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NO. 51277-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JENNIFER BROCKETT,

Appellant.

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

The Honorable Gary Bashor, Judge  
The Honorable Stephen Warning, Judge  
The Honorable Michael Evans, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Jennifer Brockett was denied her right to effective assistance of counsel where defense counsel failed to raise the defense of voluntary intoxication.

2. The trial court violated Brockett's right to present a defense where it excluded her mother Christine Brockett's testimony regarding Brockett's character and reputation for fearfulness.

3. Evidence at trial was insufficient to support a conviction for residential burglary where the garage she entered was connected to the residence only by a breezeway.

Issues Pertaining to Assignments of Error.

1. Brockett was charged with residential burglary, vehicle prowling, theft, and identity theft. The evidence revealed she was in an alcohol blackout at the time of the incident. Her attorney failed, however, to request an intoxication instruction, which would have permitted counsel to argue, and jurors to consider, whether alcohol interfered with her ability to form the requisite intent for the charged crimes. Was Brockett denied her constitutional right to effective representation?

2. Defense counsel sought to present testimony from Brockett's mother, Christine Brockett, that Brockett commonly reacted to stressful situations with paranoia and fear. The trial court concluded the

testimony may have been relevant, but then excluded it. Where the testimony was relevant to the critical contested issues of Brockett's credibility and mental state, was Brockett denied her constitutional right to present a defense?

3. Residential Burglary requires unlawful entry into a "dwelling," defined to include "a portion" of a building used by a person for lodging. Brockett entered a garage, not used by anyone for lodging, connected to a residential home by an exposed breezeway with separately secured doors to the outside on either side. Did the State fail to prove Brockett unlawfully entered a "dwelling"?

B. STATEMENT OF THE CASE

1. Initial Charges & Pleas

The Cowlitz County Prosecutor charged Brockett with the following: residential burglary (count I), second degree theft (count II), second degree vehicle prowling (count III), and second degree identity theft (count IV). CP 21-22. The State alleged Brockett entered or remained unlawfully in a garage attached to the residence of Jack Owens, and took various items of property from the garage and from a vehicle parked inside the garage. CP 46-47.

Brockett pled not guilty to all four charges. RP 51-52.

## 2. Trial Evidence

During the jury trial, the State presented testimony of the homeowner, two police officers, and a forensic scientist who compared blood found in the garage with a DNA sample taken from Brockett. The State also presented various photographs of the garage and home. The defense presented Brockett's testimony and that of her mother, Christine Brockett.

Brockett testified that on May 2, 2015, she and her boyfriend had been drinking and argued at a casino. RP 208. They departed and while driving, he slapped her. RP 208. Brockett also described this experience as a "domestic altercation." RP 208. Her boyfriend then pulled the vehicle over on Ocean Beach Highway, she and her boyfriend got out, and they each began walking in opposite directions. RP 208. He walked toward Miller's Market (a 24-hour market), and she "staggered" out of the vehicle headed toward a residential neighborhood. RP 209, 222. She was "very intoxicated and a little out of control," had no specific plan upon exiting the vehicle other than to get away from her boyfriend, and left her shoes in the vehicle. RP 209-10, 233.

After walking for some time, she fell and cut her toe open almost to the bone. RP 210. She then grew to feel afraid, unsafe, and "out of [her] element" because it was "really late at night," she was injured and bleeding,

and she was alone in “not a very good neighborhood” where she had previously seen “perverts” and “creepy people.” RP 209-10, 221-22. Given her surroundings, her recent experience with her boyfriend, and her bloody injury, she suddenly felt “desolate and desperate” and “completely helpless.” RP 209-10, 222, 233-34. She saw lights on at a house (later determined to be the residence of Jack Owens) and knocked on the door. RP 210, 233, 236. At this point, her intention was to seek assistance for her injury and to ask to use the phone in order to call her parents to come pick her up. RP 211.

When no one answered the door, she entered the garage through the side “man door.” RP 234. She testified that her intent was to seek “refuge” and see if there was a first aid kit in the garage that she could use to bandage her toe, not to commit any crime inside. RP 210-11, 217, 234. She then blacked out due to her extreme intoxication. RP 211. She described herself as having a “diminished memory” of the events that followed because she was “plastered” and “intoxicated.” RP 229. She awoke to find herself sitting in the driver’s seat of the vehicle in the garage with blood on the car floor. RP 211. By this point, she had sobered up enough to realize she should not be in a stranger’s garage. RP 211. She pressed the garage door button on the visor of the car, exited the garage through the main car door, and left the garage car door up. RP 211-12. She then walked to a friend’s

house. RP 212. Brockett testified she did not take any items from the garage or vehicle. RP 212.

Owens testified he awoke the next morning to find the garage car door partly up, blood in and around his vehicle, particularly on the driver's side floor board, and various items missing including several tools that had been hanging on the wall of the garage, his bicycle, a backpack, and three items from inside the vehicle: a twenty-pound pop-up tent, a five-pound folding chair, and his wallet containing his credit cards and driver's license. RP 64-65, 67-68. The stereo from the vehicle was also ripped out of the dashboard and was resting on the seat, but the stereo faceplate was missing. RP 68. He immediately called police. RP 66. He testified the total value of all the missing items was around \$800. RP 69.

Detective Brandon McNew, a patrol officer at the time of the incident, testified that he arrived in response to Owens' call later that day. RP 92-93. McNew took down a report of the missing items and photographed notable locations inside and outside the garage. RP 94-102, 110. McNew also took a sample of the blood and sent it to the crime lab for testing. RP 108. He later arrested Brockett, obtained a DNA buccal swab from her, and sent the swab to the lab for comparison with the blood sample. RP 110, 130.

