

No. 338321 consolidated with
No. 332969 & No. 338401

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

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

LELBERT WILLIAMS,

Appellant.

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

The Honorable Kathleen M. O'Connor

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Lelbert Williams was convicted of several charges, including attempted second degree burglary (Count III) and second degree possession of stolen property (Count V), after he was seen climbing fences in the Finch Arboretum neighborhood and trying to open a shed door. But these two counts should now be reversed.

First, the State failed to present sufficient evidence of the market value of the stolen property to support the conviction of second degree possession of stolen property. Mr. Williams respectfully requests this Court dismiss this count with prejudice.

As to Mr. Williams' conviction for attempted second degree burglary, this count should be reversed because the defendant's constitutional right to present a defense to a properly instructed jury was denied when the jury was not provided a written instruction defining "intent." Mr. Williams respectfully requests this count be remanded for a new trial.

Next, the trial court categorically refused to consider a prison-based DOSA at sentencing, as requested by Mr. Williams. At a minimum, Mr. Williams requests the matter be remanded for resentencing.

Finally, Mr. Williams objects to any appellate costs should the State prevail on appeal.

B. ASSIGNMENTS OF ERROR

1. The court erred by convicting Mr. Williams of possession of stolen property where the evidence was insufficient.
2. The trial court erred by failing to provide a written instruction to the jury defining “intent.”
3. The trial court erred by categorically denying a prison-based DOSA (drug offender sentencing alternative) request.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether there was insufficient evidence to convict the defendant of second degree possession of stolen property where the State failed to present evidence of the market value of the property.

Issue 2: Whether the trial court’s failure to provide a written jury instruction defining “intent” was a manifest error affecting a constitutional right, requiring reversal.

Issue 3: Whether the trial court abused its discretion by refusing to consider a prison-based DOSA (drug offender sentence alternative).

Issue 4: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

On May 6, 2014, law enforcement in Spokane received several calls about a man who was walking through back yards in the Finch Arboretum neighborhood. (RP¹ 244-246, 290-292, 311-312). According to one neighbor, the man appeared to be nervous and was “acting like he was hiding from somebody or kind of ducking behind things, looking around a lot.” (RP 255). The man also appeared to be carrying two bags and possibly a screw driver. (RP 231-232, 238-239).

¹ “RP” refers to the trial transcripts dated 11/20/14 through 12/12/14. Pretrial hearings were separately transcribed, but have not been referenced herein.

Another witness, John Johnston, whose mother lived in the neighborhood, testified he searched for the man, later identified as the defendant Lelbert Williams, and saw him trying to pry open the door of a shed with a screwdriver. (RP 148-150, 189, 313). Mr. Williams left when Mr. Johnston confronted him. (RP 152). The owner of the shed, Cody Frazier, testified nothing had been taken. (RP 221-222, 226)

Law enforcement apprehended Lelbert Williams in the area and placed him under arrest. (RP 185, 189, 260-261). Mr. Williams was later found to be in possession of property identified as belonging to Adam Macomber. (RP 248, 255, 268, 290-291). Mr. Macomber testified that sometime around May 6, 2014, he realized several items were missing from his apartment in downtown Spokane. (RP 268). He stated he was missing a gray and red Adidas duffel bag, a JBL Bluetooth speaker, Toshiba laptop, New Balance running shoes, Under Armour jacket, a Big Sky championship ring, a high school class ring, bracelet, headphones, a lifting belt, jump rope, books, toiletries, and some miscellaneous clothing. (RP 269-278). Mr. Macomber provided a “rough estimate” of the value of his missing property:

[State]: . . . Were you able to assess a value of an amount that all that property was worth at the time it was taken?

[Witness]: I could give a rough estimate. . .

[State]: What value would you total your loss at being?

[Witness]: I would say roughly \$800.

(RP 278). The State charged Mr. Williams with five counts, two of which are challenged herein: attempted second degree burglary (Count III), and second degree possession of stolen property (Count V). (CP 276-277). The case proceeded to a jury trial. (RP 131-486). Witnesses testified consistent with the facts stated above. (*Id.*). Mr. Williams represented himself at trial with standby counsel. (RP 3; CP 192).

