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State of Washington
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COA NO. 49992-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREAN OMARUS BARNES,

Appellant.

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

The Honorable Erik Rohrer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE SUFFICIENCY OF EVIDENCE ISSUE SHOULD BE RELITIGATED IN THE INTERESTS OF JUSTICE BECAUSE BARNES SHOWS CONSTITUTIONAL ERROR AND THE PREVIOUS DECISION WAS CLEARLY ERRONEOUS.

The State contends the trial court was bound to follow the prior Court of Appeals decision and therefore did not err in denying the CrR 7.8 motion to vacate the burglary conviction. Brief of Respondent (BOR) at 8. The point is moot because the appeal is before this Court now, which does have the power to reconsider its prior decision on the sufficiency issue. Barnes used the CrR 7.8 motion as a procedural vehicle to relitigate the issue in a court that has authority to consider the claim on its merits. The trial court should have simply transferred the motion to the Court of Appeals as a personal restraint petition under CrR 7.8(c)(2).¹ The trial court's failure to follow proper procedure should not be held against Barnes.

This Court rejected previous insufficient evidence arguments but has never expressly addressed the merits of the issue in relation to

¹ CrR 7.8(c)(2) provides "The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing."

landlord-tenant law. Barnes argued landlord-tenant law in his pro se collateral attack in No. 47611-8-II, but this Court treated the argument as a rehash of a previous argument on appeal that he had permission to enter the residence and held it was procedurally barred. State v. Barnes, noted at 195 Wn. App. 1008, 2016 WL 3965889 at *4, review denied, 186 Wn.2d 1030, 385 P.3d 108 (2016). The two arguments, however, are different. Argument based on landlord-tenant law presumes Barnes did not have Johnson's permission to be in the residence but that it doesn't matter because Barnes was still in lawful possession of the residence as a tenant whose tenancy rights had never been legally terminated.

The State claims Barnes cannot establish the previous decision was clearly erroneous because his claim regarding his legal right to live at the residence is a "speculative legal conclusion." BOR at 12. Barnes disagrees. There is nothing speculative about his argument. He applies the facts to the law, including landlord-tenant law and its relationship to the unlawful entry element of burglary.

The State argues the evidence shows Barnes voluntarily abandoned the premises and therefore lost his tenancy rights. BOR at 15-16. It points to Johnson's testimony that Barnes was "the one that chose to leave and go elsewhere." BOR at 15; RP 311. But this isolated comment must be viewed in context. Near the beginning of August, Johnson told Barnes

that he needed to leave. RP 310-311. In Johnson's mind, then, Barnes chose to leave after being told he needed to leave. From an objective standpoint, being told by your landlord that you need to leave and temporarily acquiescing to that demand is not voluntary abandonment of the premises under the law.

"Abandonment involves a voluntary leaving of property with no intention to return and claim or possess it." Koenig v. Hansen, 39 Wn.2d 506, 512, 236 P.2d 771 (1951). The evidence does not show Barnes voluntarily abandoned the premises. Johnson told Barnes that "he was not allowed to come back if I wasn't here." RP 312. Even so, Barnes re-entered the premises later that month on three separate occasions (Aug. 13, 15, 19), showing he did not abandon his tenancy interest. RP 312-13, 315-16. He still had his possessions on the premises. RP 307. He did his laundry there. RP 313. The fact that Johnson viewed himself as being in possession of the premises after telling Barnes he needed to leave does not defeat Barnes's tenancy rights. "[O]ne may have a right to the possession as against another who has the possession, as in the simple case of one who has been ousted from the land by another." Kessler v. Nielsen, 3 Wn. App. 120, 126, 472 P.2d 616 (1970) (quoting 1 H. Tiffany, Real Property § 20 (B. Jones 3d ed. 1939)).

The State further argues only a three-day notice was required under the unlawful detainer statute because Barnes failed to pay rent. BOR at 16. This contention does not help the State's argument because Johnson never gave a written three-day notice as required by the statute. RCW 59.12.030(3). Johnson only had a conversation with Barnes; nothing was put in writing. RP 311-12.

More than that, to lawfully terminate Barnes's tenancy rights for failure to pay rent, Johnson needed to initiate an unlawful detainer action to resolve the issue of possessory rights. RCW 59.18.180(2). Johnson never did so, leaving Barnes's tenancy rights intact. "An unlawful detainer action is a statutorily created proceeding that provides an expedited method of resolving the right to possession of property." Christensen v. Ellsworth, 162 Wn.2d 365, 370-71, 173 P.3d 228 (2007). The three-day written notice required by the unlawful detainer statute must notify the tenant to either pay the rent or "surrender . . . the detained premises." RCW 59.12.030(3). An unlawful detainer action is a recognized legal method of evicting tenants who do not pay their rent. Bar K Land Co. v. Webb, 72 Wn. App. 380, 383, 864 P.2d 435 (1993). In this context, "[t]he purpose of the notice is to provide the tenant with 'at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.'" Christensen, 162 Wn.2d at 371

(quoting Hous. Auth. v. Terry, 114 Wn.2d 558, 569, 789 P.2d 745 (1990)). By statute, a tenant does not forfeit a lease for failure to pay rent unless and until the required notice is given and the landlord prevails in an unlawful detainer action. Because Barnes's tenancy rights were never legally extinguished, Barnes did not unlawfully enter the premises on August 15. The evidence is therefore insufficient to prove the unlawful entry element of burglary.

The State says Barnes cannot establish actual and substantial prejudice. BOR at 13. If this Court reaches the merits of the argument and holds the evidence is insufficient to convict, Barnes need establish nothing more to secure relief. Insufficient evidence to convict is a constitutional error that satisfies the prejudice standard in the collateral attack context. See In re Pers. Restraint of Martinez, 171 Wn.2d 354, 363, 369, 256 P.3d 277 (2011) (granting PRP and vacating burglary conviction based on insufficient evidence under actual and substantial prejudice standard); In re Pers. Restraint of Crow, 187 Wn. App. 414, 424-25, 349 P.3d 902 (2015) (insufficient evidence for aggravator established actual and substantial prejudice).

B. CONCLUSION

For the reasons stated above and in the opening brief, Barnes requests vacature of the burglary conviction.

DATED this 22nd day of January 2018

Respectfully Submitted,

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