Forensic scientist Lauren Kelly testified that the DNA profiles from the blood and Brockett's buccal swab were a match. RP 188.

McNew and Officer James Bessman testified that after her arrest, Brockett was interrogated, and confessed to taking various items from Owens' garage. RP 118-20, 273. Both testified that initially Brockett denied any knowledge of a burglary at Owens' address, but when told of evidence of blood, Brockett agreed she had been in the garage and admitted to taking several items. RP 115, 273. McNew then told Brockett some items were missing from the garage, and he admitted he may have mentioned tools, but initially stated that other than tools, he did not tell her specifically about any other items. RP 119. However, he later testified he did not recall whether he told her that a bicycle and car stereo were missing. RP 120, 123. Brockett then told him she had taken the tools, car stereo, wallet, a backpack, and a bicycle, and had placed the items in the backpack, rode away on the bicycle, and then ditched the items in an alleyway. RP 118-20,123-23, 128, 288. McNew also testified Brockett did not admit to taking the pop-up tent and folding chair. RP 289.

Brockett disputed the officers' interpretation of her interrogation statements. She explained that she initially did not know what they were talking about when they brought up a burglary investigation because she was not familiar with Owens' address, did not recall taking any items from

his garage or vehicle, and so did not realize they were considering the incident a burglary. RP 213,248-49. When the officers raised the issue of blood, she knew the incident to which they were referring because she remembered being injured and bleeding, and being in a strangers' garage and vehicle. RP 220. Brockett also explained she did not volunteer to having taken any missing items, or agree that she had put the items in a backpack, rode off on a bicycle or dumped the items in an alleyway—all this information came from McNew, who repeatedly posited his theories and asked her if they could be true. RP 214, 222, 239. Brockett insisted she never admitted to taking any items or to taking any of these actions. RP 214, 239-40. Rather, she had admitted only that her memory of the evening was unclear due to her intoxication, and at most she admitted it was “possible” she did things that she could not recall. RP 215. She also testified she did clearly remember walking out the main garage door and leaving it open, and she did not ride away on a bicycle. RP 215-16.

The defense presented testimony of Mary Christine Brockett, Jennifer Brockett's mother. RP 257. Christine testified that on the evening of the incident, she received a phone call from Brockett's boyfriend Ian, and also received a call from police telling her to come pick up Brockett's vehicle because it was blocking traffic on Ocean Beach Highway. RP 257-58. When she arrived to pick up the car, the keys were still in the vehicle.

RP 258. Brockett was living with her at the time, and arrived home either late that night or early the next morning, but Christine did not see her come in. RP 259. Christine confirmed she did not see any of the items missing from Owens' garage in her home, including the pop-up tent, folding chair, wallet, wrenches, hammers, clippers, or backpack. RP 260.

Christine also testified that one of the impeachable offenses raised by the State – Brockett's conviction for taking a vehicle without permission – was relevant to an incident when Brockett took her mother Christine's vehicle without permission. RP 262-63.

Prior to testimony, defense counsel made an offer of proof that Christine would testify to Brockett's general mental state, specifically "that she is paranoid and afraid easily." RP 201. During testimony, counsel asked Christine, "Do you know - - I know you know a lot about Jennifer. Is she like everybody else?" RP 260. Christine answered, "No." RP 260. The State immediately objected to this question and the court sustained the objection but the answer was not stricken. RP 261. Defense counsel then attempted to solicit additional testimony from Christine that she had raised Brockett, Brockett was "different," and it was "not easy" to raise her. RP 261. However, the State repeatedly objected to lack of relevance and foundation. RP 261.

Defense counsel explained the testimony was relevant to how Brockett responds to situations of stress, such as the stress of being beaten up by her boyfriend on the evening of the incident. RP 261. The State objected, arguing Christine did not observe Brockett on the evening of the incident. RP 261. Counsel responded she was not seeking testimony regarding Brockett's mental state at the time of the incident, but rather "how [Brockett] gets under situations of stress." RP 261. The trial court noted, "there may be some relevancy" but sustained the State's objection reasoning, "I don't think this witness would be able to testify to that." RP 261.

Both Owens and McNew testified about the manner of connection between Owen's garage and his residence, describing it variously as "attached" and "semi-attached." RP 56, 60, 72, 93-94, 138-39. However, the essential factual description of the garage was undisputed. Owens and McNew both testified the garage was connected to the house only by a breezeway—essentially a covered walkway open to the elements, with a door to the house on one side, and a separate door to the garage on the other side. RP 60, 72, 93-94, 138-39. One could not pass from the garage to the house without walking out of doors. RP 138-39. There was no evidence presented that anyone resided in the garage. See RP 141. Detective McNew was specifically questioned regarding whether he observed a bed or any

other signs of anyone living in the garage, and testified he observed none. RP 141.

### 3. Instructions & Closing Arguments

During closing argument, defense counsel encouraged jurors to acquit Brockett of all four charged counts and to consider that at most, she was guilty of the uncharged crime of criminal trespass. RP 358. Counsel argued Brockett was present in the garage with the intent to seek refuge, not to commit a crime, because she was hurt and scared. RP 358. To further support her argument regarding intent, the defense also emphasized Brockett was drunk. RP 358.

There was no dispute Brockett was drunk. The prosecutor conceded Brockett had been drinking, and even relied on Brockett's drunkenness to explain why the jury should find credible the version of events Brockett allegedly told to McNew, i.e. to explain why Brockett would take some items and not others from the garage, and to explain why she would later dump the items in an alley a block away when such actions appeared illogical. RP 319, 324, 361-62; but see RP 327 (implicitly disputing Brockett's degree of intoxication). The State's closing argument also heavily emphasized a discussion of intent, and in particular that intent to commit a crime could be formed after entry into the garage or vehicle and

still constitute the respective crimes of residential burglary and vehicle prowling. RP 336-41.

