr. Williams had obtained from Ms. Gillette.

In motions in limine filed by the State the Friday before trial, it sought a ruling that it could offer evidence of Mr. Williams's conviction of four similar crimes in Benton County to which he pleaded guilty the year before. It contended that the prior convictions were admissible under ER 404(b) as evidence of a common scheme or plan and of his intent to deceive the victims.

When motions in limine were argued the morning of trial, the prosecutor characterized Mr. Williams's conduct in the 2013 crimes as

> basically rent[ing] out property that was foreclosed on or had been abandoned. In those cases the evidence was that he either claimed some sort of ownership interest in those other properties through a doctrine of adverse possession or he would go to a foreclosed owner, the former owner who had filed bankruptcy or been foreclosed on and would get a quitclaim deed and claim he has some sort of possessory interest in the property. . . . [H]e pled guilty, was sentenced to [I] think 17 months.
>
> So he gets out of prison and in this case our allegation is that what he did again was rented out property that had been abandoned.

RP (Feb. 16, 2016) at 5. Given the opportunity to respond to the State's interest in offering the convictions, Mr. Williams's only objection was that "my name is Corey

Javon Pugh," and "I don't feel that the State should be able to bring in any type of this evidence because the State has not produced [sic] that I am Corey J. Williams." *Id.* at 6. Having heard that objection, the court said, "I'm going to allow those convictions in." *Id.*

After dealing with the motions in limine, the trial court asked Mr. Williams to confirm that his defense was a general denial. Mr. Williams responded that he was also asserting abandonment, saying, "I believe it applied to the residential burglary in consensus with criminal trespassing." *Id.* at 10.

Among the State's witnesses was Ms. Timmins, the legal owner of the North Ely residence. Ms. Timmins testified that she lived in the house from 1983 until 2013, when she moved out after her husband passed away and she could no longer afford the mortgage payments. She had received collection notices and assumed the bank would foreclose on the house. She testified that she never hired anyone to do repair work or improvements at her house, contrary to the C. Williams Group's lien claiming it was owed $11,500 for property maintenance and repair. She testified that she did not owe Mr. Williams any money and did not give anyone permission to be inside the home after she left.

Ms. Gillette was called by the State and testified to meeting Mr. Williams, his representations about owning the property, and the payments she had made to him. Ms. Ironbear was also called by the State and testified to entering into the rental agreement

with Mr. Williams. She testified that very shortly after she moved in, a detective came to the house to speak with her about the fact that Mr. Williams did not own the house. She admitted living at the house for approximately four months before moving out, without paying rent "[b]ecause I had no idea how to get a hold of whoever leased it to me." RP (Feb. 16, 2016) at 75.

Detective Runge testified to the fruits of his investigation and that it was October 5, 2015, when he spoke with Ms. Ironbear and told her that Mr. Williams did not own the North Ely residence.

At the close of evidence, the trial court and the parties discussed jury instructions. Although Mr. Williams had not proposed an instruction on abandonment, he asked "if [the court] would instruct under abandonment." RP (Feb. 16, 2016) at 133. The court refused.

The jury found Mr. Williams guilty of residential burglary of the North Ely residence and second degree theft, but acquitted him of the charge of residential burglary of the West Bruneau residence. The trial court sentenced Mr. Williams to an exceptional consecutive sentence of 106 months' total confinement, with 84 months for the residential burglary and 22 months for the second degree theft. It imposed mandatory and some discretionary legal financial obligations after stating that Mr. Williams "is able, capable of working." RP (Jan. 28, 2016) at 25.

Mr. Williams appeals.

ANALYSIS

Sufficiency of evidence of theft

Citing *State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995), which he characterizes as involving facts "nearly identical" to this case, Mr. Williams argues that where theft is charged, loss to a victim is required for the essential element of an "unlawful deprivation"—and "[w]hen the 'victim' receives what she bargains for, no theft is committed." Br. of Appellant at 14, 13 (quoting *Lee*, 128 Wn.2d at 162). Because Ms. Gillette's daughter received the benefit of a rental accommodation for four months in exchange for payment of less than two months' rent, Mr. Williams contends that the evidence was insufficient to support the jury's verdict finding him guilty of second degree theft.

A person is guilty of second degree theft if he commits theft of property or services with a value exceeding $750 but less than $5,000. RCW 9A.56.040(1)(a). In the trial below, the State presented no evidence that Ms. Gillette sustained a net loss after taking into consideration the value of her daughter's four months' housing, let alone a net loss exceeding $750, so this issue does not turn on the usual tests for reviewing the sufficiency of evidence. It turns, instead, on whether Mr. Williams is right about the law.

