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No. 53400-2-II

IN THE COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF THE
PERSONAL RESTRAINT OF
JASON STOMPS

PETITIONER'S REPLY

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Petitioner, Jason Stomps, by and through his attorney, Michael C. Kahrs, of the Kahrs Law Firm, P.S., hereby replies to the State's response.

I. ARGUMENT

A. THE EVIDENCE PRESENTED IS RELEVANT AND PROPER TO BE HEARD.

1. Convicted Defendants Are Entitled to Notification of Their Right to a Copy of Their Attorney's File With Proper Redactions.

In support of a personal restraint petition (PRP), a petitioner must present evidence supporting their factual allegations. RAP 16.7(a)(2). Review of discovery materials is especially critical to investigate whether trial counsel was effective RAP 16.4(c)(2), (3). It is often difficult for an indigent criminal defendant to obtain a copy of their file or even know that they have that right. Criminal defendants are entitled to a copy of their "client file and discovery materials, subject to nonprejudicial withholdings under RPC 1.16(d) and redactions under CrR 4.7(h)(3). State v. Padgett, 4 Wn. App. 2nd 851, 855, 424 P.3d 1235 (2018). Padgett was not provided a copy of his file and discovery and when he requested it, the State fought against it and his trial counsel didn't even show up at the hearing. Id. at 853.

Division III carefully pointed out that "Padgett filed a motion to compel production of his client file and discovery materials, declaration with exhibits in support of the motion, proposed order, and notice of hearing." Id.

It further pointed out he explained why he needed it and acknowledged that redactions would be likely.¹ Id.

The rule that a criminal defendant should be penalized by his individual lack of knowledge to obtain a redacted copy of his trial court file when he could otherwise claim his trial court was ineffective is wrong. Without providing the defendant notice, his lack of knowledge is being used against him by requiring the diligence be that of his ineffective counsel. The State attempts to use Yates to argue against such a claim. Response, p. 12 (citing In re Pers. Restraint of Yates, 183 Wn.2d 572, 353 P.3d 1283 (2015)). But none of these cases deal with the issue of providing a criminal defendant notice of their rights to their file. The State provided another case for this proposition which is easily distinguished. In Martin, the PRP argued that the discovery that the statements made by counsel were incorrect was new evidence. In re Pers. Restraint of Martin, 2018 WL 6179309, 2 (Div. II November 27, 2018). It is easily distinguished because Stomps was unaware of the Smith statement and the Dr. Johnson declaration was after the trial.

2. Stomps Had No Knowledge that the Statement by David Smith Existed Until Recently.

Stomps never knew until recently that he had a right to his trial

¹ Padgett seemed almost singularly able to plead his case both procedurally and substantively, unlike most pro se litigants.

counsel's file with proper redactions. Exhibit 8. He was never informed of this by either his trial attorney or court. And he never saw the statement by David Smith until he saw the finalized PRP after his current counsel obtained the file. Id. This is because this interview was obtained by Stomps' current counsel from his trial counsel. Exhibit 9. This is why the statement by David Smith is new evidence to Stomps. Stomps must not be penalized by the ineffectiveness of his trial counsel without being provided notice he had the right to his case file.

Stomps would note that in the quote from Yates in the Response, the State emphasized the due diligence element which is the argument the State has claimed was made without citation to authority. When requires the question be asked of how can a defendant like Stomps exercise diligence in an IAC claim if he is unaware that he is entitled to his file?

3. Brian Johnson Is an Expert Witness and His Statement is Relevant.

As regards the statement by Dr. Brian Johnson, the State has made a general objection to his testimony under ER 702. ER 702 cuts a broad swath.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. The State did not challenge Dr. Johnson's bona fides as an expert

witness in the area of bail recovery agents. Instead, it cited several statements in the declaration that it objected to. However, it makes this argument without providing any relevant case law. Prior in its Response, the State argued that Stomps' claim that he cannot be held responsible for his lack of diligence because his ineffective trial counsel had access to this information could not be considered. Response, pp. 11-12. Stomps has an excuse, he is pushing a new paradigm. As regards the ER 702 argument, the State has no excuse for not providing legal authority for its objections.²