Yet defense counsel failed to offer any instructions relevant to Brockett's intoxication and failed to object to the sufficiency of the instructions. RP 254; see also RP 302. The State had even gone so far as to raise the issue prior to closing, arguing as follows:

There's no diminished capacity defense here. There's been no expert testimony. So I just want to avoid -- I don't know if counsel's intent, but just if there's going to be any argument that, hey, she was still, you know, so drunk out of her mind that she couldn't form the intent, that would be an improper argument since there's been no testimony to that. We typically have diminished capacity when there is a sufficient basis being done. And I don't know if she's intending to, I just want to avoid that argument being posed because there's been no evidence and we don't [sic] a jury instruction that counts for that.

RP 301 (emphasis added).

Although the prosecutor somewhat conflated the defenses of diminished capacity and voluntary intoxication, defense counsel was put on notice of both. However, when the trial court asked for a response, defense counsel stated, "I don't know what he's talking about." RP 302.

In closing, the parties also disputed whether the garage was sufficiently connected to the house to constitute a "portion" of the dwelling. RCW 9A.04.110(7).

The jury was provided the following instructions relevant to the residential burglary charge and the definition of a “dwelling.” Instruction No. 8 defined a “[d]welling” as “any building or structure or a portion thereof, which is used or ordinarily used by a person for lodging.” CP 36. “A person commits the crime of residential burglary when he or she enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein.” CP 38 (Instruction No. 10). Similarly the residential burglary “to convict” instruction stated in relevant part, “To convict... of residential burglary” requires elements “entering or remaining unlawfully in a dwelling ... with intent to commit a crime against a person or property therein[.]” CP 39 (Instruction No. 11).

The State argued the garage was “attached,” was a “part of” Owens’ residence, and qualified as a “dwelling.” RP 336, 358. Defense counsel argued the garage was not fully connected to the house, the walkway was exposed to the elements, passing from the residence to the garage required entry and exit from two separately locked doors, and so the garage did not qualify as a “dwelling.” RP 351, 354.

#### 4. Verdict, Sentence & Appeal

The jury found Brockett guilty of counts I, III and IV, including residential burglary, second degree vehicle prowling, and second degree

identity theft, and found her not guilty of second degree theft (count II). CP 56-59; RP 369-70.

The superior court sentenced Brockett to 72 months on count I, 57 months on count IV, and 364 days on count III, to run concurrent with one another. CP 67.

Brockett timely appeals. CP 76.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT AN INTOXICATION DEFENSE.

Both the federal and State constitutions guarantee the right to effective representation. U.S. CONST., AMEND. VI; WASH. CONST., ART. 1, § 22. An accused is denied this right when her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

a. *Counsel was deficient.*

"[E]vidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." State v. Coates, 107 Wn.2d 882,

889, 735 P.2d 64 (1987). An attorney's failure to request a voluntary intoxication instruction when supported by the evidence constitutes deficient performance. State v. Thomas, 109 Wn.2d 222, 223, 226-29, 743 P.2d 816 (1987).

Based on the evidence at trial, Brockett had a viable intoxication defense.

WPIC 18.10 provides:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (fill in requisite mental state).

11 Washington Pattern Jury Instructions, WPIC 18.10 (4th ed.) (October 2016 update); see also RCW 9A.16.090.

The defense is entitled to this instruction where (1) the crime charged includes a particular mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the accused's ability to form the requisite mental state. State v. Hackett, 64 Wn. App. 780, 785 n.2, 827 P.2d 1013 (1992); State v. Sandomingo, 39 Wn. App. 709, 713-14, 695 P.2d 592 (1985); see also State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (reversible error not to give instruction where evidence indicates defendant under effect of alcohol when crimes committed); State v. Jones, 95 Wn.2d 616, 622, 628 P.2d 472 (1981)

(instruction properly given where evidence established defendant had been drinking and he showed effects, including slurred speech).

Evidence supporting the instruction is viewed in the light most favorable to its proponent. State v. Bergeson, 64 Wn. App. 366, 367, 824 P.2d 515 (1992). Expert testimony is not required for the defense to be entitled to the instruction. Thomas, 109 Wn.2d at 231 (citing Jones, 95 Wn.2d at 622-23). Rather, evidence can be presented in the form of testimony from the defendant, other witnesses, or through cross-examination of the State's witnesses. Jones, 95 Wn.2d at 622 (finding evidence from defendant, lay witness, and officer sufficient for instruction); State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) (reasoning cross-examination of State's witnesses alone may be sufficient). However, the Gabryschak Court noted that "affirmative evidence presented by a defendant may ordinarily be more effective." Id.

The three-part foundation for the instruction is fully established here. Each charge against Brockett resulting in conviction required a particular mental state. To convict her of residential burglary, the State had to prove Brockett unlawfully entered or remained in a dwelling "with intent to commit a crime ... therein." CP 38 (Instruction No. 10), 39 (Instruction No. 11). Similarly, to convict her of vehicle prowling, the State had to prove she unlawfully entered or remained in a vehicle "with intent to commit a

crime ... therein.” CP 47 (Instruction No. 19); see also CP 48 (Instruction No. 20, part (2)). To convict Brockett of second-degree identity theft, the State had to prove she obtained, possessed, used, or transferred a means of identification or financial information of another person “knowingly” and “with intent to commit any crime.”<sup>1</sup> CP 51 (Instruction No. 23); see also CP 53 (Instruction No. 25, parts (1) and (2)).

Moreover, there was substantial evidence of Brockett’s intoxication and of the impact her intoxication had on her inability to form the requisite intents.