Under RCW 9A.56.020(1)(b), providing for what is known as theft by deception, "'Theft' means . . . [b]y color or aid of deception *to obtain control over the property or services of another or the value thereof*, with intent to deprive him or her of such

property or services." (Emphasis added.) "In deception cases, the statute looks only to the value of the property obtained, not the net result of the exchange." *State v. George*, 161 Wn.2d 203, 209, 164 P.3d 506 (2007).

In *George*, a father and son placed an advertisement for the sale of a pickup truck that fraudulently misrepresented the mileage, condition, and history of a truck they purchased for $1,800. *Id.* at 206. An undercover police officer handed the pair a cashier's check for the asking price of $5,500 and then arrested both. *Id.* The State charged them with first degree theft by deception and both were found guilty and convicted. *Id.* at 206-07. In affirming the Court of Appeals, which had affirmed the conviction, the Supreme Court discussed the singular importance of the value of the property or services the thief obtains from the victim:

> For purposes of a criminal charge, *there is no difference between a thief who, through deception or fraud, hands over something in exchange for the victim's property and a thief who surrenders nothing.* The legislature could have defined value in the context of a sale as the difference between what was obtained and what was given up, but it has not.

Id. at 213 (emphasis added); *see also State v. Farnworth*, 199 Wn. App. 185, 208, 398 P.3d 1172 (2017) ("[T]he value of property, for purposes of the theft statute, is the total value of the property relinquished by the victim regardless of whether the victim received some offsetting value in exchange.").

The decision in *Lee* on which Mr. Williams relies is, nonetheless, analogous to the facts of his case in many respects. In *Lee*, the defendant agreed to purchase a residence.

Before the closing date, he performed extensive repairs and improvements and then signed an agreement with the Red Cross making the residence immediately available as emergency housing for a 30-day period. *Lee*, 128 Wn.2d at 153-54. This was without any agreement by the owner of the property that Mr. Lee could have early possession of the residence to perform improvements or for any other purpose. *Id.* The owner of the residence learned of the situation and objected, but after Mr. Lee failed to attend the closing, the owner sold the residence to the emergency tenants. *Id.* at 154. Mr. Lee's conviction of second degree theft was reversed by the Washington Supreme Court, which held that the State had failed to present sufficient evidence that any victim had actually lost $250[3] or more. *Id.* at 163-64.

We might struggle with distinguishing *Lee* if the Supreme Court had not sharply limited its application itself, in *George*. It described *Lee* as "an unusual case" in which the relevant parties each received "exactly" what they were expecting or had contracted for. *George*, 161 Wn.2d at 212-13. The Supreme Court clarified that in *Lee*, it "did not, and had no occasion to, reach whether an offset was appropriate." *Id.*

Ms. Ironbear and Ms. Gillette did not receive "exactly" what Ms. Ironbear had contracted for. Rather than Ms. Ironbear having a secure, lawful residence, she and her

[3] At the time *Lee* was decided, RCW 9A.56.040 defined second degree theft as theft of property or services which exceeds $250 in value. *See* S.B. 6167, 60th Leg., Reg. Sess. (Wash. 2009).

mother learned within a matter of weeks that Ms. Ironbear's "landlord" was a trespasser. Ms. Ironbear moved out several months later. Since it is the $1,800 that Mr. Williams obtained through deception that is the relevant "value" for purposes of the charge of second degree theft, the State's evidence was sufficient.

The trial court's Faretta *colloquy was adequate*

Mr. Williams next contends that the trial court's *Faretta* colloquy was inadequate.

A defendant who has been found competent to stand trial may ask to represent himself or herself. *See In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011). Self-representation is a constitutional right, implicit in the Sixth Amendment right to counsel and explicitly guaranteed by article I, section 22 of the Washington Constitution. *Faretta*, 422 U.S. at 818-32; *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

A waiver of the defendant's right to counsel "must be not only voluntary, but knowing and intelligent," however. *Rhome*, 172 Wn.2d at 667. A thorough colloquy on the record about the dangers and disadvantages of self-representation is the preferred method of ensuring an intelligent waiver of the right to counsel. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

"A waiver determination is an ad hoc determination that rests on a judge's evaluation of a defendant's conduct, background, and experience." *Rhome*, 172 Wn.2d at 667-68. We review such a decision for an abuse of discretion, reversing only when the

decision was manifestly unreasonable, reached by applying the wrong legal standard, or based on facts not supported by the record. *Id.* at 668. "Because the trial court has the opportunity to observe a defendant's demeanor and nonverbal conduct, appellate courts owe considerable deference to a trial court's finding in this regard." *State v. Floyd*, 178 Wn. App. 402, 410, 316 P.3d 1091 (2013).

