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Court of Appeals
Division III
State of Washington

NO. 34171-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

COREY PUGH A/K/A COREY WILLIAMS,

Appellant.

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

The Honorable Vic L. Vanderschoor, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 2

B. STATEMENT OF THE CASE 4

C. ARGUMENT 12

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR THEFT, AS NO PARTY SUFFERED ANY LOSS 12

2. MR. PUGH'S WAVIER OF COUNSEL WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT. 16

a. The trial court's colloquy failed to inform Mr. Pugh that technical rules exist which would bind him in the presentation of his case and to advise him of the risks of self-representation 17

b. The trial court's colloquy failed to inform Mr. Pugh of the maximum penalties upon conviction 22

c. The trial court's colloquy failed to inform Mr. Pugh of the nature and classification of theft in the second degree 23

3. THE COURT FAILED TO PROPERLY INSTRUCT THE JURY BY REFUSING TO GIVE AN ABANDONMENT INSTRUCTION 23

a. The abandonment defense constitutes "applicable law" as applied to a charge of residential burglary and is not misleading 24

i. Failure to require the state to disprove the defense of abandonment violates due process 25

TABLE OF CONTENTS (CONT'D)

Page

ii. Legislative intent and common law do not support Division I's and II's conclusions that abandonment is not a defense to residential burglary 28

b. There was evidence to support Mr. Pugh's theory of abandonment 30

4. THE TRIAL COURT ERRED IN ADMITTING MR. PUGH'S PRIOR CONVICTIONS 32

a. Admission of Mr. Pugh's prior convictions constituted an abuse of discretion because the trial court failed to apply any legal standard 32

b. Admission of Mr. Pugh's prior convictions wes not harmless 35

5. IF THE TRIAL COURT'S ERRORS ALONE DO NOT WARRANT REVERSAL, THEIR CUMULATIVE EFFECT DOES 36

6. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED RESTITUTION 37

7. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY IN FAILING TO CONSIDER MR. PUGH'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS 38

8. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY 40

a. The word "liable" does not denote a mandatory obligation 42

b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Mr. Pugh's interpretation that "shall be liable" does not impose a mandatory obligation ... 43

TABLE OF CONTENTS (CONT'D)

Page

c. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case 46

d. The legislature knows how to make legal financial obligations mandatory and chose not to do so with respect to the criminal filing fee 47

e. To the extent he must argue *Lundy, Stoddard, and Gonzales* are incorrect and harmful for this court not to follow them, Mr. Pugh so argues 48

D. CONCLUSION 50

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Bellevue v. Acrey
103 Wn.2d 203, 691 P.2d 957 (1984) 16, 17, 21, 22

City of Bremerton v. Widell
146 Wn.2d 561, 51 P.3d 733 (2002) 26

Grisby v. Herzog
190 Wn. App. 786, 362 P.3d 763 (2015) 48, 49

In re Pers. Restraint of Dalluge
162 Wn.2d 814, 177 P.3d 675 (2008) 45

In re Personal Restraint of Arnold
___ Wn. App. ___, ___ P.3d ___, No. 34018-0-III (Apr. 25, 2017) 48

In re Rights to Waters of Stranger Creek
77 Wn.2d 649, 466 P.2d 508 (1970) 49

Simpson Inv. Co. v. Dep't of Revenue
141 Wn.2d 139, 3 P.3d 741 (2000) 45

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015) 39, 40, 46, 49

State v. Chavis
31 Wn. App. 784, 644 P.2d 1202 (1982) 20

State v. Coe
86 Wash. App. 841, 939 P.2d 715 (1997) 37

State v. Coley
180 Wn.2d 543, 326 P.3d 702 (2014) 16, 17

State v. DeVincentis
150 Wn.2d 11, 74 P.3d 119 (2003) 32, 33

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Duncan
185 Wn.2d 430, 374 P.3d 83 (2016) 48

State v. Gonzales
198 Wn. App. 151, _ P.3d _, 2017 WL 986208 (March 14, 2017). 41-43, 45, 48, 49, 50

State v. Greiff
141 Wn.2d 910, 10 P.3d 390 (2000) 37

State v. Gresham
173 Wn.2d 405, 269 P.3d 207 (2012) 35

State v. J.P.
130 Wn. App. 887, 125 P.3d 215 (2005) 25, 26, 27, 28, 30

State v. Jackson
102 Wn.2d 689, 689 P.2d 76 (1984) 33

State v. James
138 Wn. App. 628, 158 P.3d 102 (2007) 16

State v. Jenson
149 Wn. App. 393, 203 P.3d 393 (2009) 27, 31

State v. Lee
128 Wn.2d 151, 904 P.2d 1143 (1995) 13, 14, 15

State v. Lough
125 Wn.2d 847, 889 P.2d 487 (1995) 33

State v. Lundy
176 Wn. App. 96, 308 P.3d 755 (2013) 41, 43, 48, 49, 50

State v. Nordstrom
89 Wn. App. 737, 950 P.2d 946 (1997) 17, 18, 22

State v. Olson
182 Wn. App. 362, 329 P.3d 121 (2014) 27, 29, 31

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Porter
150 Wn.2d 732, 82 P.3d 234 (2004) 24

State v. Redmond
150 Wn.2d 489, 78 P.3d 1001 (2003) 24

State v. Slocum
183 Wn. App. 438, 333 P.3d 541 (2014) 32, 33

State v. Stoddard
192 Wn. App. 222, 366 P.3d 474 (2016) 41, 48, 49, 50

State v. Thang
145 Wn.2d 630, 41 P.3d 1159 (2002) 32

State v. Tharp
96 Wn.2d 591, 637 P.2d 961 (1981) 33

State v. Vasquez
178 Wn.2d 1, 309 P.3d 318 (2013) 12

State v. Vermillion
112 Wn. App. 844 51 P.3d 188 (2002) 17, 19, 22

State v. W.R.
181 Wn.2d 757, 336 P.3d 1134 (2014) 25

State v. Wiebe
195 Wn. App. 252,377 P.3d 290 (2016) 26

State v. Williams
132 Wn.2d 248, 937 P.2d 1052 (1997) 1, 7, 8, 11, 20, 24, 30

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Faretta v. California
422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) 1, 2, 16

Helvering v. Reynolds
313 U.S. 428, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) 43

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 25

Jones v. Liberty Glass Co.
332 U.S. 524, 68 S. Ct. 229, 92 L. Ed. 142 (1947) 43

RULES, STATUTES AND OTHER AUTHORITIES

3 CHARLES E. TORCIA, WARTON'S CRIMINAL LAW § 325
(15th ed. 1995) 29

BLACK'S LAW DICTIONARY 915 (6th ed. 1990) 42

CrR 7.8 ..... 5, 21

ER 404 ..... 1, 8, 32, 33, 34, 50

FINAL B. REP. on S.B. 5233, 51st Leg., Reg. Sess. (Wash. 1989) 29

GR 34 39

Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455 (2012/13) 49

LAWS OF 2009, ch. 431, § 8 13

RCW 7.68.120 44

RCW 9.94A.760 38

TABLE OF AUTHORITIES (CONT'D)

Page

RCW 9A.52.025 24

RCW 9A.52.070 25

RCW 9A.52.090 ..... 25, 27

RCW 9A.56.020 13

RCW 9A.56.040 13

RCW 10.01.160 ..... 38, 39, 40, 46

RCW 10.14.040 44

RCW 10.46.190 46

RCW 11.96A.220 45

RCW 34.05.514 44

RCW 36.18.020 ..... 2, 3, 41, 43, 44, 45, 46, 47, 50

RCW 43.43.754 47

U.S. CONST. amend. VI 16

U.S. CONST. amend. XIV 16, 25

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) 30

A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence of a deprivation of property, an essential element of the crime of theft in the second degree.