Mr. Williams testified he had been trying to get away from a man who was following him in a truck; Mr. Williams said he was scared and concerned for his safety. (RP 127, 129, 377-382, 384, 386, 393). He traveled to the Finch Arboretum neighborhood, where he eventually was apprehended by law enforcement. (RP 380, 382). He testified he did not steal anything (RP 396) and said it was not his intent to take anything from Mr. Frazier's shed. (RP 467).

In closing argument, the defendant argued Mr. Johnston was following him, whilst Mr. Williams was only trying to avoid Mr. Johnston. (RP 462, 464). Mr. Williams suggested he may have been guilty of trespassing, but not burglary. (RP 464, 466). He argued it was not his intention to steal anything from anyone's home or shed that day. (RP 467-468).

The court instructed the jury on attempted second degree burglary in Count III as follows:

A person commits the crime of Attempted Second Degree Burglary when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

...

To convict the defendant of the crime of Attempted Second Degree Burglary in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about [sic] 6th day of May, 2014, the defendant did an act that was a substantial step toward the commission of Second Degree Burglary,
- (2) That the act was done with the intent to commit Second Degree Burglary; and,
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

...

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

(RP 425-426; CP 302-304).

The jury was not given a written definition of the “intent” instruction. (CP 286-344). The trial court did read aloud an Instruction Number 8, which was the definition of “intent.” (RP 424). But this instruction was apparently omitted in the Court’s written instructions to the jury. (*See* CP 286-344).

No party objected to the missing written version of Instruction Number 8 (“intent” instruction), nor did the jury bring it to the court’s attention. (RP 424). However, soon after the reading of Instruction Number 8 (“intent” instruction), several other inconsistencies in the instructions were discovered that may have created confusion or a distraction that led to the omission of the written intent instruction. (RP 426-427, 429-430, 436). For instance, the court realized Instruction Number 18 was found to be missing and incorrect. (RP 426-427). Instruction Number 18 was supposed to be the definition of attempted theft of a motor vehicle, but instead it said it was attempted second degree burglary. (RP 427). Moreover, Mr. Williams’ and the State’s copy of the instructions appeared to have the correct Instruction Number 18, while the court and jury’s instruction packet did not. (RP 427). The trial court corrected the error and continued reading. (RP 427). It was also unclear whether certain jury instructions were numbered correctly or whether the trial court incorrectly read the number by referring to three separate instructions as “Instruction 20.” (RP 429). A juror notified the court of one of the discrepancies. (RP 430). Another typo appears to have occurred, although it is difficult to decipher from the record what happened. (RP 436). The following exchange took place:

[The Judicial Assistant]: I don’t know what happened. It keeps changing on me.

[The Court]: I think that's what's happening.

[Juror No. 4]: Microsoft Word.
(RP 436).

The court also instructed the jury on second degree possession of stolen property in Count V. (RP 430-432; CP 310-315). The jury was instructed that one of the elements of second degree possession of stolen property is that the stolen property exceeds \$750 in value but does not exceed \$5,000 in value. (RP 430-431; CP 310-311). The jury was given the following instruction defining "value":

Value means the market value of the property at the time and in the approximate area of the act.

Whenever any person is charged with possession of stolen property and such person has unlawfully in his or her possession at the same time the stolen property of more than one person, then the sum value of all stolen property shall be the value considered.

(RP 432; CP 314).

During deliberations, the jury made the following inquiry:

Please provide the legal definition of burglary in the second degree and criminal trespass in the first degree.

(RP 473; CP 285). The court responded by instructing the jury to reference its existing instructions. (CP 285)

The jury found Mr. Williams guilty in pertinent part of attempted second degree burglary (Count III) and second degree possession of stolen property (Count V). (RP 476-477; CP 339, 344).

At sentencing, Mr. Williams requested a prison-based DOSA (drug offender sentencing alternative), stating he was eligible. (RP 503). Mr. Williams pointed out he had not had any violent felonies for at least ten years. (RP 503; CP 386-387). The court refused to consider a DOSA, stating:

[Mr. Williams] never filed anything before today, this wasn't the first sentencing scheduled, that he wanted anything. I have no information with regard to DOSA. I do not have any—for one thing, I don't have anything that indicates there is any substance abuse that was going on during this period of time. I have nothing that supports a consideration of a DOSA other than somebody is asking me for it.