Dr. Johnson's actual declaration is 13 pages long. Exhibit 7. In it, he talks about the various issues relevant to the function of a BRA. "In Washington, experts are permitted to testify on subjects that are not within the understanding of the average person." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing ER 702; State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984)). The Supreme Court went on to state that "[t]he mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion. Id.(citing State v. Kirkman, 159 Wn.2d at 929, 155 P.3d 125 (2007); (State v. Ring, 54 Wn.2d 250, 255, 339 P.2d 461 (1959)). Stomps would also point out that police are often used as

² The State cited to various cases for this proposition Response, p. 12 (citing State v. Young, 89 Wn.2d 613, 574 P.2d 1171 (1978); State v. Dow, 162 Wn. App. 324, 253 P.3d 476 (2011); State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991)).

expert witnesses in police procedures. See State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999).

Finally, his testimony was not available due to the ineffectiveness of his trial counsel. The information on how bail recovery agents operate is not to be gleaned from sensational television shows like Dog the Bounty Hunter. Such knowledge is not within the common knowledge of the ordinary person and it was incumbent upon trial counsel to inform the jury of the responsibilities of and protections for BRAs. Without the specialized knowledge of the right of a BRA to enter a house in hot pursuit without meeting all the requirements of RCW 18.185.300, or that they have the right to protect themselves just like the police, the jury convicted Stomps. Such information would probably change the result at a new trial, meeting this prong of the requirements of newly discovered evidence. State v. Mullen, 171 Wn.2d 881, 906, 259 P.3d 158 (2011) (citing State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996)).

B. APPLGATE V. LUCKY BAIL BONDS, INC. IS A SIGNIFICANT CHANGE IN LAW.

The State claims that Stomps had the opportunity to argue he had “reasonable cause” to believe Barnes was inside, Applegate is not a significant change in law. Response, p. 17 (citing Applegate v. Lucky Bail Bonds, Inc., 197 Wn. App. 153, 387 P.3d 1128 (2016)). In doing so, it relies on the

holding of In re Pers Restraint of Light-Roth, 191 Wn.2d 328, 422 P.3d 444 (2018).

Light-Roth argued that a prior decision of the Supreme Court holding in O'Dell that age could be considered in sentencing was a significant change in law over the prior decision in Ha'mim. Id. at 334 (citing State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015); State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997)). O'Dell held that although “age is not a per se mitigating factor,” a sentencing court ‘must be allowed to consider youth as a mitigating factor when’ relevant.” O'Dell, 183 Wn.2d at 695-96. O'Dell held that Ha'mim

did not bar trial courts from considering a defendant’s youth at sentencing; it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant’s culpability.

Id. at 689. In rejecting Light-Roth’s argument, the Supreme Court found it significant that Light-Roth could have argued the issue before the trial court before the new decision. Light-Roth, 191 Wn.2d at 334 (citing State v. Miller, 185 Wn.2d 111, 115, 371 P.3d 528 (2016)).

This statement misses the crucial point made in the PRP, namely that it was not a planned forced entry but a an unplanned forced entry. Jury Instruction No. 17 did not apply to the facts of the case. The State is correct that if Stomps had the opportunity to argue for an unplanned forced entry

before publication of the new law, he could not raise this issue. Stomps had previously pointed out that his counsel filed a Knapstead motion asserting that Stomps had conducted an unplanned entry and, therefore RCW 18.185.300 did not apply to his case. This argument was rejected by the trial court and there was no proposed, much less final, jury instruction on unplanned forced entry.³ Exhibit 10 (Jury Instruction 17). The bottom line is that practically speaking the trial court prevented Stomps from arguing to the jury that he was making a planned forced entry onto a third party's property.

C. STOMPS MAY RAISE THE INSUFFICIENT EVIDENCE ARGUMENT IN HIS PRP BECAUSE THE ISSUE RAISED IN HIS APPEAL WAS GENERAL, NOT SPECIFIC AND IT IS IN THE INTERESTS OF JUSTICE.

The State argues that the sufficiency of the evidence issue should not be relitigated. However, Stomps must be permitted to raise this issue for two reasons. First, it is very different issue than was first raised on appeal. Second, the interests of justice requirement.

