

NO. 43036-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GERARDO MARIN-ANDRES,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Substantive Facts</u>	2
a. <u>Spencer/Kline Street Southwest Incident</u>	2
b. <u>Menza/90th Street South Incident</u>	3
c. <u>Kraut/78th Avenue Court East Incident</u>	4
d. <u>Investigation</u>	5
e. <u>Marin-Andres' Statements</u>	6
2. <u>Procedural History</u>	7
C. <u>ARGUMENT</u>	10
1. THE CONVICTION FOR FIRST DEGREE BURGLARY MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT MARIN-ANDRES OR AN ACCOMPLICE WAS "ARMED" DURING OR IN THE IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOUSE.	10
2. THE FIREARM ENHANCEMENT FOR FIRST DEGREE BURGLARY MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT MARIN-ANDRES OR AN ACCOMPLICE WAS "ARMED" DURING OR IN THE IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOUSE.	15

TABLE OF CONTENTS (CONT'D)

	Page
3. MARIN-ANDRES' CONVICTIONS FOR FIRST DEGREE THEFT AND THEFT OF A FIREARM FOR THE KRAUT INCIDENT CONSTITUTE THE SAME CRIMINAL CONDUCT AND THEREFORE HE IS ENTITLED TO BE RESENTENCED BASED ON A LOWER OFFENDER SCORE.	16
4. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL OBLIGATIONS WITHOUT MAKING A FINDING THAT MARIN-ANDRES HAD THE PRESENT OR FUTURE ABILITY TO PAY.....	18
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Baldwin</u> 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991)	18, 19
<u>State v. Bertrand</u> 165 Wn. App. 393, 267 P.3d 511 (2011).....	18, 19, 20
<u>State v. Brown</u> 162 Wn.2d 422, 173 P.3d 245 (2007).....	13, 15
<u>State v. Dolen</u> 83 Wn. App. 361, 921 P.2d 590 (1996) <u>review denied</u> , 131 Wn.2d 1006 (1997)	16
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	19
<u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	19
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	4, 6, 11
<u>State v. Gurske</u> 155 Wn.2d 134, 118 P.3d 333 (2005).....	12, 16
<u>State v. Haddock</u> 141 Wn.2d 103, 3 P.3d 733 (2000).....	17
<u>State v. Hall</u> 46 Wn. App. 689, 732 P.2d 524 (1987)	12
<u>State v. Johnson</u> 94 Wn. App. 882, 974 P.2d 855 (1999) <u>review denied</u> , 139 Wn.2d 1028 (2000)	12
<u>State v. Sabala</u> 44 Wn. App. 444, 723 P.2d 5 (1986)	12, 15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Schelin</u> 147 Wn.2d 562, 55 P.3d 632 (2002).....	12
<u>State v. Valdobinos</u> 122 Wn.2d 270, 858 P.2d 199 (1993).....	15
<u>State v. Williams</u> 135 Wn.2d 365, 957 P.2d 216 (1998).....	16
<u>State v. Willis</u> 153 Wn.2d 366, 103 P.3d 1213 (2005).....	12
 <u>FEDERAL CASES</u>	
<u>Jackson v. Virginia</u> 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)	11
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A.589.....	16
RCW 9A.52.020.....	11

A. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Marin-Andres of first-degree burglary where there was insufficient evidence of all essential elements.

2. The trial court erred by sentencing Marin-Andres to a firearm enhancement where there was insufficient evidence to prove that Marin-Andres or an accomplice was “armed” during the commission of or in immediate flight from the crime.

3. The trial court erred by failing to treat Marin-Andres’ convictions for first-degree theft and theft of a firearm as the same criminal conduct.

4. The trial court erred by imposing legal financial obligations without making a finding that Marin-Andres had the present or future ability to pay.

Issues Pertaining to Assignments of Error

1. Whether the conviction for first-degree burglary must be reversed when there was insufficient evidence to prove that Marin-Andres or an accomplice was “armed” during or in the immediate flight from the burglary at Menza’s house.