It was undisputed Brockett was drunk. Brockett testified she had been drinking with her boyfriend at a casino earlier in the evening. RP 208. She described her state as being “very intoxicated and a little out of control” upon exiting the vehicle to get away from her boyfriend, “plastered” and “intoxicated” while in Owens’ garage, and later was in a state of alcoholic “blackout” from which she awoke in Owens’ vehicle. RP 209-10, 211, 234, 229. Detective McNew also testified Brockett had told him she had been drinking with her boyfriend earlier that evening. RP 116. The State not

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<sup>1</sup> Similarly, to convict Brockett of second-degree theft, the State had to prove she wrongfully obtained another’s property “with intent to deprive that person of such property.” CP 41 (Instruction No. 13); see also CP 45 (Instruction No. 17, part (3)). However, Brockett was ultimately acquitted of this charge. CP 57.

only conceded, but affirmatively argued in closing that Brockett was “drunk.” RP 361.

It was also undisputed that Brockett’s intoxication affected her mental state to the point where she was behaving illogically. Brockett testified in detail regarding her illogical behavior and thought-processes prior to entering Owens’ garage. She stated she just wanted to get away from her boyfriend, did not initially have any concrete plan, and took off walking from the vehicle despite the fact it was very late, was not a safe neighborhood, she was alone and intoxicated, and she had left her shoes in the vehicle. RP 209-10, 221-22, 233. She “staggered” out of the vehicle and after walking barefoot for some distance, fell again, cutting her toe almost to the bone. RP 209-10. It was only at the sight of her bloody injury that she realized her circumstances were not safe, and then became afraid and felt “out of [her] element,” “desolate and desperate” and “completely helpless.” RP 209-10, 221-22, 233-34. Brockett conceded that her behavior at this point in the evening was still illogical. RP 233. She did not walk to a 24-hour-market to use a phone, or systematically knock on residential doors, but rather saw a light on at a stranger’s house, knocked on the door, and upon hearing no answer, entered the garage. RP 210, 233, 236. She testified that her intent was to seek “refuge,” ask to use a phone and to seek a first aid kit for her injury, not to commit any crime. RP 210-11, 217, 234.

When cross-examined by the State, Brockett agreed her thought processes and behaviors were not logical, and explained “[m]y logic and reason and my function were highly affected” by “intoxication.” RP 232.

Brockett testified that due to her intoxication, she was in a “blackout” for part of the night and did not recall all the events of the evening. She did, however, recall waking up in Owens’ car once she had “sobered up a little bit.” RP 215; see also RP 226 (woke up in the garage), 229 (“diminished memory” because she was “intoxicated”). She also compared her level of intoxication to a previous occasion explaining “people have told me things that I did when I was drinking and I was shocked that they were telling me these things that I did because I do not remember doing them.” RP 215.

Brockett’s testimony—that due to her intoxication, she was barefoot, bleeding from her toe, and passed out—was also corroborated by substantial evidence. Detective McNew and Owens both testified that they observed blood on the garage floor and around Owens’ car. RP 65, 69, 96-102. McNew described much of the blood around the vehicle and garage as “droplets.” RP 142. McNew documented the blood at the scene with several photographs, in his report, and with swabs sent to the Washington State Patrol Crime Lab. RP 96-103, 107-08, 134. Forensic Scientist Kelly later confirmed the swabs tested positive for the presence of blood and

matched Brockett's DNA. RP 184, 188. McNew also testified that he took pictures of the blood in the garage that looked like "footprints," confirming Brockett's foot injury. RP 98-100. McNew and Owens also testified that the largest amount of blood, which Owens described as "a lot of blood" and McNew described as a "pool," was left on the driver's side floorboard. RP 65, 141. This corroborated Brockett's testimony that she had blacked out and remained in the driver's seat for some period of time.

McNew and Owens testified some items were taken and some left behind, but neither offered a rational explanation for why some items were selected and others were not. RP 82, 124. McNew also testified Brockett had told him she dumped the items in an alleyway a block away and claimed he did not suggest this explanation to her. RP 128. The State later argued in closing that McNew would not have contemplated this explanation because it made no sense, and that this was evidence Brockett had herself made the statement and was behaving irrationally. RP 327; see also RP 361-62. Although this statement was disputed (Brockett maintained she did not take any items), if believed by the jury, it would be additional evidence of illogical behavior, and could support the voluntary intoxication theory that Brockett did not intend to commit a crime while she was in the garage and was too intoxicated to realize what she was doing until after she left. RP 212 (Brockett disputing taking any items).

The State argued in closing that Brockett's drunken state was responsible for her otherwise-inexplicable behavior, and explained why she would remove some tools from the garage but leave others, would remove the stereo but leave it on the car seat and take only the face-plate, and would dump all these items a block away in an alleyway. RP 361-62.

Trial counsel's failure to request a voluntary intoxication instruction in Brockett's case is similar to defense counsel's failure in State v. Thomas. Thomas was tried for attempting to elude a pursuing police vehicle. At trial, she testified she had several alcoholic drinks which resulted in an alcohol blackout. Because of this blackout, she had no memory of eluding police prior to her arrest. Thomas, 109 Wn.2d at 223-25.

Despite evidence that Thomas was too intoxicated to form the requisite intent (a wanton and willful disregard for others' lives or property), her attorney failed to propose a voluntary intoxication instruction or a so-called Sherman instruction,<sup>2</sup> which would have made the relevance of intoxication clear to jurors. The Thomas Court found defense counsel's performance deficient. Id. at 227-28.

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<sup>2</sup> State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982) (defendants must both subjectively and objectively act with wanton and willful disregard for lives or property; juries should be instructed that objective indications of wanton and willful disregard can be rebutted by subjective evidence pertaining to mental state).