2a. The Faretta[1] colloquy was inadequate because the court failed to inform Corey Javon Pugh[2] that technical rules exist which would bind him in the presentation of his case and failed to assure that Mr. Pugh understood the risks of self-representation.

2b. The Faretta colloquy was inadequate because the court failed to inform Mr. Pugh of the maximum penalties he faced upon conviction or of the nature and classification of theft in the second degree.

3. The trial court erred in refusing to give the abandonment instruction properly requested by the defense.

4. The trial court erred in admitting Mr. Pugh's prior convictions under ER 404(b) without articulating the purpose of their admission, their probative value, and any record regarding their admission.

5. In the event that the preceding errors alone are not reversible, their cumulative effect denied Mr. Pugh a fair trial.

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[1] Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[2] Mr. Pugh contends his name is Corey Javon Pugh and not Corey Javon Williams. The trial court referred to the defendant as Mr. Pugh throughout the trial. The information was amended to read "Corey Javon Williams aka Corey Javon Pugh." CP 29. This brief therefore refers to the appellant as Mr. Pugh.

6. The trial court exceeded its sentencing authority in imposing restitution when no person suffered any loss.

7. The trial court erred in imposing legal financial obligations without considering Mr. Pugh's current and future ability to pay.

8. The trial court should have inquired as to Mr. Pugh's ability to pay the $200 criminal filing fee under RCW 36.18.020(2)(h).

Issues Pertaining to Assignments of Error

1. Does the state's failure to put forth any evidence that any person was deprived of property in an amount exceeding $750 require dismissal of Mr. Pugh's second degree theft conviction with prejudice?

2. Was the trial court's Faretta colloquy inadequate when the court failed to ensure that Mr. Pugh understood the risks of self-representation, that Mr. Pugh understood the maximum penalties he faced upon conviction, and that Mr. Pugh understood the nature and classification of theft in the second degree?

3a. Was Mr. Pugh's abandonment theory a proper defense to the charge of residential burglary such that the trial court should have instructed the jury on abandonment?

3b. Does failing to require the state to disprove the defense of abandonment as applied to a charge of residential burglary violate due process?

3c. Was there evidence to support Mr. Pugh's theory of abandonment as applied to a charge of residential burglary?

4a. Did the trial court abuse its discretion in admitting Mr. Pugh's prior convictions when it failed to identify a proper purpose for their admission?

4b. Did the trial court abuse its discretion in admitting Mr. Pugh's prior convictions when it failed to weigh any probative value of the evidence against its prejudicial effect?

4c. Did the trial court abuse its discretion in admitting Mr. Pugh's prior conviction without making any substantive record at all?

4d. Was permitting Mr. Pugh's prior convictions not harmless and therefore reversible error?

5. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

6. When no injury to person or property is suffered, did the trial court exceed its authority when it imposed restitution?

7. When the trial court failed to consider Mr. Pugh's present and future ability to pay before imposing legal financial obligations, did the trial court exceed its authority when it imposed them?

8. Given the plain language of RCW 36.18.020(2)(h), the differences in text between RCW 36.18.020(2)(h) and other provisions of

RCW 36.18.020(2)(h), the differences between RCW 36.18.020(2)(h) and other statutes imposing mandatory legal financial obligations, and the similarities between RCW 36.18.020(2)(h) and another statute requiring a defendant "shall be liable" for discretionary legal financial obligations, is the $200 criminal filing fee a discretionary legal financial obligation?

B. STATEMENT OF THE CASE

The state charged Mr. Pugh with two counts of residential burglary and one count of theft in the second degree. CP 45-46.

At his initial appearance,[3] the trial court asked Mr. Pugh if he wished to be represented by an attorney. 5RP[4] 3. Mr. Pugh said "No, I do not." 5RP 3. The trial court referred to two separate affidavits in support of probable cause: one for one count of theft of a motor vehicle and the other for two counts of residential burglary. 5RP 3-4. Mr. Pugh moved to dismiss both cases. 5RP 3. The trial court denied the motions. 5RP 4.

The court proceeded to inquire as to Mr. Pugh's request to proceed pro se. As to the theft of a motor vehicle charge, the court initially advised

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[3] As of December 28, 2015, Mr. Pugh had two pending cases in Benton County Superior Court. The first, unrelated to this appeal, was cause no. 15-1-01280-4, involving one count of theft of a motor vehicle. The second, cause no. 15-1-01178-6, is the instant appeal. As of December 28, 2015, cause no. 15-1-01178-6 included two counts of residential burglary. On February 11, 2016, the information in cause no. 15-1-01178-6 was amended to add one count of theft in the second degree. CP 45-47.

[4] This brief refers to the verbatim reports of proceedings as follows: 1RP—January 21, 2016; 2RP—consecutively paginated transcripts of January 28, 2016 and April 12, 2016; 3RP—February 11, 2016; 4RP—consecutively paginated transcripts of February 16 and 17, 2016; and 5RP—December 28, 2015.

Mr. Pugh that the charge was a class C felony. 5RP 4. Mr. Pugh agreed the charge was a class C felony. 5RP 4. The prosecutor corrected them both, and the court then asked if Mr. Pugh understood the charge was a class B felony punishable by up to "10 years in the Department of Corrections and a fine not to exceed $20,000." 5RP 4. Mr. Pugh said "Yes." 5RP 5. The trial court asked Mr. Pugh if he understood he would be held to the same standards as an attorney as to his knowledge of the law, court rules, and presentation of evidence, and Mr. Pugh said "Yes, sir." 5RP 5.

