

**FILED**

SEP 23 2011

COA No. 29654-7-III

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

ANTONIO GARCIA VALLE, Appellant.

---

BRIEF OF APPELLANT

---

Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

**FILED**

SEP 23 2011

COA No. 29654-7-III

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

ANTONIO GARCIA VALLE, Appellant.

---

BRIEF OF APPELLANT

---

Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

- A. The State’s evidence was insufficient to support the convictions for residential burglary as to Leticia White, third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness.....1
- B. The court erred by imposing an exceptional sentence.....1

Issues Pertaining to Assignments of Error

- 1. Was the State’s evidence sufficient to support findings of guilt beyond a reasonable doubt on the charges of residential burglary (Leticia White), third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness? (Assignment of Error A)..... 1
- 2. Did the court err by imposing an exceptional sentence when the “clearly too lenient” factor was not determined by a jury? (Assignment of Error B)..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 5

- A. The State’s evidence was insufficient to support findings of guilt beyond a reasonable doubt on the charges of residential burglary (White), third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness..... 5
- B. The court erred by imposing an exceptional sentence when the “clearly too lenient” factor was not determined by a jury..... 11

IV. CONCLUSION.....14

TABLE OF AUTHORITIES

Table of Cases

*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 59 L. Ed.2d 403 (2004)..... 14

*State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 345 (2008).....13

*State v. Blight*, 89 Wn.2d 38, 569 P.2d 1129 (1977).....7

*State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).....6

*State v. Darrin*, 32 Wn. App. 394, 647 P.2d 549, review denied, 97 Wn.2d 1040 (1982).....9

*State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010)..... 10

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)....6, 10, 11

*State v. Hooper*, 100 Wn. App. 179, 997 P.3d 936 (2004).....14

*State v. Hudson*, 56 Wn. App. 490, 784 P.2d 533, review denied, 114 Wn.2d 1016 (1990).....10

*State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).....13

*State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005)....6

*State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989).....7, 8

*State v. Jackson*, 82 Wn. App. 594, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997).....7

*State v. Lalonde*, 35 Wn. App. 54, 665 P.2d 421, review denied, 100 Wn.2d 1014 (1983).....9

*State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011).....13

## Statutes

RCW 9.94A.010.....	12
RCW 9.94A.535(2).....	12
RCW 9A.48.090.....	8
RCW 9A.76.020.....	9
RCW 9A.76.040.....	9

## I. ASSIGNMENTS OF ERROR

A. The State's evidence was insufficient to support the convictions for residential burglary as to Leticia White, third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness.

B. The court erred by imposing an exceptional sentence.

### .Issues Pertaining to Assignments of Error

1. Was the State's evidence sufficient to support findings of guilt beyond a reasonable doubt on the charges of residential burglary (Leticia White), third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness? (Assignment of Error A).

2. Did the court err by imposing an exceptional sentence when the "clearly too lenient" factor was not determined by a jury? (Assignment of Error B).

## II. STATEMENT OF THE CASE

Mr. Valle was charged by second amended information with count 1 – residential burglary (Tracy O'Shea), count 2 – residential burglary (Leticia White), count 3 – second degree malicious mischief (O'Shea) or in the alternative count 4 – hit-and-run property damage, count 5 – second degree theft, count 6 –

obstructing a law enforcement officer, count 7 – third degree malicious mischief (White), count 8 – unlawful imprisonment, count 9 – coercion, and count 10 – intimidating a witness. (CP 108-111). The case proceeded to jury trial.

On July 27, 2010, at around 9 a.m., Tracy O'Shea was showering when she heard a knock on the door. (Vol. I Trial RP 46). She also heard some commotion inside the house and turned off the shower. (*Id.*). She wrapped herself in a towel and opened the bathroom door, whereupon she saw a man, Mr. Valle, standing in the bedroom. (*Id.* at 49-50). She was frightened and screamed. (*Id.* at 50). The man told Ms. O'Shea to get back into the bathroom and stay there. (*Id.* at 51). It looked like he had something under his arm. (*Id.* at 52).

She decided to come out of the bathroom and heard running. (Vol. I Trial RP 52). The house had been locked except for a back door going into the garage. (*Id.* at 53). The man was outside getting into a van. (*Id.* at 54). He ran into an antique tractor when leaving. (*Id.* at 56). She called 911 and a deputy arrived. (*Id.* at 58). Ms. O'Shea found some personal items in the area where the van was parked. (*Id.* at 68). A camcorder, battery,

charger, and her purse were missing, with a value of around \$1500 (*Id.* at 69-70).