In Stomps's appeal, this issue was raised without examination of the statutes governing the rights of bail recovery agents to do their job, much less the constitutional protections provided.⁴ Exhibit 11. It only addressed the jury

³ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁴ It failed to planned entries enshrined in RCW 18.185.300, much less unplanned forced entries as was argued in the Knapstad motion.

instructions for the basic crimes. Id. It did not address the one specific issue raised in this PRP, whether or not he was guilty of the crimes while conducting an unplanned forced entry.

Even assuming, *arguendo*, that the prior argument in the direct appeal was sufficient to meet this criterion, this Court is still entitled to hear the issue in the interests of justice. In re Pers Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). Such a justification is whether there is a justification for failing to raise the issue previously. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 420, 276 P.3d. 286 (2012). Stomps answers that the justification is the new evidence showing his constitutional right to both make an unplanned forced entry and protect himself and the residences of a domicile when doing so. Stomps would also point out that his actual innocence claim is based on the proper law as show in both his expert's declaration and the holding in Applegate.

D. STOMPS IS ENTITLED TO EQUITABLE TOLLING.

The State has argued that Stomps must argue bad faith, deception or false assurances to get the benefit of equitable tolling. Stomps had previously argued he is entitled to the benefit of tolling as set forth in In re Pers. Restraint of Carter, 154 Wn. App. 907, 230 P.3d 181 (2010). However, the failure to advise a criminal defendant of their right to their case file prior to any post-conviction action when materials obtained from that file are used to

support an ineffective assistance of trial counsel claim requires equitable tolling in the interests of justice.

II. CONCLUSION

For the reasons stated above, the evidence supports a finding Stomps is not time barred. It further supports there was insufficient evidence to convict and his trial counsel was ineffective, warranting dismissal. Finally, Stomps is innocent of all charges of his conviction, again warranting dismissal.

III. REQUEST FOR RELIEF

Jason Stomps is under unlawful restraint. Based upon the foregoing, he asks that he be found innocent of his crimes of conviction due to his actual innocence or in the alternative, insufficient evidence. In the alternative, he asks that the case be remanded back to Clark County Superior Court for a new trial based on ineffective assistance of counsel.

Respectfully submitted this 23rd day of December, 2019.


MICHAEL KAHRS, WSBA #27085

NOTICE OF SERVICE

I hereby certify that on this 23rd day of December, 2019, I caused to be electronically filed the foregoing document with the Clerk of the Court of the Court of Appeals using the electronic filing system which will send notification and a copy of this filing to the individuals listed below:

Aaron T. Bartlett, DPA
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666



Michael Kahrs

IV. EXHIBITS

8. Second Declaration of Jason Stomps.
9. Declaration of Michael C. Kahrs
10. Jury Instruction No. 17.
11. State v. Stomps; Petitioner's opening brief.

EXHIBIT 8

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

IN THE MATTER OF THE
PERSONAL RESTRAINT OF
JASON STOMPS,

Petitioner.

No. 53400-2-II

SECOND DECLARATION OF
JASON STOMPS

1. I am over the age of 18, have personal knowledge of the facts set forth herein, and I am competent to testify.

2. I am the Petitioner in this case.

3. Before my trial, I had never seen the statement of David Smith give to the Clark County Sheriff's Department when meeting with my trial counsel. The first time I knew about the statement was in conversations with my current attorney, Michael Kahrs.

4. The first time I actually saw a copy was when I received my copy of my PRP.

5. The first time I knew I was entitled to copy of my case file from my trial attorney was when I was informed of this by my current attorney, Michael Kahrs. I absolutely do not remember being told by anyone including the trial court or my trial counsel that I could have copy of case file after conviction.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS ____ day of December, 2019.

Jason Stomps by Michael Kahrs
JASON STOMPS
per fallen
Original to the
file

EXHIBIT 9

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

IN THE MATTER OF THE
PERSONAL RESTRAINT OF
JASON STOMPS,

Petitioner.

No. 53400-2-II

DECLARATION OF
MICHAEL C. KAHRs

1. I am over the age of 18, have personal knowledge of the facts set forth herein, and I am competent to testify.

2. I am counsel for the Petitioner in this case.

3. I obtained a copy of the trial attorney's file by contacting him. In the file was the statement made by David Smith to the Clark County Sheriff's Office.

I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 22nd day of December, 2019.