The court then inquired as to Mr. Pugh's educational background. 5RP 5. Mr. Pugh stated he completed three years of college. 5RP 5. The court asked if Mr. Pugh was familiar with the rules of evidence, and Mr. Pugh said "Yes." 5RP 5. Upon further inquiry, Mr. Pugh stated he was familiar with the rules of evidence after studying criminal law and business law at Columbia Basin College. 5RP 5. The court asked Mr. Pugh if he was familiar with the Revised Code of Washington as it relates to the charge of theft of a motor vehicle, and Mr. Pugh said "Yes, I am." 5RP 5. When asked how he was familiar with that RCW, Mr. Pugh responded, "I believe that I've had prior 7.8 motions with this prior RCW with another Alaska statute which I fought in the Supreme Court [of Washington]." 5RP 6. The court confirmed that, when he mentioned "7.8," Mr. Pugh was referring to Washington Criminal Rule 7.8. 5RP 6. The court did not inquire further as to

Mr. Pugh's familiarity with the applicable RCW or to which RCW Mr. Pugh was referring.

The trial court asked if Mr. Pugh understood residential burglary is a class B felony "subject to the same potential maximum of 10 years or a fine not to exceed $20,000." 5RP 7. Mr. Pugh said, "Yes, sir." 5RP 7. The court did not ensure Mr. Pugh understood he faced two counts of residential burglary. The court did not ensure Mr. Pugh understood that he faced a potential maximum sentence of 20 years' imprisonment and $40,000 if convicted of both counts of residential burglary, should the sentences be run consecutively. The court did not ensure Mr. Pugh understood he faced a potential total maximum sentence of 30 years' imprisonment and $60,000 if convicted of all three pending charges, should the sentences be run consecutively.

The trial court asked if it was Mr. Pugh's desire to represent himself. 5RP 7. Mr. Pugh responded, "Absolutely. As a secured party, I am." 5RP 7. The trial court then asked Mr. Pugh if he was familiar with the Revised Code of Washington and the elements as they relate to residential burglary. 5RP 8. Mr. Pugh responded, "As a secured party, sir, I am aware and I do object to that." 5RP 8. This exchange followed:

> THE COURT: Sir, I will have to ask you what you mean by the term secured party?

> MR. [PUGH]: I'm secured party in the State of Washington. My organization is secured party C. Williams LLC. I've been brought before this Court in that the Court is aware of my secured party status. Nothing further.
>
> THE COURT: All right. With that said, at this time I'm going to find that you are aware of the nature of the charge. You are aware you will be held to the same standard as would an attorney before the Court. And I will allow you to represent yourself, sir.

5RP 8.

At no time did the court inquire further as to Mr. Pugh's understanding of the RCW and the elements of residential burglary. Despite the fact that Mr. Pugh faced 30 years' imprisonment, the court never advised Mr. Pugh of the risks or disadvantages of self-representation. At no point did the court assure that Mr. Pugh understood how existing technical rules would bind him in the presentation of his cases.

On February 11, 2016, the state filed an amended information, adding one count of theft in the second degree. 3RP 5; CP 45-47. At no point did the court inform Mr. Pugh that theft in the second degree is a class C felony, punishable by up to five years' imprisonment and a $10,000 fine. RCW 9A.20.021(1)(c). The court did not inform Mr. Pugh that, at this point, if convicted of all pending charges against him, he faced a maximum sentence of thirty-five years' imprisonment and a $70,000 fine. The court did not inform Mr. Pugh of the nature of the theft in the second degree charge.

The residential burglary charges arose from allegations that Mr. Pugh unlawfully entered or remained in two Kennewick homes in which he had no ownership interest, changed the locks, and rented the homes out to unsuspecting tenants. CP 3-4. He accepted a security deposit ($800) and one month's rent ($1000) from Laura Gillette, and Ms. Gillette's daughter Krista Ironbear lived at 523 North Ely Street in Kennewick, Washington for four months. 4RP 25. The state alleged that Mr. Pugh's company, C. Williams Group LLC, filed liens on 523 North Ely Street and 2402 West Bruneau stating that the legal owners of the homes owed a debt for property management and labor performed. CP 3.

During motions in limine, the prosecutor stated his intent to admit seven of Mr. Pugh' prior convictions (criminal trespass, theft in the second degree, theft in the second degree, attempted theft in the second degree, theft in the second degree, theft in the second degree, and theft in the third degree) under ER 404(b) "to show the defendant's common scheme or plan" and his intent to deceive. CP 153-54; 4RP 5. The prosecuting attorney told the trial court that "the fact [sic] of those cases are the same scheme as the case in this matter." 4RP 5. He continued:

> In the 2013 case, what the defendant did was basically rent out property that was foreclosed on or had been abandoned. In those cases the evidence was that he either claimed some sort of ownership interest in those other properties through a doctrine of adverse possession or he

> would go to a foreclosed owner, the former owner who had filed bankruptcy or been foreclosed on and would get a quit claim deed and claim he has some sort of possessory interest in the property. So he gets out of prison and in this case our allegation is that what he did again was rented out property that had been abandoned. So it's the same scheme and we feel that the prior case should come in to explain that is part of a similar scheme. I think it also goes to his knowledge he was doing something illegal and his intent to deceive the victims.

4RP 5.

The prosecutor attached the probable cause statement and information from the prior case to his trial brief in support of his argument that "it's the same scheme." CP 155-57. There was no discussion of the substance of these documents on the record and no indication that they were reviewed. The trial court stated, "I am going to allow those convictions in." 4RP 6. The trial court did not state the purpose of the admission of the prior convictions, did not describe what he believed their relevance to be, and did not make any findings regarding the probative value or prejudicial effect of their admission. The court provided jurors with a limiting instruction instructing them to only consider the prior convictions for the purpose of determining if the offenses were part of a common scheme or plan or to establish the defendant's intent to deceive.[5]

---

[5] The 2013 probable cause statement contains information divided into seven counts. CP 156-57. In Count I, the state alleged that Mr. Pugh rented out a home to a tenant when he had no ownership interest in the home. CP 156. In Count II the state alleged that the tenant paid Mr. Pugh a deposit. CP 156. In Count III the State alleged that the owner of a home

The convictions were admitted through Detective Rick Runge over Mr. Pugh's objection, who testified that he previously had contact with Mr. Pugh in 2013. 4RP 99. Runge described facts underlying the 2013 convictions, which he testified were similar to the current charges against Mr. Pugh—that unoccupied homes were rekeyed and rented out, sometimes with Mr. Pugh claiming ownership through adverse possession. 4RP 100. Runge also testified he referred the 2013 charges to the prosecutor's office and Mr. Pugh pleaded guilty to criminal trespass (degree unknown), four counts of theft in the second degree, attempted theft in the second degree, and theft in the third degree. 4RP 100-04. Runge provided property addresses and victim names as they related to each count. 4RP 100-04.

In support of its charge of residential burglary at 523 North Ely Street, the state presented Gail Timmins. Ms. Timmins testified that she "guess[ed]" she was the owner of 523 North Ely Street, that she left the home of her own free will around September of 2013 with no intention of returning, and that the home was abandoned when she left it. 4RP 15-16, 22. She also testified that she thought the home was getting foreclosed on. 4RP

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quitclaimed her interest in the home to Mr. Pugh, who later refused to pay the utilities bill. CP 156-57. Count IV alleges Mr. Pugh rented out the property (in which he apparently had ownership interest) to a tenant who paid the utilities bill and found out the home was in foreclosure. CP 157. In Count V the state alleged that Mr. Pugh rented out a home to a tenant when he had no ownership interest in the home and accepted a deposit. CP 157. In Count VI the state alleged that Mr. Pugh rented out a home to a tenant when he had no ownership interest in the home and accepted a deposit. CP 157. In Count VII the state alleged that the owner of a home quitclaimed his interest in the home to Mr. Pugh and Mr. Pugh rented the home out to a tenant. CP 157.