2. Whether the firearm enhancement for first-degree burglary must be reversed when there was insufficient evidence to

prove that Marin-Andres or an accomplice was “armed” during or in the immediate flight from the burglary at Menza’s house.

3. Whether the trial court erred by failing to count Marin-Andres’ convictions for first-degree theft and theft of a firearm for the Kraut incident as the same criminal conduct.

4. Whether the trial court erred by imposing legal financial obligations without making a finding that Marin-Andres had the present or future ability to pay.

B. STATEMENT OF THE CASE

1. Substantive Facts

a. Spencer/Kline Street Southwest Incident

Sara Spencer testified that her home on the 109-block of Kline Street Southwest in Lakewood, Washington, was burglarized on the morning of June 8, 2009, while she was at work and her son was at school. 3RP 190-91. The burglars broke through her front door and rifled through her closets and drawers. 3RP 193. They left with a digital camera, several DVD movies, a laptop computer, Wii and V.Smile electronic game systems, game cartridges and discs for the systems, and other miscellaneous personal items. 3RP 196-198.

That same morning, school bus driver Susan Pernell observed a dark-colored SUV stopped improperly at an intersection outside Spencer's house. 3RP 224. There were two men inside. 3RP 226. She saw three other men exit the house and load things in the car, which she found suspicious enough to make a note of the license plate number and mention it to Spencer's neighbor. 3RP 227-228.

b. Menza/90th Street South Incident

Iolani Menza testified that in the morning of June 8, his home on the 300-block of 90th Street South in Lakewood was burglarized while he and his son were at a restaurant having breakfast. 8RP 765-66. The front door appeared to have been kicked in, and certain areas of the house had been ransacked. 8RP 768. The burglars left with a vintage ukulele, a Wii electronic game system and games, a Coach purse, a camera, a cell phone, a computer CPU tower, and several other small items. 8RP 772-773, 775-776, 778. The burglars also took an unloaded 20-gauge shotgun that Menza stored in a green soft-sided case underneath his mattress. 8RP 779.

c. Kraut/78th Avenue Court East Incident

Joseph Kraut, a Washington State Patrol Trooper, testified that his home at 78th Avenue Court East cul-de-sac in Graham, Washington was burglarized while he was on vacation. 6RP 469. Neighbors reported the break-in to the Kraut home around noon on June 9, 2009. 5RP 376-77. The burglars appeared to have entered the home by breaking through exterior and interior garage doors. 6RP 472. The burglars ransacked the home, and apparently dumped pet food over the floors and discharged pepper spray. 5RP 376. The burglars took jewelry, an autographed Green Bay Packers jacket, and baseball cards. 6RP 493, 673.

The burglars also took a large locked safe, which had been hidden under some blankets and pillows in the master bedroom. 6RP 673. The safe contained jewelry, Kraut's social security card, a taser, a stamp collection, and several firearms, including Kraut's .40 caliber duty revolver, a .357 caliber revolver, a 9mm Beretta, a .357 Ruger, a .22 Ruger and a .25 caliber pistol. 6RP 673-76. The safe was secured with both a key lock and combination lock. 6RP 473. All firearms in the home were secured in the safe. 6RP 500.

Kraut's neighbors noticed two suspicious cars in the cul-de-sac that day; a dark colored SUV and a tan or beige colored sedan.

5RP 352, 357, 372, 394, 396. One neighbor saw two of the men approach Kraut's front door and knock. 5RP 398. The men then hopped over Kraut's fence and went into his yard. 5RP 400. Another neighbor later identified Gerardo Marin-Andres from a photo array as the driver of the SUV. 6RP 509.

d. Investigation

Police located the SUV with the reported license, which was registered to Marin-Andres' mother. 5RP 303-4, 305. Police located it at the home Marin-Andres shared with his parents. 5RP 305. Police records showed that Marin-Andres was driving that SUV when he was recently stopped and cited. 5RP 304. When police surrounded the house, Marin-Andres voluntarily exited the home and spoke with them. 5RP 312. Before advising him of his rights, the officers asked Marin-Andres if he knew why they were there — Marin-Andres responded that he thought it was in connection with the firearms stolen the day a house in Graham. 6RP 628.

