



29592-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

ELISEO C. SANCHEZ, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

RESPONDENT'S BRIEF

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A. ISSUE

1. When an occupant of a residence consents to the entry of a person whose entry is otherwise unlawful under a court order of protection, is the person's entry unlawful as that term is defined in Washington's burglary statutes, 9A.52 RCW?

B. STATEMENT OF THE CASE

Marie Vera Rodriguez and Eliseo Sanchez are married and have four children. (CP 13) On the evening of August 28, 2011, police were dispatched to their home. (CP 24) Mr. Sanchez had been in Mexico for about two years, while Ms. Rodriguez had remained in Wenatchee. (CP 24)

Ms. Rodriguez told a police officer, speaking through an interpreter, that Mr. Sanchez had been living with her and their children for about a week, and this cohabitation had included consensual sex. (CP 28) She said that on the evening of his arrest, she had tried to leave the home and Mr. Sanchez prevented her from doing so. She did not claim that she had ever asked him to leave. (CP 28)

In 2010, a no-contact order was in effect, prohibiting Mr. Sanchez from entering the residence of Ms. Rodriguez. (CP 36-37)

The State charged Mr. Sanchez with residential burglary and violation of a no-contact order. (CP 10-11) The trial court granted a defense motion to dismiss the charge, finding Ms. Rodriguez had consented to Mr. Sanchez's presence in their home.¹ (CP 15, 38) The court ruled that, in the context of the burglary statute, entry into a dwelling is lawful if made with the consent of the occupant, even if it violates a protective order. (CP 38)

The State appealed. (CP 39)

C. ARGUMENT

1. A PERSON WHO OCCUPIES, OR IS INVITED BY AN OCCUPANT, OF A RESIDENCE IS PRIVILEGED TO ENTER OR REMAIN AND CANNOT BE CONVICTED OF BURGLARY.

A person is guilty of residential burglary if he or she enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property in that dwelling. RCW 9A.52.025(1). A person "enters or remains unlawfully" if he or she "is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3);

¹ "The Court found that Ms. Sanchez had consented to Mr. Sanchez being in her residence and that she never revoked that consent. (CP 38, Finding of Fact #4) The State has not assigned error to this finding; it is, accordingly, a verity on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959)

State v. Lopez, 105 Wn. App. 688, 694-95, 20 P.3d 978 (2001);
State v. Thomson, 71 Wn. App. 634, 637-38, 861 P.2d 492 (1993).

Only the person who resides in or otherwise has authority over the property may grant permission to enter or remain. *State v. J.P.*, 130 Wn. App. 887, 892, 125 P.3d 215 (2005) citing *State v. Grimes*, 92 Wn. App. 973, 978, 966 P.2d 394 (1998). Division II of this court applied this principle in the context of a domestic violence protective order in *State v. Wilson*. The court held that a “no contact” order is ineffective to override the privilege of an occupant of a dwelling to enter or remain in that dwelling. *State v. Wilson*, 136 Wn. App. 596, 609, 150 P.3d 144 (2007). Because the defendant in *Wilson* was a co-signer on the lease and lived in the residence, the court held that he was licensed or privileged to enter and remain in the dwelling, and therefore could not be convicted of burglary. *Id.*

The State contends that *Wilson* is distinguishable because the no contact order prohibited contact with the victim, but did not prohibit Wilson's presence at the residence. The court's reasoning did not, however, rely solely on the absence of a protection order provision prohibiting Mr. Wilson from entering the residence.

The court held: “It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent,

that drives the burglary statute's definition of a person who 'is not then licensed, invited, or otherwise privileged to so enter or remain' in a building." *Id. citing* RCW 9A.52.010(3). In concluding that a court order cannot render entry unlawful, for purposes of the burglary statute, *Wilson*, at 608, emphasized the difference between "the purpose of a no-contact order . . . to prevent a victim from having to face her batterer . . ." and "the burglary statute's intent . . . to allow an occupant to prevent all those who are unwelcome from entering the premises." Here, as in *Wilson*, it is the defendant and his wife, not the State, who occupied the residence.

The State nevertheless contends that failure to treat as a burglary any entry into a building in violation of a domestic violence protective order undermines the legislature's intent to protect victims of domestic violence. This argument ignores the legislature's provision of effective tools for enforcing such court orders. *See* RCW 26.50.110.

At a minimum, violation of a court order "provision excluding the person from a residence, workplace, school, or day care" is punishable as a gross misdemeanor. RCW 26.50.110(1)(a)(ii). And upon conviction, the offender may be required to "submit to electronic monitoring" at his own expense. RCW 26.50.110(1)(b). Such a violation is also punishable as contempt of court. RCW 7.21.040(5), 26.50.110(3). Such a violation is punishable as a felony if it also involves assaultive conduct.

RCW 26.50.110(4). A third violation is punishable as a felony.
RCW 26.50.110(5).

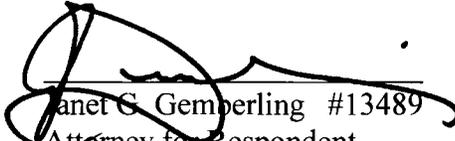
As the *Wilson* court recognized, the values protected by the burglary statute differ significantly from the purposes of the domestic violence statutes. 136 Wn. App. At 608. Enactment of RCW 26.50.110 reflects the legislature's recognition that burglary laws are not an effective tool for addressing the issues peculiar to domestic violence.

D. CONCLUSION

Mr. Sanchez was guilty of misdemeanor violation of a court order under RCW 26.50.110(a). Because he was an occupant of the residence, with the consent of the other occupant, his wife, he was privileged to enter and remain in the residence, and the trial court properly dismissed the burglary charge. This court should affirm the trial court decision dismissing the burglary charge.

Dated this 22nd day of July, 2011.

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