15. She testified that Bank of America was the mortgage holder. 4RP 16. The state did not present testimony from Bank of America. Finally, Ms. Timmins testified that she had recently received a notice from the City of Kennewick notifying her that she needed to clean up her backyard at 523 North Ely Street. 4RP 17-18.

Laura Gillette testified that in September of 2015, her daughter Krista Ironbear was looking for a place to live. 4RP 24. According to Ms. Gillette and Ms. Ironbear, Ms. Ironbear entered into an agreement with the C. Williams Group to lease the 523 North Ely Street property. 4RP 26, 65, 67. Ms. Gillette testified that she paid $800 as a security deposit and $1,000 for the first month's rent, and that she did this to help her daughter. 4RP 25. The monthly rent was to be $1,000. 4RP 35. Both Ms. Gillette and her daughter, Krista Ironbear, testified that Ms. Ironbear took possession of the residence right after the $1,800 was paid. 4RP 30, 67. Ms. Gillette testified that Mr. Pugh brought a stove and a refrigerator over to the home soon after. 4RP 30. Ms. Gillette testified that she never paid anything more. 4RP 35. Ms. Ironbear testified that despite staying at the residence for four months, she never paid anything at all. 4RP 67, 68.

The jury returned guilty verdicts on Count I (residential burglary, 523 North Ely Street) and Count II (theft in the second degree), and a not

guilty verdict as to Count III (residential burglary, 2402 West Bruneau). CP 81-83; 4RP 150.

Despite finding Mr. Pugh indigent and authorizing appointed counsel on appeal, the trial court imposed LFOs without inquiring into Mr. Pugh's ability to pay ("sherrif's [sic] service fee" of $60, jury demand fee of $250, and $47.56 in witness fees). CP 152. The trial court also imposed a victim assessment of $500, a $200 filing fee, a DNA collection fee of $100, and $1800 in restitution to Ms. Gillette. CP 143. In imposing these fees, the Court simply stated on the record that "the defendant is able, capable of working." 2RP 25. The judgment and sentence was devoid of any finding regarding Mr. Pugh's ability to pay. CP 143.

Mr. Pugh timely appeals. CP 113-14.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR THEFT, AS NO PARTY SUFFERED ANY LOSS

This court reviews the sufficiency of the evidence by asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the state. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Because Ms. Gillette suffered no loss, no rational juror could have found sufficient evidence of this essential element of second degree theft.

Accordingly, this court must reverse Mr. Pugh's second degree theft conviction.

Mr. Pugh was charged with theft in the second degree under RCW 9A.56.020(1)(b) and RCW 9A.56.040(1)(a). "Theft" means to obtain control over the property of another with intent to deprive him or her of such property or services. RCW 9A.56.020(1)(b). A person is guilty of second degree theft if he commits a theft of property exceeding seven hundred fifty dollars in value. RCW 9A.56.040(1)(a). In its amended information, the state alleged Mr. Pugh obtained control over money belonging to Laura Gillette in the amount of $1,800 "for her daughter to rent a residence." CP 47.

Loss to the victim is key in determining whether an unlawful deprivation has occurred. State v. Lee, 128 Wn.2d 151, 162, 904 P.2d 1143 (1995). For the state to establish deprivation of property it must establish a loss to or a taking of property from the victim valued at more than the statutorily required amount.[6] Id. at 163. When the "victim" receives what she bargains for, no theft is committed. Id.

In Lee, the defendant rented out a property in which he had no ownership interest to unsuspecting tenants. Id. at 153-54. The tenants

[6] At the time Lee was decided, RCW 9A.56.040 defined theft in the second degree as the theft of property or services which exceed(s) two hundred and fifty dollars in value. This amount has since been amended to seven hundred and fifty dollars in value. LAWS OF 2009, ch. 431, § 8(1)(a), codified as amended at RCW 9A.56.040(1)(a).

moved into the home after the defendant received $700. Id. at 154. The prosecutor argued in closing that the "gist of the case" was that the defendant rented out a house he did not own and accepted money as rent. Id. at 154-55. The defendant was convicted of theft in the second degree and challenged the sufficiency of the evidence on appeal. Id. at 156.

The Washington State Supreme Court reversed the conviction, holding that the state did not present sufficient evidence to establish that the defendant's actions deprived the victim tenants of value. Id. at 164. Instead, the court reasoned, they received what they bargained for. Id. at 163. The court dismissed the state's argument that the tenants faced possible eviction at the hands of the true owner of the home because they still received the housing that they bargained for. Id. at 163. While the court acknowledged that the true owner of the home could have been a "victim" of the theft, it added that the state never referred to the owner as a victim of theft and presented insufficient evidence to establish that any parties were deprived of the statutorily required $250 or more. Id. at 163-64.

This case is nearly identical to Lee and requires the identical disposition. The state charged Mr. Pugh with theft in the second degree and alleged in its information that Mr. Pugh deprived Ms. Gillette of property when she paid him $1,800 for her daughter to rent a residence that he did not own. Ms. Gillette testified that she paid $800 as a security deposit and

$1,000 for rent, and that she did this to help out her daughter. 4RP 25. The monthly rent was $1,000. 4RP 35. Both Ms. Gillette and her daughter, Krista Ironbear, testified that Ms. Ironbear took possession of the residence right after the $1,800 was paid. 4RP 30, 67. Ms. Gillette testified that Mr. Pugh brought a stove and a refrigerator over to the home. 4RP 30. Ms. Gillette testified that she never paid anything more. 4RP 35. Ms. Ironbear testified that despite staying at the residence for four months, she never paid anything at all. 4RP 67, 68. In closing, the prosecutor argued "Concerning the theft charge. This is pretty much obvious. The defendant used some deception against Laura Gillette to get $1800 from her. . . . He committed theft in the second degree by stealing, by deception, $1800 from Laura Gillette." 4RP 142, 143. But, like the tenants in Lee, Ms. Gillette suffered no loss. She paid less than two months' rent to help her daughter find a place to live, and her daughter lived there for four months.

Because the state did not establish that Ms. Gillette suffered a loss at all, let alone a loss in an amount greater than $750, it did not establish deprivation of property in an amount greater than $750. As in Lee, the state never referred to Ms. Timmins, the apparent owner of the property, as a victim of theft. As in Lee, the state presented no evidence of the property's rental value. No rational factfinder could find that the state proved that Ms. Gillette suffered a loss in an amount greater than $750 beyond a reasonable

doubt, even when viewed in the light most favorable to the state. Mr. William's theft conviction must be reversed and this matter must be dismissed with prejudice.