What I believe is appropriate to do in this case is the standard range, and to run all of these charges concurrently, which is what I am going to do. That, to me, is fair. It represents what Mr. Williams was convicted of. It certainly acknowledges, obviously, that he has a significant history. But I really have nothing that would support a DOSA sentence.

(RP 506). Later, Mr. Williams attempted to raise the issue again, and the following exchange took place:

[Mr. Williams]: ... I wasn't sure that I had to address the court about the DOSA thing. There was [sic] drugs that played a factor in that in the hospital that [standby defense counsel] Mr. Harget had got release of information from that stipulates that I did—I was on drugs at the time. So

I—as I say, I wasn't aware I had to address the court on that.

[The Court]: Normally when somebody is asking for a particular type of something other than the standard range, they have to give me some information. And I am not willing to continue this and continue this and continue this sentencing. It is up to me. DOSA is strictly discretionary with the court, it is not something you are entitled to. It is something the court has to consider.

This case has gone on long enough at this point and you could have brought it to my attention sooner. At least what I read in this case didn't involve drugs. I don't know if there was something more that I didn't see, but I don't see all the police reports and that sort of thing.

At any rate, this is what [sic] intend to do.

(RP 508). The court maintained its imposition of a sentence in the standard range. (RP 498-513).

Finally, the judgment and sentence states, “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 393). An order of indigency on file indicates Mr. Williams' impoverished status. (CP 519-520).

Mr. Williams appealed his judgment and sentence to this Court.

E. ARGUMENT

Issue 1: Whether there was insufficient evidence to convict the defendant of second degree possession of stolen property where the State failed to present evidence of the market value of the property.

At trial, the State presented testimony that the approximate value of Mr. Macomber's stolen property was \$800. (RP 278). However no

evidence was presented to show what the market value of the property was, and thus there was insufficient evidence to convict Mr. Williams of second degree possession of stolen property (Count V).

In every criminal prosecution, due process requires the State to prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the 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) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

A person is guilty of possession of stolen property in the second degree if he “possesses stolen property . . . which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value.” RCW 9A.56.160(1)(a). Value of stolen property is defined as the “market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(21). “Market value is defined in this state as the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction.” *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (citation & quotations omitted). Market value is not “based on the value thereof to any particular person, but rather on an objective standard.” *State v. Kleist*, 126 Wn.2d 432, 438, 895 P.2d 398 (1995) (citation and quotations omitted). The retail price is not absolute evidence of market value. *Id.* at 436 (citations omitted). Evidence other than market value, such as replacement cost, is inadmissible at trial unless it is first shown the property has no market value. *State v. Ehrhardt*, 167 Wn. App. 934, 276 P.3d 332 (2012).

In *State v. Ehrhardt*, the court determined insufficient evidence existed to uphold the defendant’s second degree theft conviction for stolen tools. 167 Wn. App. 934, 936, 276 P.3d 332 (2012). The court noted the State “presented no direct evidence and insufficient circumstantial

evidence of the condition or depreciation of the tools from which the jury could infer their market value.” *Id.* at 946. Although the witness did testify as to the condition and recent purchase price of some of the tools, the condition of the rest of the stolen tools was not presented at trial. *Id.* at 945-46. The witness merely testified as to what the tools cost, “not what they were then worth in their used condition” after approximately three years’ of use in construction. *Id.* The court reversed with prejudice because the State failed to present sufficient evidence of the tools’ market value. *Id.* at 946 (also noting the State did not “present evidence that the tools had no market value, which would have permitted the State to rely on evidence of their replacement cost”).

Here the State did not present any evidence of the market value of the stolen goods.² The only evidence the State presented regarding the value of the stolen property was Mr. Macomber’s testimony. (RP 278). The State did not present evidence as to how old the items were, what condition they were in, how much they originally cost, or, if the items had no market value, what their replacement cost would be. *C.f., Erhardt*, 167 Wn. App. at 946. The only information the jury heard about the stolen items was a “rough estimate” by the victim witness, Mr. Macomber. (RP 278). When Mr. Macomber was asked what he would value his total loss

² The jury was properly instructed that the value of stolen property is determined by its “market value.” (CP 314); WPIC 79.20 Value—Definition.

at, he replied “roughly \$800.” (RP 278). There was no indication how Mr. Macomber arrived at this value.