The trial court's discussions of self-representation with Mr. Williams were extensive, but he asserts two shortcomings. The first is that the trial court "failed to inform [him] that technical rules exist which would bind him in the presentation of his case and failed to assure that [he] understood the risks of self-representation." Br. of Appellant at 1. The second is that the trial court "failed to inform [him] of the maximum penalties he faced upon conviction or of the nature and classification of theft in the second degree." *Id.*

Our Supreme Court's decision in *Acrey* is frequently cited for its statement that a court's colloquy with a defendant "at a minimum, should consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case." 103 Wn.2d at 211. Yet the "minimum" it identifies is in the context of holding that a colloquy is "the *preferred means* of assuring that defendants understand the risks of self-representation" and conveying the court's "strong[ ] *recommend*[*ation*]" of a colloquy as the "*most efficient means* of limiting appeals." *Id.* (emphasis added). Absent

a colloquy, *Acrey* holds that the court will still "look at any evidence on the record that show defendant's actual awareness of the risks." *Id.*

Before allowing Mr. Williams to represent himself below, the trial court asked if Mr. Williams was familiar with the rules of evidence and the Revised Code of Washington, and he answered that he was. He was told he would be held to the same standards as an attorney, which Mr. Williams said he "absolutely" understood. RP (Dec. 28, 2015) at 5. Mr. Williams claimed to have taken college courses in criminal law and business law.

At the time Mr. Williams sought to represent himself, the trial court informed him that residential burglary, the only crime with which he was charged at the time, is a class B felony, subject to a maximum of 10 years' incarceration and a fine not to exceed $20,000. RP (Dec. 28, 2015) at 7. It is true that the trial court did not repeat the *Faretta* colloquy almost seven weeks later, when the State moved to amend the information to add the second degree theft charge, so Mr. Williams was not apprised of the maximum penalty upon conviction for that charge. But a second colloquy was not required. *See State v. Modica*, 136 Wn. App. 434, 445-46, 149 P.3d 446 (2006), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008) ("The trial court was not required to sua sponte engage Modica in a second full colloquy in which it informed him of the new charge's maximum penalty."). Mr. Williams had already waived his right to counsel and had been representing himself at the time the State amended the charges. "[A] valid waiver of the right to assistance of

counsel generally continues throughout the criminal proceedings, unless the circumstances suggest that the waiver was limited." *Id.* at 445 (citing *Arnold v. United States*, 414 F.2d 1056, 1059 (9th Cir. 1969)).

In addition, the record reveals that Mr. Williams pleaded guilty only a year earlier to four counts of second degree theft committed in 2013, providing evidence that even without a further colloquy, he had an appreciation for the risk presented by the single second degree theft charge added by amendment.

Considering the extent of the colloquy and giving the appropriate deference to the trial court's finding, we find no abuse of discretion by the trial court in allowing Mr. Williams to represent himself.

The trial court did not abuse its discretion in refusing to instruct the jury on abandonment

Mr. Williams argues that the trial court's refusal to instruct the jury on abandonment prevented him from arguing his theory of defense to the residential burglary charges. We review a trial court's refusal to give a requested jury instruction de novo when the refusal is based on a ruling of law. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007).

Under RCW 9A.52.090, it is a defense to *criminal trespass in the first degree* that a building involved was abandoned. RCW 9A.52.090(1), .070. The legislature has not identified abandonment as a defense to residential burglary. This court has repeatedly

held that the jury need not be instructed on abandonment as a defense to residential burglary. *State v. Olson*, 182 Wn. App. 362, 377, 329 P.3d 121 (2014); *State v. Jensen*, 149 Wn. App. 393, 399-400, 203 P.3d 393 (2009); *State v. Ponce*, 166 Wn. App. 409, 269 P.3d 408 (2012).

Mr. Williams nonetheless argues that this court's opinion in *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005) supports his right to have the jury instructed on abandonment as a defense to residential burglary. For reasons explained in *Ponce* and *State v. Cordero*, 170 Wn. App. 351, 284 P.3d 773 (2012), Mr. Williams reads too much into *J.P.* In that case, the court recognized the holding of *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) that statutory defenses to criminal trespass that negate the element of unlawfully entering or remaining at premises are not affirmative defenses. Instead, "once a defendant has offered some evidence that his or her entry was permissible . . . the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter." *Id.*

The trial court's instructions were sufficient for Mr. Williams to argue any defense that would negate the element of unlawfully entering or remaining in the Kennewick residences. In the to-convict instruction for residential burglary regarding 523 N. Ely, the trial court instructed the jury that to convict Mr. Williams the State must prove the following elements beyond a reasonable doubt:

> (1) That on or about the time from September 15, 2015 to October 5, 2015, *the defendant entered or remained unlawfully in a dwelling*;
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
> (3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 59 (emphasis added). Jury instruction 10 further instructed the jury that "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." *Id.* at 61. There was no error.