2. MR. PUGH'S WAVIER OF COUNSEL WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT.

The state and federal constitutions guarantee an accused the right to counsel at all critical stages of a criminal proceeding. These provisions also guarantee the right to self-representation. U.S. CONST. amends. VI, XIV; CONST. art. I, § 22; Faretta, 422 U.S. at 807; State v. Coley, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). However, a waiver of counsel must be knowing, voluntary, and intelligent. City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). A trial court's grant of a defendant's self-representation request is reviewed for abuse of discretion. State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007). Discretion is abused if the trial court's decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. James, 138 Wn. App. 628, 636, 158 P.3d 102 (2007).

To make a knowing, voluntary, and intelligent waiver of counsel, the defendant should be made aware of the nature and classification of the charge, the maximum penalty upon conviction, and the dangers and disadvantages of self-representation and what the task entails. Faretta, 422

U.S. at 835; Acrey, 103 Wn.2d at 211; State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002). Defendants should be advised that presenting a defense requires the observance of technical rules and is not just a matter of "telling one's story." State v. Nordstrom, 89 Wn. App. 737, 742, 950 P.2d 946 (1997). Courts are required to indulge in every reasonable presumption against finding that a defendant has waived the right to counsel. Coley, 180 Wn.2d at 560.

a. The trial court's colloquy failed to inform Mr. Pugh that technical rules exist which would bind him in the presentation of his case and to advise him of the risks of self-representation

The trial court's cursory inquiry into Mr. Pugh's understanding of the charges against him and his educational background was insufficient to establish a knowing, voluntary, and intelligent waiver of the constitutional right to counsel. When the trial court did seek substantive answers from Mr. Pugh as opposed to single-word responses, Mr. Pugh's answers did not establish an understanding of the charges, applicable technical rules as they related to his case, or of the risks of self-representation. This colloquy was insufficient to overcome the required presumption against finding that a defendant has waived the right to counsel; instead, the trial court's apparent presumption *in favor* of finding Mr. Pugh had waived his right to counsel

was manifestly unreasonable. Mr. Pugh's convictions must be reversed and remanded for a new trial.

The trial court's colloquy lacked any advisement of the dangers and disadvantages of self-representation. "[T]he record must somehow reflect that the accused was advised that the decision to proceed to trial without the assistance of counsel carries with it substantial risks and disadvantages." Nordstrom, 89 Wash. App. at 744. While the trial court inquired as to Mr. Pugh's familiarity with the "rules of evidence in the State of Washington" generally, it failed to establish that Mr. Pugh understood what those rules were or how they would affect the presentation of his case. See id. (waiver of counsel invalid where court gave explanation of certain rules that would apply at trial but did not explain the link between the existence of the rules and the dangers of proceeding pro se).

The trial court did not ask if Mr. Pugh understood that the rules of evidence would govern what evidence may or may not be introduced. The trial court did not ask whether Mr. Pugh understood that if he wished to testify, he would need to present testimony by asking questions of himself and answering them and could not simply stand up and tell his story. The trial court did not ask Mr. Pugh if he was familiar with the right to present witnesses at the state's expense, determine if he understood he would have an opportunity to voir dire a jury, discuss the use of peremptory challenges

or challenges for cause, or ask if Mr. Pugh understood the process or importance of submitting motions for omnibus or 3.5 hearings. The trial court did not ask if Mr. Pugh had ever represented himself before. The trial court did not advise Mr. Pugh that he would likely be better represented by a trained attorney, or discourage Mr. Pugh's self-representation in any way. The court did not advise Mr. Pugh that it would not assist him. The court did not ask Mr. Pugh if he was making his decision voluntarily. The court did not even advise Mr. Pugh that trying a jury trial was difficult.

To be sure, Mr. Pugh was not required to possess any working technical knowledge of applicable rules to validly waive his right to counsel. Had the court asked questions to establish that Mr. Pugh understood how technical rules could affect the presentation of his case, and had Mr. Pugh betrayed that he lacked any knowledge on the subject and still wished to represent himself, waiver would still be proper. But, to determine whether Mr. Pugh fully understood the risks he faced by waiving counsel, the trial court had the responsibility to ask substantive questions to assure that Mr. Pugh was aware of what the task entails. See Vermillion, 112 Wn. App. at 857 ("A defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, but the record should establish that he knows what he is doing and his choice is made with eyes open.").

Mr. Pugh's passive responses were insufficient for the trial court to adequately weigh the character of his waiver. State v. Chavis, 31 Wn. App. 784, 788, 644 P.2d 1202 (1982). "The judge must make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently." Id. at 790. Here, Mr. Pugh agreed that theft of a motor vehicle was a class C felony. 5RP 4. When advised that it was actually a class B felony, Mr. Pugh also said he understood. 5RP 4-5. When asked if he understood that he would be held to the same standards as an attorney, Mr. Pugh said he did. 5RP 5. When asked if he understood the rules of evidence, he said that he did. 5RP 5. When asked if he was familiar with the RCW, he said he was. 5RP 5. When asked if he understood that residential burglary was a class B felony punishable by up to 10 years' imprisonment and a $20,000 fine, Mr. Pugh said he did. 5RP 7. These single answer responses did not establish that Mr. Pugh fully understood the dangers of self-representation. Chavis, 31 Wn. App. at 789.

What substantive answers Mr. Pugh did give during the colloquy also suggest that he was not aware of the risks of self-representation. When the trial court asked if he was familiar with the residential burglary statute and its elements, Mr. Pugh responded that he was a secured party and objected, apparently to the application of the law to him. 5RP 7. He went on to say that as the secured party of C. Williams LLC, he had been brought

before the court before. 5RP 8. This answer suggests that Mr. Pugh believed he was appearing before the court as a limited liability company instead of as an individual charged with multiple felonies. It is unclear what Mr. Pugh meant, however, because the trial court failed to explore his statements further. Apparently satisfied with Mr. Pugh's answer regarding his secured party status, the trial court stated: "All right. With that said, at this time . . . I will allow you to represent yourself, sir." 5RP 8. When the trial court asked how Mr. Pugh was familiar with the theft of a motor vehicle RCW, Mr. Pugh answered that he had "[CrR] 7.8 motions with this prior RCW with another Alaska statute . . .." 5RP 5-6. It is unclear to what Mr. Pugh was referring, and the trial court failed to inquire further.