On July 28, 2010, Sgt. Paul Snyder of the Quincy Police was asked by Deputy Wade Hilliard to go out to an address to watch a residence and look out for a vehicle and Mr. Valle. (Vol. I Trial RP 12). A van went by with Sgt. Snyder recognizing the driver, but not the passenger. (*Id.* at 13). Deputy John McMillan arrived and chased after the van. Running about a quarter-mile behind, the sergeant heard over the radio that the passenger was running. (*Id.*). That man was Mr. Valle. (*Id.* at 15). A chase ensued in a cornfield. (*Id.* at 15-19). Mr. Valle went toward a residence and was later removed from there. (*Id.* at 19, 21).

On July 27, 2010, Misty Gonzalez loaned her van to Mr. Valle, with whom she had children. (Vol. I Trial RP 44-45). She next saw the van about 3 p.m. that day. (*Id.* at 46). Mr. Valle had changed clothes and told her he loaned the van to his friend, Hector. (*Id.* at 48). The van was damaged. (*Id.* at 49).

Deputy Hilliard responded to a burglary call at Ms. O'Shea's residence on July 27, 2010. (Vol. I Trial RP 76). He ran the van's plates off a photo from a security camera at the O'Shea home. (*Id.* at 83). The van was registered to Ms. Gonzalez. (*Id.*). He

prepared a photo montage from which Ms. O'Shea identified Mr. Valle as the man in her home. (*Id.* at 89-92). The deputy noted the front end damage to the van was consistent with hitting the tractor. (*Id.* at 94).

Deputy McMillan was involved in the cornfield chase on July 28, 2010. (Vol. I Trial RP 123-130). Mr. Valle ran out of the field and toward a house. (*Id.* at 130). The deputy found him in the bathroom of the home and took him into custody. (*Id.* at 133). A female, Ms. White, was in the home. (*Id.* at 131) There was a mess in the closet, even though nothing was out of place before Mr. Valle arrived. (*Id.* at 136).

On July 28, 2010, Ms. White was at her in-laws' home where she had been house-sitting. (10/21/10 Trial RP 143). She heard someone come in the back door while she was in the living room and thought her husband was home. (*Id.* at 144, 146-147). Mr. Valle walked into the living room instead. (*Id.* at 144). He told her not to tell the police he was there. (*Id.* at 147). She was not going to leave the house as her daughter was still inside. (*Id.* at 148).

At the close of the State's case, the defense moved to dismiss the residential burglary (White), second degree malicious mischief (White), hit-and-run, obstructing, unlawful imprisonment,

coercion, and intimidating a witness charges. (10/21/10 Trial RP 169). Except for lowering count 3 from second degree malicious mischief to third degree, the court denied the motion. (Vol. III Trial RP 4-18). The hit-and-run charge was later dismissed. (CP 388).

Mr. Valle testified in his own defense. (Vol. III Trial RP 24-64). On July 27, 2010, he let Hector Garcia borrow the van. (*Id.* at 26). The next day, he was riding in the van and the police came up from behind. (*Id.* at 28). Mr. Valle ran into a cornfield and then to a house because he did not want to get hurt by the police. (*Id.* at 29). He was running from them. (*Id.* at 47).

No exceptions were taken to the court's jury instructions. (*Id.* at 79). Mr. Valle was found guilty on both counts of residential burglary, both counts of third degree malicious mischief, second degree theft, obstructing, unlawful imprisonment, coercion, and intimidating a witness. (CP 174, 175, 177, 178, 179, 180, 181, 182, 183). The court imposed an exceptional sentence with findings and conclusions citing the multiple offense and "clearly too lenient" factors in support of it. (CP 388, 188-189). This appeal follows.

### III. ARGUMENT

A. The State's evidence was insufficient to support findings of guilt beyond a reasonable doubt on the charges of residential

burglary (White), third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

Mr. Valle moved to dismiss the second degree malicious mischief, hit-and-run, obstructing, unlawful imprisonment, coercion, and intimidating a witness charges at the end of the State's case. (10/21/10 Trial RP 169). The court granted the motion in part and lowered count 3 to third degree malicious mischief, but denied dismissal of the other charges. (Vol. III Trial RP 4-18). The hit-and-run charge was later dismissed. (CP 388).