The trial court did not err in admitting Mr. Williams's prior convictions

Mr. Williams next argues the trial court erred when it admitted evidence of his prior convictions without articulating the purpose of their admission and conducting the balancing required by ER 404(b).

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show conformity therewith. *See State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Alongside this general prohibition, ER 404(b) provides examples of proper purposes for which such evidence may be admissible, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

The analytical approach used to determine the admissibility of a person's prior crimes, wrongs, or acts under ER 404(b) is well settled. The trial court must "'(1) find

by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The party seeking to introduce the evidence has the burden of establishing the first three elements. *Gresham*, 173 Wn.2d at 421.

The trial court is supposed to conduct its analysis on the record. *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231 (2010). "But where the trial court fails to conduct an ER 404(b) analysis on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial." *Id.* at 196.

Here, the first order of business on the morning trial began was argument of the parties' motions in limine. One of the first addressed by the State was its desire to offer evidence of Mr. Williams's four prior second degree theft convictions for rekeying and renting other peoples' unoccupied homes. It argued the prior convictions involved the same scheme and plan as the current offense conduct, and "go[ ] to his knowledge he was doing something illegal and his intent to deceive the victims." RP (Feb. 16, 2016) at 5.

Asked to respond, Mr. Williams did not disagree with the prosecutor's description of the offense conduct involved in the four crimes; he objected solely on the basis that

"Corey J. Williams" was convicted of the crimes, not Corey J. Pugh. Without conducting the balancing analysis on the record, the trial court stated it would allow the evidence. Mr. Williams made no further objection.

The trial court erred by failing to conduct the balancing analysis on the record, but the error was harmless. At issue were convictions, so there was no question the conduct occurred. The State articulated permitted purposes for which the evidence would be offered. There was substantial similarity between Mr. Williams's prior criminal acts and the acts for which he was being charged. There is no reasonable probability that the trial court's failure to weigh probative value against prejudice on the record materially affected the outcome of the trial.

The trial court did not exceed its sentencing authority by ordering restitution

Mr. Williams next contends the trial court exceeded its authority by ordering him to pay $1,800 restitution to Ms. Gillette, arguing that her deposit and rent payment did not go to waste. Mr. Williams's only objection to the restitution at the time of sentencing was that he was a "secured party" on the Ely Street property. RP (Jan. 28, 2016;) at 26.

Under RCW 9.94A.753(5), restitution "shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property," unless extraordinary circumstances make restitution inappropriate. RCW 9.94A.753(5) requires a sufficient causal connection between the crime with which an

offender is charged and convicted, and the injuries for which restitution is sought. We review a trial court's award of restitution for abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

When Ms. Gillette paid Mr. Williams $1,800 she did not receive, in exchange, the secure and lawful housing for her daughter that she bargained for. Instead, she paid $1,800 to someone the jury found to be a residential burglar. The trial court did not abuse its discretion.

We accede to the State's request that we strike the $357.56 in discretionary legal financial obligations (LFOs) rather than address Mr. Williams's Blazina[4] *challenge*

Mr. Williams next argues that the trial court failed to make an individualized inquiry into his present and future ability to pay before it imposed discretionary LFOs.

The State agrees to strike the three fees that it concedes are discretionary: the sheriff's service fee, jury demand fee, and witness fee, which total $357.56. We accede to its request and will remand with directions to strike these discretionary LFOs.

Mr. Williams's argument that the criminal filing fee is discretionary has been rejected

Finally, Mr. Williams argues that the trial court erred when it imposed the criminal filing fee, which he contends is discretionary, without conducting a *Blazina* inquiry. The criminal filing fee is mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755

[4] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

(2013); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *State v. Gonzales*, 198 Wn. App. 151, 153, 392 P.3d 1158, *review denied*, 188 Wn.2d 1022, 398 P.3d 1140 (2017).

We remand with directions to strike the three discretionary LFOs but otherwise affirm the judgment and sentence.[5]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, A.C.J.

Fearing, J

[5] Mr. Williams makes an assignment of error to cumulative error, which, having found no error, we need not address.

APPENDIX B

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COREY JAVON WILLIAMS, Appellant.	)	No. 34171-2-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 3, 2018, is hereby denied.

PANEL: Judges Siddoway, Pennell, Fearing

FOR THE COURT:

Lawrence-Berrey C.J.

ROBERT E. LAWRENCE-BERREY
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

July 13, 2018 - 11:46 AM

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