The trial court's questions regarding Mr. Pugh's educational background were irrelevant to the issue of whether his waiver of counsel was made knowingly, voluntarily, and intelligently. "A defendant's background is certainly relevant to his *ability* to make a sensible, intelligent decision regarding his self-representation. That background, however, is not relevant to show whether a sensible, literate, and intelligent defendant *possesses the necessary information* to make a meaningful decision as to the waiver of counsel." Acrey, 103 Wn.2d at 211 (emphasis added). Because the trial court's colloquy failed to ensure that Mr. Pugh possessed the necessary information regarding risks of self-representation to make the decision to

waive counsel, the court's finding was manifestly unreasonable. Mr. Pugh's convictions must be reversed and remanded for a new trial.

b. The trial court's colloquy failed to inform Mr. Pugh of the maximum penalties upon conviction

On December 28, 2015, the court failed to inform Mr. Pugh of his maximum penalty upon conviction of all three charges. To make a knowing, voluntary, and intelligent waiver of counsel, the defendant should be made aware of the maximum penalty upon conviction. Acrey, 103 Wn.2d at 211; Vermillion, 112 Wn. App. at 851; Nordstrom, 89 Wn. App. at 742. While the court told Mr. Pugh that theft of a motor vehicle carried a maximum penalty of 10 years in prison and a $20,000 fine and that residential burglary carried a maximum penalty of 10 years in prison and a $20,000 fine, the court did not ensure that Mr. Pugh understood the sentences could be run consecutively or that he understood he was charged with two counts of residential burglary instead of one. In short, the court did not ensure that Mr. Pugh understood that he faced 30 years' imprisonment and a $60,000 fine as opposed to 10 years in prison and a $20,000 fine.

On February 11, 2016, the information was amended to add one count of theft in the second degree. 3RP 5; CP 45-47. The court failed to mention the maximum penalty upon conviction of second degree theft whatsoever, let alone that the maximum penalty could be run consecutively

to any other sentences. Because the court did not ensure Mr. Pugh understood the possible maximum penalties he faced, the waiver of counsel was not knowingly and intelligently made. The trial court's acceptance of the waiver under these circumstances was manifestly unreasonable. Mr. Pugh's convictions must be reversed and remanded for a new trial.

c. The trial court's colloquy failed to inform Mr. Pugh of the nature and classification of theft in the second degree

Nor was Mr. Pugh informed of the nature and classification of the charge of theft in the second degree. The court did not inquire as to whether he was aware of the RCW, the elements of the charge, or applicable defenses. Failure to so inform Mr. Pugh was manifestly unreasonable, his waiver of counsel was not knowing and intelligent, and his convictions must be reversed and remanded for a new trial.

3. THE COURT FAILED TO PROPERLY INSTRUCT THE JURY BY REFUSING TO GIVE AN ABANDONMENT INSTRUCTION

During motions in limine, Mr. Pugh informed the court he would be seeking to assert the defense of abandonment. Both the state and the defense elicited testimony supporting a theory of abandonment from the owner of 523 North Ely Street, Gail Timmins, who testified she had lived in her home for thirty years and left in 2013, she "guess[ed]" was still the owner of 523 North Ely Street, and she had no intention to return. Consistent with his

stated intent at the beginning of trial, Mr. Pugh requested an abandonment instruction at the close of testimony. The court refused to give the instruction and to engage in analysis or provide an explanation for this refusal. The trial court's failure to instruct the jury on the applicable law and failure to allow Mr. Pugh to argue his clearly stated theory of the case is reversible error. Mr. Pugh is therefore entitled to reversal of his residential burglary conviction and remand for a new trial.

Alleged errors of law in a trial court's jury instructions are reviewed de novo. State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). Parties are entitled to instructions that, as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party to argue his or her theory of the case. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Failure to give an instruction allowing a party to argue its theory of the case when there is evidence to support the theory is prejudicial error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

a. The abandonment defense constitutes "applicable law" as applied to a charge of residential burglary and is not misleading

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. Criminal

trespass is a lesser included offense of burglary and occurs when a person knowingly enters or remains unlawfully in a building. State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005); RCW 9A.52.070. It is a defense to criminal trespass if a building involved in the offense was abandoned. RCW 9A.52.090(1).

i. Failure to require the state to disprove the defense of abandonment violates due process

When unlawful entry or remaining is a necessary element of a crime charged and the defense of abandonment is asserted, failure to require the state to disprove the defense violates due process. The due process clause of the Fourteenth Amendment guarantees, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, section 1. This due process guaranty requires the state to prove every element necessary to constitute the crime with which a defendant is charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

When a defense negates an element of a crime, the burden is on the state to prove the absence of the defense beyond a reasonable doubt because the constitution does not allow a defendant to bear the burden of disproving an element of the crime. State v. W.R., 181 Wn.2d 757, 770, 336 P.3d 1134 (2014); see also State v. Wiebe, 195 Wn. App. 252, 256-57, 377 P.3d 290

(2016). The abandonment defense negates the unlawful presence element of criminal trespass and shifts the burden to the state to prove the absence of the defense. City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

Because the unlawful entry or presence element of the burglary statute is the same as the unlawful entry or presence element of the criminal trespass statute, Division III held that the abandonment defense also applies to a charge of residential burglary. State v. J.P., 130 Wn. App. at 895. J.P. was charged with residential burglary after he entered an unoccupied home and painted on windows and walls inside. Id. at 890. J.P was convicted and, on appeal, he argued that the home was abandoned and that he should be permitted to assert an abandonment defense to the charge of residential burglary. Id. at 894.

The J.P. court looked to the reasoning employed in Widell, where the State Supreme Court held that statutory defenses to trespass, of which abandonment was one, negated the unlawful presence or entry element of trespass and shifted the burden to the state to prove the absence of the defense. J.P., 130 Wn. App. at 895. Because the unlawful presence/entry element is a necessary element of both criminal trespass and residential burglary, the J.P. court reasoned that a statutory defense that negated one

would also negate the other.[7] Id. Therefore, the court held, RCW 9A.52.090(1)'s abandonment defense could be applied to a charge of residential burglary. Id.

While Divisions I and II have both held that abandonment is not a defense to residential burglary, their holdings rest on untenable grounds. Both courts held that the defense applies only to criminal trespass and not burglary because RCW 9A.52.090 does not specifically state that the defense is applicable as to burglary. State v. Jenson, 149 Wn. App. 393, 399, 203 P.3d 393 (2009); State v. Olson, 182 Wn. App. 362, 377, 329 P.3d 121 (2014). But there is no statutory provision that specifically lays out any defenses to the charge of burglary; still, we know that defenses exist. For example, should a defendant charged with burglary have been invited or licensed to enter a dwelling, the defendant would be permitted to assert that his entry was prompted by a good faith belief that the entry was permissive. This defense would negate the unlawful entry/remaining element and would be proper in a burglary case even though there is no statutory authority allowing a defendant to assert it. The lack of statutory authority allowing a defendant to assert a defense does not preclude a defendant from doing so.

[7] While J.P. was allowed to argue abandonment as a defense to residential burglary, the defense ultimately failed. The court found that the state successfully established that the home in question was not abandoned. J.P., 130 Wn. App. at 896.

Further, neither court engaged in any meaningful analysis of why the defense of abandonment would negate the unlawful entry/remaining element of criminal trespass but would not negate the identical unlawful entry/remaining element of burglary.