Police obtained a search warrant for Marin-Andres' home, and discovered a computer CPU, a laptop computer, and shotgun shells. 6RP 518, 547-48.

Based on information provided by Marin-Andres, police also executed a search warrant at a trailer in Auburn, and found a Green Bay Packers jacket, a taser and several firearms, including a 20-gauge shotgun in a green nylon case. 6RP 534, 536-37, 620. At the time of the search, Griego Smith Escalante, Nelson Hernandez, Enrique Rivera and Gregoria Andres were present. 6RP 533, 535, 600-601.

Police also went to B&I Coin Shop in Lakewood, and learned that on June 9, 2009, Marin-Andres, and three others sold several pieces of jewelry matching those taken from Kraut. 6RP 566-69.

e. Marin-Andres' Statements

In a formal police interview, Marin-Andres told police that his cousin, Gregoria Andres, had asked him to drive Andres and some friends to three burglaries. 6RP 584, 7RP 644-45, 667. He said that Andres, Nelson Hernandez, Enrique Rivera and Smith Escalante had burglarized the homes. 6RP 586-87. Andres picked the neighborhood and he and his friends knocked on doors until they found a vacant house, then kicked in the door and entered. 7RP 667, 676. Marin-Andres' only role was as driver—he never entered any of the houses. 7RP 644, 668. Marin-Andres admitted he was present when the jewelry was pawned. 6RP 584, 7RP 710.

2. Procedural History

The State eventually charged Marin-Andres with 12 crimes in connection with the three burglaries.¹

COUNT	CRIME CHARGED	INCIDENT	TRIAL COUNT
1	First Degree Burglary	Menza	1
2	Residential Burglary	Menza	2
3	First Degree Burglary	Kraut	3
4	Trafficking in Stolen Property	Kraut	4
11	First Degree Theft	Menza	5
12	Residential Burglary	Spencer	6
13	Second Degree Theft	Spencer	7
14	Theft of a Firearm	Menza	8
15	Theft of a Firearm (40-cal. Handgun)	Kraut	9
16	Theft of a Firearm (357 Handgun)	Kraut	10
17	Theft of a Firearm (9mm Handgun)	Kraut	11
18	First Degree Theft	Kraut	12

¹ Initially, Marin-Andres entered into a plea agreement with the State in exchange for his cooperation with the prosecution. 2/11/11 RP 1-12. He successfully moved to withdraw his plea based on ineffective assistance of counsel. 3/11/11 RP 51-53. The Prosecution then amended the charges against him in anticipation of trial. CP 59-64.

CP 59-64.² For counts 1 and 3, the State alleged that Marin-Andres or an accomplice was armed with a firearm during or in flight from the crime, elevating the crime to first-degree burglary and subjecting him to a firearm enhancement. CP 59-60. At his own request, Marin-Andres represented himself at trial with standby counsel. RP 6/21/11 2, 9.

After the State rested, Marin-Andres moved to dismiss the firearm enhancements, arguing that a burglar is not “armed” for purposes of a firearm enhancement unless the State proves that the firearm is more than simply “loot.” 8RP 792. Marin-Andres also moved to dismiss both counts of first degree burglary, arguing that the State had failed to prove he or an accomplice was “armed” during the commission of the crimes where the only guns present were those belonging to the homeowners because there was an insufficient nexus between the stolen firearms and the crimes. 8RP 792. The trial court denied the motions to dismiss, ruling that the evidence was sufficient to submit the charges and special verdict forms to the jury. 8RP 823.

² The Court re-numbered the counts for the jury at trial to avoid the numbering gap; therefore, the trial numbering is also reflected above.

The jury found Marin-Andres guilty of all counts except count 3 (first degree burglary of Kraut home). 9RP 890. The jury returned a special verdict finding Marin-Andres or an accomplice was armed with a firearm in the commission of count 1. 9RP 890.