The defense offered evidence on the merits of the case. (Vol. III Trial RP 25, 64). By doing so, Mr. Valle waived any challenge to the motion to dismiss at the end of the State's case.

*State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997). But he may still contest the sufficiency of the evidence to support these convictions. *Id.*

On the residential burglary charge involving Ms. White, the State failed to show that Mr. Valle had the "intent to commit a crime against a person or property therein." (CP 135). The court gave an instruction on inference:

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 139).

An inference is a legal deduction or conclusion from an established fact. *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989). It permits the inference of one fact from another as a presumption. *Id.* at 876. The State proffered no evidence that Mr. Valle entered or remained in this home with any intent to commit a crime there. He was hiding from the police. (Vol. III Trial RP 47). For a criminal statutory presumption to pass the test of constitutionality, the presumed fact must follow beyond a reasonable doubt from the proved fact. *State v. Blight*, 89 Wn.2d 38, 569 P.2d 1129 (1977). A presumption is only permissible when

no more than one conclusion can be drawn from any set of circumstances. *Jackson*, 112 Wn.2d at 876. More than one conclusion can be drawn here. The circumstances are such that the presumed fact Mr. Valle intended to commit a crime in the home does not follow beyond a reasonable doubt from the proved fact he was there. His conviction on the residential burglary charge involving Ms. White must be reversed. *Id.*

As for the third degree malicious mischief charges, the State offered no evidence at trial on the amount of damage done to the tractor in count 3 or the door in count 7. In instructions 20, 21, 35, and 36, the court instructed the jury that an element of the crime was physical damage to property in an amount exceeding \$50 but not exceeding \$750. (CP 144, 145, 159, 160; *but see* RCW 9A.48.090 (no dollar amount)). Because the record shows the State did not offer any evidence as the amount of property damage incurred, it failed to prove an essential element of third degree malicious mischief as instructed by the court. *Green, supra.*

Furthermore, the State failed to show that Mr. Valle damaged the "property of Leticia White" as required by instruction 36. (CP 160). The record reflects that she was house-sitting at her in-laws' home. (10/21/10 Trial RP 143). The door was not the

property of Ms. White. The State's evidence was insufficient to support guilt on count 7 on this ground as well.

Mr. Valle was convicted of obstructing a law enforcement officer in count 6. On the motion to dismiss, the defense argued the State should have charged him under the specific statute for resisting arrest rather than the general statute for obstructing. (10/21/10 Trial RP 174). The rule requiring that crimes be charged under a specific rather than a general statute applies when a violation of the specific statute necessarily also constitutes a violation of the general statute. *State v. Darrin*, 32 Wn. App. 394, 396, 647 P.2d 549, *review denied*, 97 Wn.2d 1040 (1982). That is precisely the case here.

Obstructing requires that the defendant "willfully hindered, delayed, or obstructed" a law enforcement officer in the discharge of his official duties. (CP 156; RCW 9A.76.020). A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. RCW 9A.76.040. What Mr. Valle did was resist arrest under that specific statute. A violation of RCW 9A.76.040 necessarily constitutes a violation of the general obstructing statute, RCW 9A.76.020. *See State v. Lalonde*, 35 Wn. App. 54, 665 P.2d 421, *review denied*, 100 Wn.2d

1014 (1983); *State v. Hudson*, 56 Wn. App. 490, 784 P.2d 533, review denied, 114 Wn.2d 1016 (1990). Mr. Valle's conviction of obstructing must be reversed.

As for the unlawful imprisonment conviction, the State had to prove beyond a reasonable doubt that Mr. Valle restrained Ms. White's movements "by physical force, intimidation, or deception." (CP 161, 162). There was no claim physical force or deception was used. (10/21/10 Trial RP 177). The question was whether there was intimidation. Mr. Valle told Ms. White not to tell the police he was there. (*Id.* at 147). She was frightened – not by his words, but by his being there and running away from police. (*Id.* at 147-148). Even when viewed in a light most favorable to the State, this evidence fell short of showing Mr. Valle restrained her by intimidation. His conviction for unlawful imprisonment cannot stand. *Green, supra*.