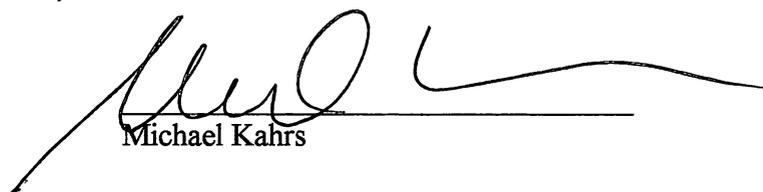

Michael Kahrs

EXHIBIT 10

INSTRUCTION NO. 17

It is a defense to the charge of burglary in the first degree that the defendant was a bail bond recovery agent making a planned forced entry as permitted by law.

Before a bail bond recovery agent may apprehend a person subject to a bail bond in a planned forced entry, the bail bond recovery agent must:

(1) Have reasonable cause to believe that the defendant is inside the dwelling, building, or other structure where the planned forced entry is expected to occur; and

(2) Notify an appropriate law enforcement agency in the local jurisdiction in which the apprehension is expected to occur. Notification must include, at a minimum: The name of the defendant; the address, or the approximate location if the address is undeterminable, of the dwelling, building, or other structure where the planned forced entry is expected to occur; the name of the bail bond recovery agent; the name of the contracting bail bond agent; and the alleged offense or conduct the defendant committed that resulted in the issuance of a bail bond.

During the actual planned forced entry, a bail bond recovery agent shall wear a shirt, vest, or other garment with the words "BAIL BOND RECOVERY AGENT," "BAIL ENFORCEMENT," or "BAIL ENFORCEMENT AGENT" displayed in at least two-inch-high reflective print letters across the front and back of the garment and in a contrasting color to that of the garment.

EXHIBIT 11

NO. 47546-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON R. STOMPS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable Derek Vanderwood, Judge
Cause No. 14-1-00772-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, burglary in the first degree, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in not taking count II, kidnapping in the second degree, from the jury for lack of sufficiency of the evidence.
03. The trial court erred in not taking count III, kidnapping in the second degree, from the jury for lack of sufficiency of the evidence.
04. The trial court erred in not taking count IV, kidnapping in the second degree, from the jury for lack of sufficiency of the evidence.
05. The trial court erred in not taking count V, assault in the second degree, from the jury for lack of sufficiency of the evidence.
06. The trial court erred in not taking count VI, assault in the second degree, from the jury for lack of sufficiency of the evidence.
07. The trial court erred in not taking count VII, assault in the second degree, from the jury for lack of sufficiency of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Stomps intended to commit a crime against a person or property inside the building to support his conviction for burglary in the first degree as charged in count I? [Assignment of Error No. 1].

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//

02. Whether there was sufficient evidence that Stomps intended to abduct each of the three individuals to support his convictions for kidnapping in the second degree as charged in counts II-IV? [Assignments of Error Nos. 2, 3 and 4].
03. Whether there was sufficient evidence that Stomps intended to create in each of the three individuals apprehension and fear of bodily injury to support his convictions for assault in the second degree as charged in counts V-VII? [Assignments of Error Nos. 5, 6 and 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jason R. Stomps was charged by third amended information filed in Clark County Superior Court April 14, 2015, with burglary in the first degree, count I, three counts of kidnapping in the second degree, counts II-IV, and three counts of assault in the second degree, counts V-VII, each with a firearm sentencing enhancement, contrary to RCWs 9A.08.020, 9A.52.020, 9A.40.030, 9A.36.021, and 9.94A.533. [CP 42-44].

Subject to further evidentiary objections, Stomps's statements to the police were ruled admissible at trial, which commenced April 13, the Honorable Derek Vanderwood presiding. [RP 25-26; CP 128-131].

Neither objections nor exceptions were taken to the jury instructions. [RP 339].

Stomps was found guilty, including weapon enhancements, sentenced below his standard range, and timely notice of this appeal followed. [CP 80-110].