At sentencing, the State conceded that count 2, residential burglary, merged with count 1, first-degree burglary. 9RP 11/23/11 4; 9RP 1/13/12 9. However, the parties disputed the correct offender score. The defense argued that the first degree theft and theft of a firearm convictions for the Menza home were the same criminal conduct, as were the first degree theft and three theft of a firearm convictions for the Kraut home. 9RP 11/23/11 7. The defense also argued that the court should exercise its discretion to find that the theft convictions for all three homes were the same criminal conduct as the burglary convictions. 9RP 1/13/12 13-14. The defense argued the correct offender scores would be 5 for the burglary convictions and 3 for the rest. 9RP 1/13/12 13-14.

The court found that the three convictions for theft of a firearm from the Kraut residence were the same criminal conduct. 9RP 1/13/12 18, 26, 27. The court also found that the first degree theft and theft of a firearm convictions for the Menza home were the same criminal conduct. 9RP 1/13/12 25.

However, the court found that the theft and theft of a firearm convictions did not merge for sentencing purposes because some of the property stolen (jewelry) had a different victim from the firearm convictions, namely Mrs. Kraut. 9RP 1/13/12 17. The court also declined to merge the theft convictions with the burglary for sentencing. 9RP 1/13/12 27.

The court found that Marin-Andres had an offender score of 9 for the burglary convictions and 7 for the others, and imposed a sentence at the low end of the standard-range, 87 months for the first degree burglary convictions, plus 60 months for the enhancement, with the rest concurrent. 9RP 1/13/12 35, CP 219. Without determining Marin-Andres' ability to pay, the court ordered \$2,800 in legal financial obligations. CP 221-222.

This appeal timely follows. CP 230.

C. ARGUMENT

1. THE CONVICTION FOR FIRST DEGREE BURGLARY MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT MARIN-ANDRES OR AN ACCOMPLICE WAS "ARMED" DURING OR IN THE IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOUSE.

The State charged Marin-Andres with first-degree burglary of the Menza house in count 1. CP 59. At the close of the State's case, Marin-Andres moved to dismiss the charge, as well as the

associated firearm enhancement. 8RP 792. These motions were denied. 8RP 822-23. Marin-Andres was then convicted by the jury of first-degree burglary for the Menza incident and he was given a firearm sentencing enhancement. 9RP 890, CP 222. The court erred in denying the motion to dismiss the first-degree burglary conviction and the conviction must be reversed and dismissed because there was insufficient evidence to prove all the essential elements of that crime.

Under the state and federal constitutions, a criminal conviction must be reversed where no rational trier of fact could have found that the State proved all of the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

An essential element of burglary in the first degree is that the defendant was armed with a deadly weapon during the commission of the burglary. RCW 9A.52.020(1)(a). A defendant is “armed with a deadly weapon” for the purposes of first degree burglary if a firearm is “easily accessible and readily available for use by the defendant for either offensive or defensive purposes.” State v.

_____, 46 Wn. App. 689, 695, 732 P.2d 524 (1987) (quoting State v. Sabala, 44 Wn. App. 444, 448, 723 P.2d 5 (1986)).

Furthermore, the State must show there is a “nexus” or link not only between the gun and the defendant, but also the gun and the crime itself. See State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005); State v. Schelin, 147 Wn.2d 562, 569-70, 55 P.3d 632 (2002). In determining if a nexus has been proved, the court: “should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).” Schelin, at 570.

The State must show more than just the mere presence of a gun in the place where illegal activity occurs. See State v. Johnson, 94 Wn. App. 882, 895-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). The Supreme Court has held that even where a defendant was in a car with drugs and a gun, but the State did not show that the defendant made any movement toward the gun, used it, or accessed it at the time he acquired or possessed the drugs, the State did not prove a sufficient “nexus” to show that he was “armed.” Gurske, 155 Wn.2d at 143.