Similarly, because Brockett was entitled to a voluntary intoxication instruction, her attorney was deficient for failing to request one. Without such an instruction, counsel could not and did not present an intoxication defense. This failure was particularly important because Brockett did not dispute that she was present in the garage and the vehicle, making her intent (or lack thereof) a critical issue. Thus, there was no legitimate reason not to seek the instruction. In addition, counsel responded to the State's motion to exclude a voluntary intoxication argument by stating, "I don't know what he's talking about." RP 302. Thus, the record strongly supports the conclusion that counsel did not fail to request the defense for a legitimate strategic reason, but merely from a failure to recognize the available defense.

*b. Brockett suffered prejudice.*

To establish prejudice, Brockett need only show a "reasonable probability" that but for counsel's mistake, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94).

Thomas is again instructive. The Thomas Court recognized that without proper instructions explaining the relevancy of intoxication to intent, it could not be confident in the jury's verdict. Thomas, 109 Wn.2d

at 228-29; compare State v. Aamhold, 60 Wn. App. 175, 180-81, 803 P.2d 20 (so long as jury instructed on voluntary intoxication, failure to give Sherman instruction harmless; intoxication instruction, by itself, sufficient to allow defense to challenge requisite mental state), review denied, 117 Wn.2d 1016 (1991).

There can be no confidence in the jury verdict here, either. As discussed above, the charges against Brockett required proof of particular mental states. And although the evidence revealed that Brockett was extremely intoxicated while she was in the garage and the vehicle, no instruction made that fact relevant to the jury's decision. Absent the instruction, jurors could not consider Brockett's intoxication to the point of blacking out when deciding whether the prosecution had proved the requisite mental states for convictions.

The State took advantage of defense counsel's mistake. During closing, the prosecutor argued Brockett was "drunk" and was not "acting completely rational." RP 361-62. The prosecutor used the evidence of Brockett's intoxication to explain why some items in the garage were taken and some were left behind, and why the items were later dumped in an alleyway, because "when people are drunk, they do things that are not rational." RP 361-62. The prosecutor then argued

... does that matter? No, because why she did it  
[UNINTELLIGIBLE]. A person who drives recklessly on

a motorcycle with the intent to show off or a dad rushing to go see the birth of his kid, the reason why they did that, we don't care. What we know is that she said we know what crimes we committed, we have the confession that she offered and we have scientific evidence that links her to this. Find her guilty of residential burglary, vehicle prowl in the second degree, ID theft second degree, and again theft two if you find that she committed all of those.

RP 360-61 (emphasis added).

The evidence showing her degree of intoxication—including Brockett's testimony of the level of her intoxication, the arbitrary nature of missing items, as well as her blood corroborating her lack of shoes, injury and blackout—were all substantial factors showing she lacked the ability to form the required mental states. However, without the voluntary intoxication defense, Brockett's alcohol blackout was irrelevant to the charged crimes, and the prosecutor successfully argued, "we don't care."

RP 361.

Given Brockett's drunken stupor, there is a reasonable probability jurors would not have found she possessed the requisite intent for residential burglary, vehicle prowling, and identity theft had they been provided a voluntary intoxication instruction. Because counsel's deficient performance was prejudicial, Brockett was denied her right to effective assistance and reversal is required. Thomas**Error! Bookmark not defined.**, 109 Wn.2d at 232.

2. BROCKETT WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHERE THE TRIAL COURT EXCLUDED HER MOTHER'S TESTIMONY RELEVANT TO HER MENTAL STATE.

Here, the trial court denied Brockett the right to present the testimony of her mother, Christine Brockett, which would have established Brockett's tendency to react to stressful situations with paranoia and fear. This testimony was highly relevant to both her mental state and her credibility. As such, it should not have been excluded under the rules of evidence or on the basis of any purported prejudice to the State. The failure to admit the testimony violated Brockett's constitutional right to present a defense and requires reversal of her convictions.

The Sixth Amendment and article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., AMEND. VI; WASH. CONST., ART. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Taken together, these rights constitute the right to present a defense. State v.

Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017) (citing State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010)).

These rights are not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Evidence “must be of at least minimal relevance.” Id. at 622. “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. The State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be withheld only “if the State’s interest outweighs the defendant’s need.” Id. Where evidence has “*high* probative value ‘it appears no state interest can be compelling enough to preclude its introduction.’” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012).<sup>3</sup> However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

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<sup>3</sup> Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable reasons include errors of law. Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

*a. The trial court ruled the evidence was relevant.*

Here, the trial court essentially found Christine’s testimony was at least minimally relevant commenting, “there may be some relevancy,” yet still sustained the State’s objection. RP 261. The trial court was correct to find the evidence relevant.

Defense counsel made a sufficient offer of proof that Christine knew Brockett, had raised her, and was aware she was “different,” not “like everybody else” and was “not easy” to raise, because she was “paranoid and easily afraid.” RP 201, 260-61. The primary issues disputed at trial were Brockett’s intent, and specifically, the credibility of her story that she entered Owens’ garage to “seek refuge” because she was afraid, not because she intended to commit a crime. Thus, the relevance of Christine’s testimony is apparent. Its purpose is to support Brockett’s version of events and explain why her behavior is plausible, even if it was inconsistent with how most people would behave under similar circumstances.

Given this context, Christine’s testimony was more than minimally relevant; it was of high probative value.

*b. The evidence may not be excluded on the basis of prejudice to the State.*

Given that the evidence was of “high probative value,” it could not be excluded on the basis of any prejudice to the State. Jones**Error!**  
**Bookmark not defined.**, 168 Wn.2d at 720 (emphasis omitted).

Even if this Court were to conclude that Christine's testimony was of only minimal relevance, the testimony must still be admitted. This is because where evidence is minimally relevant, it can be withheld only "if the State's interest" in excluding prejudicial information "outweighs the defendant's need." Darden, 145 Wn.2d at 622. Here, the State did not, and could not, make any showing of prejudice to the State.