02. Substantive Facts

On March 20, 2014, near 8:30 in the evening, police were dispatched to the scene of a reported forced entry in progress at the residence of Annette Waleske and her husband, which was located in Clark County. [RP 79, 131, 145-46]. The Waleskes' daughter Tayler had called 911 to report that there was "someone at my house right now banging on our door and asking for someone that doesn't live here, and he has a gun." [RP 115-16]. Upon arrival at the scene, police observed that the front door of the residence had been "blown completely off its hinges" and that Stomps, a bail enforcement agent, was standing just inside the entryway holding a fully loaded operable handgun. [RP 148-49, 209, 217]. He was immediately detained without incident. [RP 108, 151].

Prior to the deputies arrival, Stomps had pounded on the front door and said he was looking for Courtney Barnes. [RP 80-81, 83, 101, 114]. "He said, 'Open the fucking door now, or I'm going to kick it in.'" [RP 84]. At the same time, David Smith, Stomps's partner, was banging on the

unlocked slider at the the back of the house. [RP 103, 172]. After the residents said they didn't know Barnes and to go away, Stomps broke down the door with a large hammer. [RP 101, 114, 172]. Once inside, he and Smith ordered the three residents out of the upstairs bedroom and into the downstairs living room at gunpoint. [RP 90-92, 104-05, 128]. Stomps ordered 20-year-old Quincey Waleske, who had just gotten out of the shower and had only a towel wrapped around him, and 19-year-old Nathan Panosh to handcuff themselves to each other before ordering them to get on the floor along with Quincey's 18-year-old sister Tayler, who had earlier called 911. [RP 78, 92-94, 105-06]. Stomps and Smith said they were bail bond recovery agents looking for a fugitive. [RP 106]. All three occupants said that Stomps never identified himself before entry into the house, only that he was looking for Barnes and that if they didn't open the front door he would kick it in. [RP 86-87, 101-02].

Stomps told the police he was there to serve a fugitive warrant and that the fugitive's girlfriend who had posted the bail lived at the residence, adding that Regan Bail Bonds, his employer, owned the house. [RP 169-171]. He thought the fugitive was in his 30s. [RP 171]. Smith had called him to assist in apprehending the fugitive, telling Stomps that one of the males inside the house matched the description of the fugitive. [RP 170-71]. Stomps "said he identified himself as bail enforcement and told the

occupants to come to the door.” [RP 172]. Before going to the door, Stomps “told a bail lady” to call law enforcement to inform them they were forcing entry. [RP 173]. He said “he hadn’t had time to clear the house looking for Mr. Barnes prior to the arrival of law enforcement.” [RP 175]. He did not think any of the occupants were Barnes. [RP 175].

He said that he went –that they went - - he said, “I went off a CI tip and a description that fit the size of the fugitive, Mr. Barnes.”

[RP 175].

Courtney Barnes’s bail contract had been arranged by his girlfriend Sinan Hang, who had listed the Waleskes’ residence as her address on the bail bond contract signed November 26, 2013. [RP 226-27, 233]. Annette Waleske had known Hang since high school and had given her permission in the past to use her address as her mailing address, which she did. [RP 140]. Hang was never given permission to use the address as her home residence. [RP 141].

Stomps’s wife Victoria,¹ who was a bail agent with Regan Bail Bonds, was at the scene and testified that Stomps had knocked on the door and yelled, ““Bail enforcement, open up.”” [RP 242-43]. She called 911:

I told 911, I believe, this is Victoria with Regan Bail Bonds. I think I gave them the address, and I told

¹ The two were married after the incident. [RP 240].

them that my two agents were about to force entry into the home.

[RP 244].

Jason Stomps testified that prior to entry into the house he had identified himself multiple times as “bail enforcement” and that he was there for Courtney Barnes. [RP 259-60]. He was wearing a black fugitive recovery vest with yellow lettering indicating “Fugitive Recovery.” [RP 158, 220, 242, 281]. Looking into the house, Stomps believed he “had spotted the fugitive myself.” [RP 261]. He then instructed his wife to call 911 and to bring him his tool, a railroad tie driver that’s like a sledgehammer, weighing about 10 pounds, which he used to take the door off its hinges. [RP 264-66]. Upon entry he pulled out this gun and told the three people to come downstairs because he needed to search the house. [RP 266-69]. He did not think anyone of the three individuals was the fugitive. [RP 279, 282]. He told the two males to handcuff themselves together for safety reasons “because I needed to clear the house and they were not listening to us.” [RP 269]. “I had no idea how many people were in the house, who was in the house, if there were weapons in the house.” [RP 269]. He wanted the people out of the way because he “did not (want) anybody to get hurt or us to get hurt or - - I was concerned for everybody’s safety, just not mind.” [RP 270]. He denied he ever went upstairs in the

house or that he pointed his firearm at the the three individuals. [RP 271, 279]. He had “verified the same address that the cosigner (Hang) had listed as her address along with several other addresses.” [RP 272]. The search engine he used to do this indicated that Hung used the Waleskes’ address between January 2012 and January 2013. [RP 290].