In State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007), the Supreme Court further developed the “nexus” requirement. In Brown, the homeowner’s rifle was moved at some point during the burglary from the closet where it was normally stored to a bed, along with ammunition. 162 Wn.2d at 430-31. The defendants were interrupted during the burglary and fled without taking anything. Id., at 430-31. The Supreme Court reversed both the first-degree burglary conviction and its firearm enhancement, finding that there was insufficient evidence that Brown or an accomplice was “armed.” 162 Wn.2d at 432, 435.

The Court rejected the idea that a defendant is “armed” for the purposes of a first-degree burglary charge simply because a gun is among the items taken in the burglary or intended to be so taken. 162 Wn.2d at 432. Instead, there must be some evidence that the gun is handled by one of the perpetrators in such a way during the crime that would indicate “an intent or willingness to use it in furtherance of the crime.” 162 Wn.2d at 432.

There was no evidence that anyone used or handled the gun taken in the Menza burglary during that burglary or in “flight” therefrom in any way that might show an intent or willingness to use it in the burglary. The only evidence was that it was taken as “loot,”

along with other items from the home. Marin-Andres' statement to police shows that he lists the shotgun among the other items taken. 7RP 683. There is no evidence that it was removed from its case inside the house during the burglary.

There is also no evidence that it was accessible at all in the "flight" from the burglary. The "flight" was accomplished when Marin-Andres and the others drove from Menza's house to the Auburn trailer. There is no evidence that the shotgun was in the passenger compartment at all, rather than the trunk. There is no evidence that the shotgun had been removed from its case.

The actions of the participants after the burglary confirm that the rifle was, to them, no more than "valuable loot." After taking all of the property to Auburn, they looked for buyers for the guns and the other property taken. 7RP 684, 717. Most of the guns were sold. 7RP 719. However, they had apparently not yet found a buyer for the rifle before the search the next day and it was found, still in its soft case, under the trailer in Auburn. 6RP 536. The box of 20-gauge shotgun shells that was also taken from Menza's home had been left forgotten in Marin-Andres' SUV, rather than being stored with the rifle. 5RP 323. There is no evidence that the

shotgun was taken to Kraut's home when that was burglarized the next day.

As in Brown, the little evidence this record contains about the shotgun indicates that the participants regarded the gun as "nothing more than valuable property" to be taken and sold. See Brown, 162 Wn.2d at 432. There is no evidence in this record that the participants showed "an intent or willingness to use it in furtherance of the crime." See Brown, 162 Wn.2d at 432. Therefore, the State failed to prove by sufficient evidence that Marin-Andres or an accomplice was armed in the commission of the burglary and the first-degree burglary conviction must be reversed.

2. THE FIREARM ENHANCEMENT FOR FIRST DEGREE BURGLARY MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT MARIN-ANDRES OR AN ACCOMPLICE WAS "ARMED" DURING OR IN THE IMMEDIATE FLIGHT FROM THE BURGLARY AT MENZA'S HOUSE.

As noted above, the same definition of "armed" applies when determining whether a person is "armed" for the purposes of a deadly weapon or firearm sentence enhancement. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) (citing Sabala, 44 Wn. App. at 448); State v. Gurske, 155 Wn.2d 134, 138-

39, 118 P.3d 333 (2005). Consequently, the firearm enhancement imposed for the first degree burglary conviction must also be reversed because there is insufficient evidence that Marin-Andres or an accomplice was “armed” during the burglary when they stole the homeowner’s shotgun.

3. MARIN-ANDRES’ CONVICTIONS FOR FIRST DEGREE THEFT AND THEFT OF A FIREARM FOR THE KRAUT INCIDENT CONSTITUTE THE SAME CRIMINAL CONDUCT AND THEREFORE HE IS ENTITLED TO BE RESENTENCED BASED ON A LOWER OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), where a defendant is convicted of two or more crimes, current offenses are treated as prior convictions for determining the offender score, except where “the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.”