Without more—price tags, receipts, the condition of the property, or information as to what an objective person would pay for Mr. Macomber’s property at market value—there is insufficient direct or circumstantial evidence to show the property was worth at least \$750. Used electronic equipment quickly degrades in value and the record does not indicate that the items Mr. Macomber owned (laptop, hot spot, and speaker) were recently purchased or if they were in good or even minimally working condition. (RP 278). The two rings Mr. Macomber owned—a championship ring and high school class ring—are highly personalized items, which likely had more sentimental value than monetary value. (RP 277-278). No information was provided as to how much Mr. Macomber’s items cost him or their condition—whether new, used, in good working condition, or acquired second-hand. (RP 269-278).

No direct or circumstantial evidence explains how much these items were worth to an objective and well-informed buyer who was not obligated to enter into the transaction. *Longshore*, 141 Wn.2d at 429; *Kleist*, 126 Wn.2d at 438. The only testimony presented was the value of the items to a particular person—Mr. Macomber. *Kleist*, 126 Wn.2d at 438 (market value is not “based on the value thereof to any particular

person, but rather on an objective standard”). It is impossible to tell from looking at the photographs admitted as exhibits what market value these items had. (RP 269-278).

Taking all the facts in the light most favorable to the State, no rational trier of fact could have found the market value of the stolen property to be between \$750 to \$5,000 beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22); *also Erhardt*, 167 Wn. App. at 936.

Mr. Williams respectfully requests his conviction for second degree possession of stolen property be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (setting forth this remedy.) (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

Issue 2: Whether the trial court’s failure to provide a written jury instruction defining “intent” was a manifest error affecting a constitutional right, requiring reversal.

The trial court read an instruction defining “intent” to the jury, but the record reflects the jury was not given a written version of this same instruction. (RP 424; CP 286-344). This manifest error affected Mr. Williams’ constitutional right to present a defense to a properly instructed jury for attempted second degree burglary in Count III.

A party may challenge a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). To meet this test, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). “[T]he appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *Id.* (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). In order for an error to be “manifest” under RAP 2.5(a)(3), a showing of actual prejudice is required. *Id.* at 99 (quoting *Kirkman*, 159 Wn.2d at 935). “To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (internal quotation marks omitted) (alteration in original) (quoting *Kirkman*, 159 Wn.2d at 935).

The Sixth and Fourteenth Amendments provide a criminal defendant with a due process right to a fair trial, which includes the right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). “To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the

jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *State v. O’Hara*, 167 Wn. 2d 91, 105, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010) (citation omitted).

In *State v. Allen*, the Washington Supreme Court reversed an attempted second degree burglary conviction when the trial court declined to issue the defendant’s requested “intent” instruction pursuant to the statutory definition of the word. 101 Wn.2d 355, 362, 678 P.2d 798 (1984) (citing RCW 9A.08.010(1)(a), which states, a “person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime”). *See also* WPIC 10.01 Intent—Intentionally—Definition. (The “note on use” to WPIC 10.01 states this “intent” definition “must be given whenever intent is an element of the crime charged.” WPIC 10.01 Intent—Intentionally—Definition.) The *Allen* Court noted that, although it is clear a jury must be instructed on every element of the crime, it is “less clear whether the jury must be further instructed as to a statutory definition of an element of a crime.” *Id.* at 358 (citations omitted) (adding that “cases generally hold that trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of common understanding”).

The *Allen* Court discussed the four different culpable mental states specifically defined by the legislature. *Id.* at 360-362. Because these mental states were specifically defined, the Court concluded a jury must be instructed on the statutory definition of “intent;” significantly, the Court said it could not assume the jury’s own definition of “intent” would have the same meaning as the statutory definition. *Id.* at 360-362.

Generally, the failure to give definitional instructions is not an error of constitutional magnitude. *O’Hara*, 167 Wn.2d at 106-07 (unpreserved error in instruction defining “malice” was held not to be an error of constitutional magnitude). Failure to propose a defining instruction may preclude issue review for the first time on appeal. *State v. Scott*, 110 Wn.2d 682, 691, 757 P.2d 492 (1988). Specifically, failure to define different mental states in jury instructions may not necessarily be required, though trial courts are encouraged to exercise sound discretion on the matter. *Id.* at 691-692 (citing *Allen*, 101 Wn.2d at 362).