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE
THAT STOMPS COMMITTED BURGLARY
IN THE FIRST DEGREE, COUNT I, KIDNAPPING
IN THE SECOND DEGREE, COUNTS II-IV, OR
ASSAULT IN THE SECOND DEGREE, COUNTS
V-VII.²

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

² As the sufficiency argument is similar for each of the counts, the counts are addressed collectively herein for the purpose of avoiding needless duplication.

Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

To prove burglary in the first degree, the State was required to prove each of the following elements beyond a reasonable doubt, as reflected in the court’s to-convict instruction:

- (1) That on or about March 20, 2014 the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon; and
- (4) That any of these acts occurred in the State of Washington.

[CP 59].

The State's evidence was insufficient to prove the second element: that Stomps intended to commit a crime against a person or property inside the building.

The jury was further instructed that,

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

[CP 61].

This inference, however, does not relieve the State of its burden to prove each element of the crime without violating due process. This is so because the State must show that the permitted inference more likely than not flows from the proven fact if the inference is offered as the sole and sufficient proof of intent to commit a crime in the building. State v. Cantu, 156 Wn.2d 819, 826, 132 P.3d 725 (2006).

Here, instead of relying solely on the statutorily permissible inference, the State offered evidence of the other charged offenses of kidnapping in the second degree and assault in the second degree to prove not only the second element of burglary in the first degree but the other offenses as well.

To prove kidnapping in the second degree, as charged in counts II-IV, the State was required to prove that Stomps intentionally abducted each of the three individuals. [CP 67-69]. To prove assault in the second degree, as charged in counts V-VII, the State had to prove that Stomps assaulted the same three people. As argued [RP 385] and instructed,

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not intend to inflict bodily injury.

[CP 70].

What is at issue is whether there was sufficient evidence that Stomps intentionally abducted the three individuals in the building or intended to create in them apprehension and fear of bodily injury. This was required because the State had to prove that Stomps intended to commit a crime within the building in order to convict him of burglary in the first degree, in addition to the other offenses. The State failed to carry its burden in this regard.

There is no issue but that Stomps approached the Waleskes' residence as a bail bond recovery agent looking to arrest Courtney Barnes, a fugitive. That was and remained his only intent throughout the events. He thought he had seen Barnes inside the residence and knew after entry

that the three young occupants were not Barnes. His purpose and intent at that point was to clear the house as he continued to look for Barnes. He had no idea how many, if any, other people were in the house or if “there were weapons in the house.” He just wanted the people out of the way because he was concerned for everybody’s safety, not just his own. [RP 270]. Deputy Sheriff Tim Boardman was of similar mind, explaining that the police also checked the house after Stomps was secured to see if Barnes was there: “We made a quick check to make sure - - I mean, because people lie to us, too – and he wasn’t there.” [RP 167].

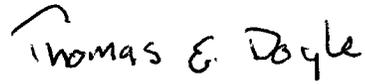
Stomps purpose and intent for being in the residence never changed from when he first approached the house until the police arrived, a point a which he still “hadn’t had time to clear the house looking for Mr. Barnes.” [RP 174]. He did not enter nor remain in the residence with the intent to commit a crime against a person or property therein. Sufficient evidence did not support Stomps’s convictions for the charged offenses, with the result that they must be dismissed.

E. CONCLUSION

Based on the above, Stomps respectfully requests this court to dismiss his convictions consistent with the arguments presented herein.

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DATED this 20th day of November 2015.



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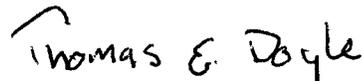
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I certify that I served a copy of the above brief on this date as follows:

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DATED this 20th day of November 2015.



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