Courts have applied this balancing test and considered potential prejudice to the State in other cases implicating the right to present a defense. For example, in Jones, the right to present testimony regarding an alleged victim's actions and motivations just prior to the alleged incident were pitted against the State's concern that the testimony was an attack on the alleged victim's character. See id. at 717-18, 721.

Jones was accused of raping K.D. Id. at 717. The trial court prohibited Jones both from offering his own testimony and from cross-examining witnesses about K.D.'s participation in a consensual all-night sex party beginning earlier that evening. Id. at 719-20. Specifically, Jones sought to testify "that during a nine-hour alcohol- and cocaine-fueled sex party [K.D. and another woman] danced for money and engaged in consensual sexual intercourse" with Jones and two other men they met at a truck stop. Id. at 717. The trial court found that discussion of the sex party was offered for the purpose of attacking the alleged victim's credibility and

was barred by the rape shield statute. Id. at 717-18. The trial court asserted that Jones was not, however, precluded from testifying generally that K.D. had consented to sex with him. Id. at 721.

The Washington Supreme Court was unconvinced by this reasoning, and reversed, noting, “The trial court’s formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events,” and thus, “effectively barred Jones from presenting his defense.” Id. at 721 (emphasis added). Remand for retrial was required. Id. at 721.

Jones illustrates that even in a much more extreme example, where the prejudice to the State was that its primary witness would be tarnished by her alleged embarrassing and potentially credibility-destroying participating in an all-night, consensual, drug-fueled sex party, the constitutional right to present a defense still required admission of this highly probative evidence.

By contrast, Christine’s testimony was relevant only to Brockett, her tendencies toward paranoia and fearfulness, and its impact on her mental state when confronted with stress of any kind. The testimony had no direct involvement of any State witness, did not paint any State witness in a bad light, or implicate any State witness in prior bad acts. There simply was no prejudice, let alone any unfair prejudice. Thus, even if a balancing test were

appropriate, which the defense does not concede, there is no prejudice to the State to weigh against the relevance to the defense. Christine's testimony was improperly excluded.

*c. The trial court appears to have excluded the evidence under an improper legal standard.*

Although the trial court did not fully articulate its reasons, its ruling appears to have been based on the rules of evidence, potentially those applicable to relevance, foundation, reputation and character of the accused. See ER 403 (exclusion of relevant evidence), 404 (character evidence), 405 (permissible methods of proving character), 406 (habit or routine practice). If so, such reasoning was in error.

Washington courts have repeatedly held that where the right to present a defense is implicated, the proper legal standard is not provided by the rules of evidence, but rather by Darden and Jones. Thus, any evidence rule restrictions regarding the manner or form of the excluded testimony do not apply and cannot provide a justification for exclusion.

Here, as discussed above, the evidence was of high probative value to the defense and so cannot be excluded even on the basis of any prejudice to the State. Moreover, the State failed to identify any prejudice that might result from Christine's testimony regarding Brockett's reputation or character for fearfulness, or her general reactions and mental state when

confronted with stressful situations. Thus, even if the court were to engage in balancing under this test, which the defense does not concede should occur, admissibility of Christine's testimony is still required.

*d. Remand for retrial is required.*

The erroneous exclusion of the testimony discussed above requires reversal as a violation of Brockett's right to present a defense if "the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." Duarte Vela, 200 Wn. App. at 326 (citing United States v. Blackwell, 459 F.3d 739, 753 (6th Cir.2006)), 328.

Here, the remaining evidence did not overwhelmingly establish Brockett's guilt. It was uncontested that Brockett had been drinking and was in Owens' garage. The trial focused on Brockett's mental state and credibility.

Christine's testimony would have created a reasonable doubt regarding Brockett's mental state and intent in entering and remaining in the garage. Her testimony made it more likely that Brockett felt a strong need to seek refuge and would enter a strangers' garage even though others might not have behaved that way. In addition, Christine's testimony was relevant to Brockett's credibility, and particularly to the dispute between herself and officers regarding whether she had confessed during interrogation.

First, the officer testimony was not overwhelming. Rather, it was effectively impeached where counsel showed the officers did not record the interrogation despite having the equipment, did not take verbatim notes despite having two officers present in the room, and did not even write all relevant details in their reports. E.g. RP 160-61, 270-72, 274.

In addition, Brockett's testimony suggested she was intimidated by the interrogation, because McNew was "very persistent" and "a little aggressive with his assumptions." RP 40. She agreed she did not recall the evening because she was highly intoxicated, and insisted she had not confessed to taking anything, but rather McNew had filled in the gaps of her memory with his own suppositions. RP 39-40. Brockett's explanation of her interrogation makes much more sense if the jury were to have heard Christine's testimony that Brockett is paranoid and easily frightened.

By contrast, without Christine's testimony, Brockett's version of events appears less plausible. Why would someone feel so fearful as to be compelled to enter a stranger's garage when simply walking through a neighborhood? Why would someone be so intimidated as to agree with officers that it was possible she had taken items when she did not recall having taken them, rather than forcefully insisting that she had not taken them? These questions were left unanswered for the jury, and left the State free to attack Brockett's credibility during closing argument. See e.g. RP

327 (implicitly attacking Brockett's credibility). Given the trial's emphasis on Brockett's intent and credibility, it was particularly important to allow testimony that would present a full picture of Brockett's general mental state and thought processes.

This Court should find Christine's testimony, if properly admitted "creates a reasonable doubt that did not otherwise exist," and so requires reversal for retrial. Duarte Vela, 200 Wn. App. at 326, 328.

3. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR RESIDENTIAL BURGLARY WHERE IT WAS UNDISPUTED THE GARAGE AND HOUSE WERE SEPARATED BY AN OPEN BREEZEWAY.

In criminal prosecutions, due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). A reviewing court should reverse a conviction for insufficient evidence where, viewing the evidence and inferences in the light most favorable to the prosecution, a rational trier of fact could not find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Under Washington law, "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. “‘Dwelling’ means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7).

Whether a building is a dwelling “turns on all relevant factors and is generally a matter for the jury to decide.” State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). Relevant factors include whether the place is “usually occupied” by a person lodging there, whether someone deemed the place her abode and treated it as such, whether it was furnished and rented out periodically, whether a former occupant intended to return to the location to live there, and how long the place had been vacant. Id. at 91 n.18 (citing foreign cases).

Applying these factors to Brockett’s case, there is no dispute Owen’s home was a dwelling—testimony established he and his two children were home and residing in the house on the date Brockett entered the garage. RP 55. There is also no dispute the garage is not a dwelling in its own right—the evidence established no one was living in the garage. RP 141.

Finally, there is no dispute regarding how the garage was connected to the house. Both Owens and McNew testified, supported by photographic evidence, that the garage was connected to the house only via a covered

walkway or breezeway. RP 60, 72, 93-94, 138-39. The breezeway consisted only of a covered roof, there were no walls enclosing the area. RP 60, 72, 93-94, 138-39. Rather, a person would be required to exit the house door, walk through the elements, and enter a second door to gain entrance to the garage. RP 60, 72, 93-94, 138-39.

The dispute at trial consisted of whether the garage was sufficiently connected to the house to constitute “a portion” of the house, and thus qualify as a “dwelling.” RCW 9A.04.110(7). The State argued the garage was “attached,” was a “part of his residence” and so qualified as a “dwelling.” RP 336, 358. Defense counsel quoted Detective McNew to argue in closing the garage was only “semi-attached.” RP 26, 138, 351, 354. Counsel argued that where the garage was not fully connected to the house, but rather was connected only by a covered walk-way, exposed to the elements, and required entry and exit from two separate doors, it was not part of the residence and did not qualify as a “dwelling.” RP 351, 354; see also RP 56 (objecting to prosecutor asking witness if garage was “attached”).

An examination of existing case law illustrates that a garage merely connected by an open breezeway, and separated by two external doors, is not sufficiently connected to constitute “a portion” of the residence. Washington courts have repeatedly held that where the space at issue is

essentially one room in a larger building, and the larger building is used for lodging, the space qualifies as a dwelling, regardless of whether it has a separate entrance. However, such cases require the space to be wholly contained within, immediately contiguous to, or at least functionally connected with the building used for lodging. Owens' garage was none of these things, and so is not a "dwelling."

For example, in State v. Moran, Moran "crawled underneath the deck, through an access door set in the house's foundation, and into a lighted area beneath the house with access to [a sewage] pipe." 181 Wn. App. 316, 318, 324 P.3d 808, review denied, 181 Wn.2d 1020, 337 P.3d 327 (2014). On appeal, the court held the area was a part of the house and so the evidence was sufficient the defendant had entered a "dwelling" as required to support his residential burglary conviction. Id. at 318.

The evidence established that in order to access the area, the defendant had to remove the lattice that hung down from the deck to the ground, crawl under the deck, and access a door set into the foundation of the house. Id. at 319. The area was lighted, there was enough space to stand, the floor was covered with plastic, and nothing was stored there. Id.

On the basis of these facts, the court reasoned:

Clearly, this enclosed area beneath the living space, regardless of what moniker is assigned to it, was a portion of the house. The access door was set in the house's foundation, the house's utilities were accessible from the area, and

access could be gained only by crawling underneath the deck of the house. Therefore, when [Moran] entered the area, he entered a portion of the house.

Id. at 322.

The Moran Court considered the reasoning of the Indiana Court of Appeals, which had concluded a basement was a portion of a house. Id. at 323 (citing Burgett v. State, 161 Ind. App. 157, 314 N.E.2d 799, 803 (1974)). ““Being under the same roof, functionally interconnected with and immediately contiguous to other portions of the house, it requires considerable agility to leap over this fulsome interrelationship to a conclusion that a basement is not part of a dwelling house because no inside entrance connects the two.”” Id. at 323 (quoting Burgett, 314 N.E.2d at 803).

The space in Moran was directly underneath the house; thus, the ceiling of the space was the floor of the house. Id. at 322. The access point to the space required Moran to tamper with the deck, a space that was clearly attached to, and part of, the main residence. Id. The access door was set into the house’s foundations. Id. Finally, the home’s utilities were accessible, and in fact, the jury found Moran had entered in order to tamper with the utilities and plug up the house plumbing. Id. at 318, 322.

Similarly, in two cases, Washington appellate courts have held that where the space is part of larger building, some part of which is used for

lodging, the space is a “dwelling.” In State v. McPherson, the court held a jewelry store supported a residential burglary conviction because there was an occupied apartment above the jewelry store, and testimony established “that the only way to access the apartment was by the stairs located inside the store, and that the apartment was separated from the store by a ‘swinging door’ at the bottom of the stairway and a door at the top of the stairs that did not lock or shut securely. 186 Wn. App. 114, 115, 116-17, 344 P.3d 1283, review denied, 183 Wn.2d 1012, 352 P.3d 188 (2015). Like the spaces in Burgett and Moran, the apartment in McPherson was part of an “immediately contiguous” building, shared walls and a ceiling or floor with, was “functionally interconnected” to, and was ““under the same roof”” as the lodging area. Id. at 323 (quoting Burgett, 314 N.E.2d at 803).