However, in *State v. Sanchez* a trial court’s failure to read an instruction aloud—which defined the essential element of “intent” in an assault case—was held to be an error of constitutional magnitude. 122 Wn. App. 579, 590, 94 P.3d 384 (2004). Although the jury had been given the written instruction, it could not be presumed the jury read it during deliberations. *Id.* 591. And, the defendant’s defense to the assault

charge was lack of specific intent. *Id.* at 591. The court determined the oral omission “relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt”, constituting reversible error. *Id.* at 590.

Here, the trial court read aloud the proper instruction on “intent” to the jury, but it then failed to provide the jury with the written version. (RP 424; CP 286-344). Typically the “intent” instruction is given for attempted crimes, as well as second degree burglary; the “notes on use” for the WPICs for attempted second degree burglary advise using the “intent” instruction. WPIC 60.03 (Second Degree Burglary Definition); WPIC 60.04 (Second Degree Burglary Elements); WPIC 100.01 (Attempt Definition); WPIC 100.02 (Attempt Elements).

It is clear that during the reading of the jury instructions, several other errors were discovered (although the majority of them appear to have been corrected during the reading of the court’s instructions to the jury). (RP 426-427, 429-430, 436; CP 286-344). In addition, during the reading, it was discovered neither the State nor Mr. Williams appeared to have the exact same set of instructions as the jury and trial judge. (RP 427). Ultimately, because the intent instruction was read aloud, Mr. Williams was not on notice at the time of trial to the error. The absence of the intent instruction from the written jury instruction packet was only

subject to being noticed once review was taken in this matter. Simply put, Mr. Williams was not in a position to notice or object at the time of trial in order to correct the error. (RP 417-446; CP 286-344).

This jury instruction error affected Mr. Williams' constitutional right to adequately argue his theory of defense. Mr. Williams' defense theory was that he was scared and concerned for his safety. (RP 127, 129, 377-382, 384, 386, 393). He stated he had no intention of stealing anything, he was merely trying to get away from a man he believed to be following him. (RP 127, 129, 377-382, 384, 386, 393, 396). The jury may have believed Mr. Williams when he argued in closing he had no intention to take anything from Mr. Frazier's shed. (RP 467-468). Notably, the jury also specifically asked the trial court during its deliberations for the definitions of "burglary" and "criminal trespass." (RP 473; CP 285). The court responded to the jury's inquiry by referring it back to its written instructions, demonstrating how critical it was for the written instructions to be accurate and complete. This exchange with the jury suggests the jury was rereading its instructions and may have made a different decision during deliberations with proper instructions.

The trial court's failure to give the requested "intent" instruction was a manifest error affecting a constitutional right. Mr. Williams was entitled to present his defense theory to a properly instructed jury. The

error in the instructions affected the jury's ability to fully consider and weigh what level of mental culpability was present in this case. Because the error was prejudicial and had practical and identifiable consequences on the outcome of the trial, Mr. Williams respectfully requests his conviction of attempted second degree burglary be reversed and remanded. *Sanchez* 122 Wn. App. at 590 (setting forth this remedy).

Issue 3: Whether the trial court abused its discretion by refusing to consider a prison-based DOSA (drug offender sentence alternative).

At sentencing, Mr. Williams requested the trial court consider granting a prison-based DOSA (drug offender sentence alternative). (RP 503, 506, 508). The trial court declined to consider the request, which Mr. Williams now appeals. (*Id.*)

Under the prison-based DOSA, an offender spends half of his sentence in an institution and the other half under community custody with an appropriate substance abuse treatment program. RCW 9.94A.662. The time spent in the institution is calculated using "one-half of the midpoint of the standard sentence range." RCW 9.94A.662(1)(a).