Multiple offenses encompass the same criminal conduct if they require the same objective criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a); State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997). The trial court’s determination of what constitutes the same criminal conduct is

reversed for an abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Here, Marin-Andres successfully argued that the convictions for theft in the first degree and theft of a firearm from the Menza house were the same criminal conduct. 9RP 11/23/11 7. However, the trial court erroneously rejected his identical argument that the first degree theft and theft of a firearm convictions from the Kraut house were also the same criminal conduct. 9RP 11/23/11 7; 9RP 1/13/12 17.

The trial court found that the offenses did take place in the same time and place. 9RP 1/13/12 17. However, the court found that there were different victims for the offenses because some of the stolen property for the first degree theft conviction was jewelry purchased by Mr. Kraut for his wife, while the firearms were deemed to be solely belonging to Mr. Kraut. 9RP 1/13/12 17.

There is no evidence to support the trial court's finding that the jewelry was exclusively the property of Mrs. Kraut and that the guns were exclusively the property of Mr. Kraut. As a married couple, all of their property was presumptively community property of both. The jewelry and guns were all stolen from the same place — the safe stored in their home. While Mrs. Kraut may have been

the one to use the jewelry and Mr. Kraut used the guns, that does not mean that they don't both own their community property. There is absolutely no reasonable distinction between these crimes by victim. Because the victim, time and place of the offenses was the same, the trial court erred by failing to count the first-degree theft and firearm convictions in counts 9-12 as the same criminal conduct. Marin-Andres is entitled to be re-sentenced with a lower offender score.

4. THE TRIAL COURT ERRED BY IMPOSING LEGAL FINANCIAL OBLIGATIONS WITHOUT MAKING A FINDING THAT MARIN-ANDRES HAD THE PRESENT OR FUTURE ABILITY TO PAY.

To enter a finding regarding ability to pay legal financial obligations (LFOs), a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)). This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04. This error may be raised for the first time on appeal. Bertrand, at 394.

While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12); see State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be challenged for the first time on appeal).

The trial court imposed \$2,800 in legal financial obligations on Marin-Andres, including \$2,000 in court-appointed attorney fees and defense costs, \$200 criminal filing fee, \$500 crime victim assessment, and \$100 DNA database fee. CP 220-21. As in Bertrand, the trial court here did not ever consider the defendant's financial resources in relation to the legal financial obligations, nor did the court make any findings. See 9RP 1/13/12 35. The record suggests that far from having a present or future ability to pay,

Marin-Andres had neither. The record shows that at the time of sentencing, Marin-Andres had already been found indigent and had been incarcerated for 947 days. 9RP 1/13/12 36. An order of indigency was entered for purposes of appeal. 9RP 1/13/12 36-37.

Accordingly, the court's order of legal financial obligations in the amount of \$2,800 is clearly erroneous and should be stricken. See Bertrand, 165 Wn. App. at 405. Before the State can collect LFOs in this case, moreover, there must be a properly supported, individualized judicial determination that Marin-Andres has the ability to pay.

D. CONCLUSION

Marin-Andres' first degree burglary conviction and the associated firearm enhancement must be reversed because there is insufficient evidence to prove that he or an accomplice was armed during the commission of the crime or in immediate flight therefrom.

In addition, the trial court erred at sentencing in failing to consider the theft of a firearm and first-degree theft convictions for the Kraut burglary as the same criminal conduct for purposes of calculating Marin-Andres' offender score and in imposing legal

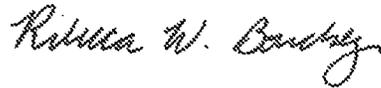
financial obligations without first considering whether Marin-Andres had the present or future ability to pay.

Therefore, this case must be remanded for the reversal of Marin-Andres' first degree burglary conviction and re-sentencing.

DATED this 18th day of July, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 43036-3-II
)	
GERARDO MARIN-ANDRES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF JULY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GERARDO MARIN-ANDRES
DOC NO. 355326
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P.O. BOX 777
MONROE, WA 98272

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x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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