In State v. Neal, the Court of Appeals similarly upheld the tool room inside residential apartment building as a “dwelling” because it was a portion of structure currently in use for lodging. 161 Wn. App. 111, 112-115, 249 P.3d 211 review denied, 172 Wn.2d 1011, 259 P.3d 1109 (2011). There, Neal did not dispute that the residential apartment building as a whole was a “dwelling” or that the tool room was a room contained wholly within the apartment building. Id. at 112.

In contrast, Owens’ garage was neither contained within, “functionally interconnected with,” nor “immediately contiguous to other

portions of the house.” Moran, 181 Wn. App. at 323 (quoting Burgett, 314 N.E.2d at 803). In addition, it was not “under the same roof.” Id. at 323 (quoting Burgett, 314 N.E.2d at 803). Rather, it was separated by an open space, shared no walls in common, had two separately locked entrances, and was connected only by what McNew described as “a little patio area” covered by an “awning.” RP 94. No evidence suggested utilities were accessible from the garage, or that the garage could be entered only by first tampering with some part of the house. Thus, according to the reasoning of Moran, McPherson, and Neal, as well as Indiana’s Burgett, Owens’ garage is not “a portion” of the main residence.

Most relevant is State v. Murbach, in which the homeowner testified the garage was “attached to their house,” and “[a] door connects the house and the garage.” 68 Wn. App. 509, 511, 843 P.2d 551 (1993). The court noted the issue of whether an “attached” garage was part of a dwelling was an issue of first impression in Washington. Id. at 512.

The court cited several other jurisdictions that had considered similar issues. Id. at 512-13 (internal citations omitted). The Murbach Court considered a Colorado case wherein “the court held . . . ‘[t]he statutory definition of dwelling comprehends an entire building’, including an attached garage.” Murbach, 68 Wn. App. at 513, n.4 (emphasis added) (quoting People v. Jiminez, 651 P.2d 395, 396 (Colo.1982)). Twice,

California courts had noted, “[W]here the garage is an attached and integral part of the house, it is simply one room of several which together compose the dwelling.”” Murbach, 68 Wn. App. at 513, n.4 (emphasis added) (quoting People v. Moreno, 158 Cal. App.3d 109, 204 Cal. Rptr. 17,18-19 (1984), quoting People v. Cook, 135 Cal. App.3d 785, 795-96, 185 Cal. Rptr. 576 (1982)).

Finally, in a New Mexico case, the court there had concluded, on the basis of a statute with similar wording as Washington’s, that an attached garage was a dwelling because it “was a part of the structure used as living quarters.”” Murback, 68 Wn. App. at 513 (quoting State v. Lara, 92 N.M. 274, 587, P.2d 52 (Ct.App.1978)). The Lara court had concluded the garage was attached, because despite lacking a direct door to the residence, it shared a wall with the house and “was ‘directly contiguous to and a functioning part’ of the residence” as opposed to a separate building. Lara, 92 N.M. at 275 (citing Burgett, 161 Ind. App. 157).<sup>4</sup>

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<sup>4</sup> Only in Illinois had the court found that an attached garage was not a dwelling, but that was due to a difference in the definition of the term “dwelling” which there required “a structure that is “used by another as a residence or living quarters in which the owners or occupants actually reside.””” Murback, 68 Wn. App. at 513, n.4 (quoting People v. Thomas, 137 Ill.2d 500, 148 Ill. Dec. 751, 561 N.E.2d 57,64 (1990), cert. denied, 498 U.S. 1127, 111 S. Ct. 1092, 112 L. Ed. 2d 1196 (1991) (quoting People v. Bales, 108 Ill.2d 182, 191, 91 Ill. Dec. 171, 483 N.E.2d 517 (1985))).

The Lara Court contrasted this result with that of two other cases: one where the garage did not share any wall with the house and was connected only by a cement walkway, and another case with a garage that was a wholly separate building located on the back of the lot. Lara, 92 N.M. at 275 (citing People v. Picaroni, 131 Cal. App. 2d 612, 281 P.2d 45 (1955) (cement walkway); Bean v. Commonwealth, 229 Ky. 400, 17 S.W.2d 262, 262 (1929) (wholly unconnected)).

Based on an analysis of these cases, the Murback Court concluded the garage, which shared a direct door into the residence and so must necessarily have also shared a wall in common, was therefore a “dwelling.” Murback, 68 Wn. App. at 511, 513-14. Murback essentially applies the rule previously articulated in Moran: a space is part of the residence, and therefore is a “dwelling” if it is “functionally interconnected with,” “immediately contiguous to other portions of the house,” and “under the same roof.” Moran, 181 Wn. App. at 323 (quoting Burgett, 314 N.E.2d at 803).

Owens’ garage is easily distinguishable. Unlike garages such as those in Murback and Lara, which shared a wall with the residence, Owens’ garage was a separate building, connected only by an awning, similar to the concrete walkway in Picaroni. It was neither “functionally interconnected with,” “immediately contiguous to,” nor “under the same roof” as the

house. Moran, 181 Wn. App. at 323 (quoting Burgett, 314 N.E.2d at 803). This Court should hold based on the undisputed facts, the garage was not sufficiently connected to the residence to qualify as a “dwelling” under RCW 9A.04.110(7).

Because the State failed to prove beyond a reasonable doubt that Owens’ garage was a “dwelling,” Brockett’s conviction for residential burglary must be vacated and the charge dismissed with prejudice. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

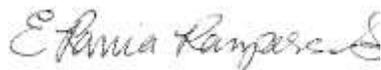
D. CONCLUSION

Brockett respectfully asks this Court to vacate her residential burglary conviction for insufficient evidence and dismiss the charge with prejudice, and to remand for retrial on the remaining convictions given the violations of her right to effective assistance of counsel and her right to present a defense.

DATED this 15th day of June, 2018.

Respectfully submitted,

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