Generally, the decision of whether to grant a sentencing alternative, such as DOSA, is not reviewable on appeal. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1)) (other citation omitted). "However, an offender may always challenge the procedure by which a sentence was imposed." *Id.* An offender has the

right to challenge the “underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” *State v. White*, 123 Wn. App. 106, 113-114, 97 P.3d 34 (2004) (citations omitted). Appellate review is permitted for correction of legal errors or abuses of discretion by the sentencing court. *Id.* (citing *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

A defendant is entitled to request the trial court consider a sentencing alternative. *Grayson*, 154 Wn. 2d at 342 (citation omitted); RCW 9.94A.660(2) (“A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state”). To assist the trial court in determining whether to impose a DOSA, “the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report” RCW 9.94A.660(4). A trial court’s categorical refusal to consider a requested sentencing alternative is reversible error. *Grayson*, 154 Wn. 2d at 342.

In *State v. Grayson*, the trial court refused to consider a DOSA sentence for the defendant. 154 Wn.2d at 336-337, 342. The trial court believed there was not adequate funding for the DOSA program, and did not articulate any other reasons for the denial. *Id.* at 342. The *Grayson* Court determined the categorical refusal to consider a DOSA was error and reversed. *Id.*

In this case, the trial court categorically refused to consider Mr. Williams’ request for a prison-based DOSA. (RP 503, 506, 508). Mr. Williams raised the DOSA request at sentencing, but the trial court refused to even inquire into Mr. Williams’ eligibility. (*Id.*). As a basis for its denial, the trial court stated it did not want to continue the sentencing hearing and did not have enough information.³ (*Id.*). It appears Mr. Williams was eligible: he claimed he was high on drugs at the time he was arrested, and it also appears he had not been convicted of any violent crimes in the last ten years. (RP 503, 508 and CP 386-387); RCW 9.94A.660(1)(c). Nothing in the DOSA statute requires the request be in writing (RCW 9.94A.660 and RCW 9.94A.662), and there was no reason why the court could not have continued the sentencing to have Mr. Williams evaluated for treatment. RCW 9.94A.500 (courts “may extend the time period for conducting the sentencing hearing” for good cause). In addition, the trial court did not provide any alternative explanations for denying the request. *Grayson*, 154 Wn.2d at 342 (trial court did not articulate any additional reasons for denying the DOSA other than lack of funding).

³ The sentencing was continued one time previously—at no fault of Mr. Williams’—as the State requested an exceptional sentence without prior notice to the defendant. (RP 493-495).

Because the trial judge categorically refused to consider a prison-based DOSA for Mr. Williams, he respectfully requests this case be remanded for resentencing. *Grayson*, 154 Wn.2d at 342.

Issue 4: Whether this Court should refuse to impose costs on appeal.

Mr. Williams preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016. (CP 130).

Mr. Williams likely remains indigent and unable to pay costs that may be imposed on appeal. Appellate counsel anticipates filing a report as to Mr. Williams' continued indigency and likely inability to pay an award of costs, no later than 60 days following the filing of this brief, as required by this Court's General Court Order issued on June 10, 2016. (See CP 160).

There is no support in the record at this time that the defendant/appellant has the ability to pay costs on appeal. Also, these costs would be a detrimental barrier to Mr. Williams' successful reentry into society and imposition of them would be inconsistent with those principles enumerated in *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

For these reasons, along with the anticipated filing of the form regarding Mr. Williams' ongoing indigency, Mr. Williams respectfully requests that no costs on appeal be assigned to him.

F. CONCLUSION

The State failed to present sufficient evidence to support a conviction for second degree possession of stolen property (Count V). Mr. Williams respectfully requests this Court reverse and dismiss this conviction with prejudice.

Next, Mr. Williams' constitutional right to present a defense was denied when the jury was improperly instructed on attempted second degree burglary (Count III). He respectfully requests the case be remanded for a new trial.

Further, the trial court abused its discretion by categorically refusing to consider a prison-based DOSA. The matter should be remanded for resentencing.

Finally, Mr. Williams objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 27th day of July, 2016.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33296-9-III
vs.)
LELBERT WILLIAMS)
Defendant/Appellant) PROOF OF SERVICE
_____)

I, Kristina M. Nichols, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 27, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Lelbert Louise Williams, DOC #977983
Cedar Creek Correctional Center
PO Box 37
Littlerock, WA 98556

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at SCPAappeals@SpokaneCounty.org using Division III's e-service feature.

Dated this 27th day of July, 2016.

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