Moreover, the incidental restraint doctrine prevents Mr. Valle from being punished for the restraint, if any, of Ms. White that was merely incidental to the commission of another crime. The circumstances are such that the restraint was entirely incidental to his being there in the home. See *State v. Elmore*, 154 Wn. App. 885, 901-02, 228 P.3d 760, review denied, 169 Wn. 2d 1018

(2010). He thus cannot be convicted of unlawful imprisonment as the alleged restraint had no independent purpose or effect. *Id.*

Mr. Valle was also convicted of coercion and intimidating a witness. The issue on these charges was whether a threat was communicated to Ms. White. (10/21/10 RP 178-188). The court perceived any such threat to be indirect at most. (*Id.*). But the record fails to reflect any threats at all by Mr. Valle to Ms. White. He just asked her not to tell the police he was there. (10/21/10 Trial RP 147). No reasonable person would interpret that statement as compelling her to abstain from conduct which she had a legal right to engage in (coercion) or to induce her not to report information relevant to a police investigation (intimidating a witness). (CP 163, 165). Ms. White clearly was not threatened as she actually motioned to the police that he was in the residence and they responded. (10/21/10 RP 20-22, 152). The State failed to prove a threat, direct or indirect. His convictions for coercion and intimidating a witness must be reversed. *Green, supra.*

B. The court erred by imposing an exceptional sentence when the “clearly too lenient” factor was not determined by a jury.

Finding Mr. Valle had prior unscored misdemeanors and multiple current offenses and an offender score of at least 16, the

court imposed an exceptional sentence on the two residential burglary convictions as the standard range would result in a sentence clearly too lenient in light of RCW 9.94A.010. (CP 188-189). The court entered these conclusions of law:

1. The defendant has a minimum of 16 points which are seven higher than the maximum taken into account when scoring.
2. The defendant's prior unscored misdemeanor and gross misdemeanor convictions totaling 30 convictions.
3. The defendant's prior unscored misdemeanor results in a presumptive sentence that is clearly too lenient in light of RCW 9.94A.010.
4. The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished and would result in a sentence clearly too lenient in light of RCW 9.94A.010. (*Id.*).

The standard range sentence on each of the burglaries was 63-84 months. (CP 391). The court sentenced Mr. Valle to exceptional sentences of 120 months on each burglary and ran them consecutively as well. (CP 392-393).

RCW 9.94A.535(2) indicates an exclusive list of factors by which the trial court can impose an aggravated exceptional sentence without findings of fact by a jury:

- . . . (2) The trial court may impose an aggravated exceptional sentence without a finding of fact by a

jury under the following circumstances:

...

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

A defendant is not entitled to notice of the State's seeking such an exceptional sentence that the judge can impose. *State v. Mutch*, 171 Wn.2d 646, 659, 254 P.3d 803 (2011).

The court made a finding that some of Mr. Valle's current offenses would go unpunished because of his high offender score. (CP 189). It also made the finding that the unpunished offenses would result in a sentence clearly too lenient. (*Id.*). But the conclusion that allowing a current offense to go unpunished is "clearly too lenient" is a factual determination that cannot be made by the trial court following *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 59 L. Ed.2d 403 (2004). See *State v. Alvarado*, 164 Wn.2d 556, 568, 192 P.3d 345 (2008)(quoting *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005)). The *Alvarado* court stated the "clearly too lenient" determination is based on factual consequences that must be made by the jury to meet Sixth Amendment muster. 164 Wn.2d at 564. Accordingly, the court's

finding the presumptive sentence was “clearly too lenient” cannot stand. The jury must decide that question. *Id.*

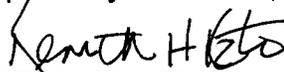
This factor played most strongly in the court’s imposition of an exceptional sentence. (1/10/11 RP 14). From the record, it cannot be said the court would have imposed this sentence absent that factor. The exceptional sentence above the standard range for each burglary and running them consecutively must be reversed. *State v. Hooper*, 100 Wn. App. 179, 188, 997 P.2d 936 (2004).

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Valle respectfully urges this Court to (1) reverse his convictions of residential burglary (White), third degree malicious mischief, obstructing, unlawful imprisonment, coercion, and intimidating a witness and dismiss the charges and (2) reverse the exceptional sentence and remand for resentencing within the standard range.

DATED this 23<sup>rd</sup> day of September, 2011.

Respectfully submitted,

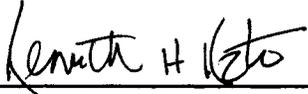


---

Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on September 23, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on D. Angus Lee, Grant County Prosecutor, PO Box 37, Ephrata, WA 98832-0037; and Antonio Garcia Valle, #777968, PO Box 900, Shelton, WA 98584.

  
\_\_\_\_\_  
Kenneth H. Kato