During motions in limine, Mr. Pugh clearly stated his intent to assert the defense of abandonment. J.P. provided authority that defense was applicable to the charge of residential burglary. However, the court summarily refused to offer the instruction without conducting analysis or providing an explanation. The refusal prevented Mr. Pugh from arguing his theory of the case. As the abandonment defense negates the unlawful remaining/entry element of residential burglary, the judge's refusal to offer the instruction also improperly relieved the state of its burden of proving the absence of the defense beyond a reasonable doubt, violating due process.

ii. Legislative intent and common law do not support Division I's and II's conclusions that abandonment is not a defense to residential burglary

Division I relied in part on legislative intent and common law in support of its holding that abandonment is not a defense to burglary, but neither of those sources actually supports its conclusion. First, the court looked to the following language from senate bill 5233 in finding that the legislature did not intend for abandonment to be a defense to residential

burglary: "the crime of residential burglary was enacted in order to punish burglaries occurring in dwellings more harshly '[i]n light of the . . . potential for personal injury inherent in such crimes.'" Id. at 378 (quoting FINAL B. REP. on S.B. 5233, 51st Leg., Reg. Sess. (Wash. 1989)). The Olson court also noted that, under the common law, "burglary has always been regarded as a serious crime because of the ancient notion that a man's home is his castle . . . [and] he should be able to feel secure in his castle." Id. (quoting 3 CHARLES E. TORCIA, WARTON'S CRIMINAL LAW § 325, at 253 (15th ed. 1995)).

This legislative history seriously undermines Division I's conclusion. If the legislature's intent was to punish burglaries more harshly when there is the potential for personal injury, that would exclude cases where homes are abandoned and empty inside. If the common law regarded burglary as a more serious crime due to the ancient notion that a man should feel secure in his castle, then that would exclude cases where a man has left said castle with no intention of returning. The reasoning employed by the legislature and underlying the common law in providing for the safety of the inhabitants of a dwelling is inapplicable when the residence is abandoned. Such safety concerns cannot be logically read to preclude the assertion of the abandonment defense to a charge of burglary.

b. There was evidence to support Mr. Pugh's theory of abandonment

Failure to give an instruction allowing a party to argue its theory of the case when there is evidence to support the theory is prejudicial error. Williams, 132 Wn.2d at 259-60. Because "abandon" is not defined by statute, the J.P. court looked to dictionary definitions to define the term: "'Abandon' is defined as 'to cease to assert or exercise an interest, right, or title . . . especially with the intent of never again resuming or reasserting it' and 'to give up . . . by leaving, withdrawing, ceasing to inhabit . . .'" J.P., 130 Wn. App. at 895-96 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2 (1993)).

The owner of 523 North Ely Street testified that she had left her home in 2013 and had no intention to return. Mr. Pugh was charged with unlawfully entering or remaining at 523 North Ely Street sometime between September 15, 2015 and October 5, 2015. Because Ms. Timmins had testified that she had no intent of returning to 523 North Ely after 2013 and the state had presented evidence that she was the owner, there was ample evidence in the record to support Mr. Pugh's theory. Ms. Timmins stated explicitly that she had indeed abandoned the property. 4RP 22.

The court failed to properly instruct the jury by declining to offer an abandonment defense instruction when it was requested. Such an instruction would have informed the jury as to the applicable law, would not have been misleading, and would have allowed Mr. Pugh to argue his theory of the case when there was ample evidence in the record to support the theory. As the abandonment defense negates the unlawful presence/entry element, the state would have been required to prove the absence of the defense beyond a reasonable doubt had the instruction been properly offered. Failure to allow the instruction therefore not only prevented Mr. Pugh from arguing his theory of the case but also relieved the state of this burden, violating due process.

While Olson and Jenson held that abandonment is not an applicable defense to burglary, both cases relied on statutory language without addressing due process considerations and relied on legislative intent and common law when those authorities did not support its conclusion. Failure to give the abandonment instruction was prejudicial error. Mr. Pugh is entitled to reversal of his residential burglary conviction and remand for a new trial at which he may fairly advance his defense theory.

4. THE TRIAL COURT ERRED IN ADMITTING MR. PUGH'S PRIOR CONVICTIONS

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Before analyzing whether evidence of prior bad acts is to be admitted, "a trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The state's burden when attempting to admit evidence of prior bad acts under an exception to ER 404(b)'s general prohibition is substantial. Id. Before allowing admission of evidence of prior bad acts, the trial court is required to find by a preponderance of the evidence that the misconduct occurred, identify a proper purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime(s) charged, and weigh the probative value of the evidence against its prejudicial effect. DeVincentis, 150 Wn.2d at 17; State v. Slocum, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

a. Admission of Mr. Pugh's prior convictions constituted an abuse of discretion because the trial court failed to apply any legal standard

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, takes a view that no reasonable person would take, applies the wrong legal

standard, or bases its ruling on an erroneous view of the law. Slocum, 183 Wn. App. at 449. "[C]aution is called for in application of the common scheme or plan exception." DeVincentis, 150 Wn.2d at 18. "[T]he acts must have 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" Id. at 19 (quoting State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

Our supreme court has emphasized the importance of making a record that identifies the purpose for which evidence is to be admitted and, only if the evidence is relevant, balances the probative value against the prejudicial effect of the evidence. State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). "[T]he process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue." Id. "[T]he absence of a record precludes effective appellate review." Id. "Without . . . balancing and a conscious determination made by the court on the record, the evidence is not properly admitted. State v. Tharp, 96 Wn.2d 591, 591, 637 P.2d 961 (1981).

The trial court abused its discretion when it failed to apply any legal standard or make any substantive record in ruling that Mr. Pugh's prior seven convictions were admissible under ER 404(b). Had the trial court made a record of the relevance and the purpose of admitting Mr. Pugh's

prior convictions, it would have been clear that there were significant differences between the facts underlying Mr. Pugh's 2013 convictions and those alleged in the present case. For instance, in 2013, Mr. Pugh either had actual ownership interest in the homes he rented out through a quitclaim deed or he claimed ownership through adverse possession. CP 156-57. In the present case, the state alleged that Mr. Pugh had no ownership interest in the homes and that he filed improper liens on homes for labor not actually performed. CP 3. While some facts underlying the 2013 theft and attempted theft convictions were similar to the facts underlying the present charge of theft in the second degree in that Mr. Pugh collected rental deposits in both cases, others alleged that Mr. Pugh deceived a tenant by having him pay outstanding utility bills. CP 156-57. That the trial court admitted all seven convictions without an individualized analysis of their relevance or purpose underscores the unreasonableness of its decision.

No reasonable judge would take the trial court's position that summarily admitting Mr. Pugh's seven prior convictions under ER 404(b) without making any record regarding the purpose or probative value of those convictions would be appropriate. In failing to make a record and apparently relying on the state's position that "the fact [sic] of those cases are the same scheme as the case in this matter," the trial court precluded effective appellate review. 4RP 5. Admission of this evidence without conducting an

individualized analysis into the relevance of each conviction, without making a record identifying the proper purpose for which evidence was to be admitted, and without weighing the evidence was manifestly unreasonable and constituted an abuse of discretion.

b. Admission of Mr. Pugh's prior convictions was not harmless

Because the trial court abused its discretion in admitting Mr. William's prior convictions, Mr. Pugh is entitled to reversal of his convictions and remand for a new trial unless the error was harmless. Under the harmless error test, the question is whether the outcome of the trial would have been materially affected had the error not occurred. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

As to count I, residential burglary (at 523 North Ely Street), Ms. Timmins testified that she "guessed" she was the owner of 523 North Ely Street, that she left in 2013 on her own free will, and that she did not intend to return. She also testified that she thought the home was getting foreclosed on. 4RP 15. Bank of America was the mortgage holder. 4RP 16. The state did not present testimony from Bank of America. Ms. Timmins also testified that she had received a notice from the City of Kennewick notifying her that she needed to clean up her backyard at 523 North Ely Street. 4RP 17-18. Detective Runge testified that in Mr. Pugh's prior case, Mr. Pugh

would claim ownership over unoccupied homes and rent them out. Detective Runge also testified that based on these actions, Mr. Pugh pleaded guilty to criminal trespass, theft in the second degree, theft in the second degree, attempted theft in the second degree, theft in the second degree, theft in the second degree, and theft in the third degree.

Given that the apparent owner of 523 North Ely Street claimed no interest in the home which placed into question the unlawfulness of Mr. Pugh's entry/remaining on the premises, admission of evidence of Mr. Pugh's prior convictions resulting from previously asserting ownership over unoccupied homes was not harmless error; there was a reasonable probability that, based on evidence before them that Mr. Pugh previously pleaded guilty after renting out unoccupied homes, jurors would assume that this entry was also unlawful. Absent the prejudicial evidence of these prior convictions, there was a reasonable probability that the jury's verdict would have been materially affected. The improper admission of his prior seven convictions was not harmless. Mr. Pugh is entitled to reversal of his convictions and remand for a new trial.

5. IF THE TRIAL COURT'S ERRORS ALONE DO NOT WARRANT REVERSAL, THEIR CUMULATIVE EFFECT DOES

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify

reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The trial court committed several errors in this case, including failing to properly instruct the jury by declining to offer an abandonment instruction and its admission of Mr. Pugh's prior convictions without articulating a basis for doing so or engaging in an appropriate analysis regarding the relevance and prejudicial effects of their admission. In asserting an abandonment defense, Mr. Pugh's theory was that his entry/remaining at the dwellings was not unlawful. The judge declined to offer the instruction and Mr. Pugh was not able to argue his theory of the case. This error was exacerbated when the court erroneously allowed evidence that Mr. Pugh had previously pleaded guilty after renting out unoccupied homes, from which jurors could gather that such an entry/remaining *was* unlawful. If this court determines that, individually, these errors do not require reversal of one or both of Mr. Pugh's convictions, it should conclude that, when taken together, these errors deprived Mr. Pugh of a fair trial and their cumulative effect requires reversal.

6. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED RESTITUTION

Restitution is not appropriate where the victim has not suffered any injury to person or property as a direct result of the crime. State v. Coe, 86 Wash. App. 841, 843, 939 P.2d 715 (1997). The state presented evidence

that Ms. Gillette paid Mr. Pugh $1800, less than two months' rent, for her daughter to live in a rental property for four months. The state did not present any additional evidence establishing that Mr. Pugh deprived Ms. Gillette of value beyond what she herself bargained for. Because Ms. Gillette did not suffer a loss the imposition of restitution was not appropriate. This court should instead vacate the restitution order imposed and remanding for resentencing.

7. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY IN FAILING TO CONSIDER MR. PUGH'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS

RCW 9.94A.760 permits trial courts to order LFOs as part of a criminal sentence. However, RCW 10.01.160(3) prohibits imposing LFOs unless "the defendant is or will be able to pay them." To determine whether to impose LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed mandatory LFOs including a $500 crime victim assessment, $100 DNA collection fee, and $1800 in restitution to Laura Gillette. CP 143. The court also imposed discretionary LFOs including a "sherriff's" [sic] service fee, a jury demand fee, and witness fees. CP 152. The trial court failed to make an individualized inquiry into Mr.

Pugh's present and future ability to pay before it imposed these discretionary LFOs. In so doing, the court exceeded its statutory authority and these discretionary LFOs should be vacated.

The Washington Supreme Court recently recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). The Blazina court held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. 182 Wn.2d at 837-39. This requirement "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id. The court should consider such factors as length of incarceration and other debts, including restitution. Id.

The Blazina court did not stop there. It further directed courts to look to GR 34 for guidance. Id. GR 34 specifies several ways in which a person may be found indigent, including if he or she receives assistance from a needs-based program such as social security or food stamps. Id. If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." Id. at 839. Only by conducting such a "case-

by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

At sentencing, the trial court failed to make an individualized inquiry into Mr. Pugh's current or future ability to pay discretionary LFOs. 2RP 25. The court imposed an extensive amount of restitution, $1800, but did not consider the burden of this additional debt.

Mr. Pugh qualified as indigent, reporting zero savings, real estate, or other assets. CP 132-36. He reported no income from any source. CP 136. The trial court determined Mr. Pugh was indigent and ordered that he is entitled to counsel for review "wholly at public expense." CP 137-38. Yet the trial court did not consider Pugh's indigency when it imposed discretionary LFOs, as RCW 10.01.160(3) requires. The trial court merely made a rote finding on the record that "the defendant is able, capable of working." 2RP 25. Blazina holds this is insufficient to justify discretionary LFOs. 182 Wn.2d at 838. Mr. Pugh accordingly asks this court to vacate the LFO order and remand for resentencing. Id. at 839.

8. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY

The trial court imposed a $200 criminal filing fee. CP 143, 152. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an ability-to-pay inquiry.

Mr. Pugh recognizes that Divisions Two and Three have held that the filing fee listed in RCW 36.18.020(2)(h) is a mandatory legal financial obligation. See State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). More recently, Division Two, when challenged on the point that Lundy does not contain reasoned statutory analysis, concluded that RCW 36.18.020(2)(h) was mandatory simply because the statute contains the word "shall." State v. Gonzales, 198 Wn. App. 151, ___ P.3d ___, 2017 WL 986208, at *1-2 (March 14, 2017).[8]

The Gonzales court's statutory analysis was not reasoned but overly simplistic. The same goes for Lundy and Stoddard, neither of which even attempted statutory analysis. Lundy, 176 Wn. App. 102 (unanalyzed proposition that "the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing" the criminal filing fee); Stoddard, 192 Wn. App. at 225 (relying on Lundy for the one-sentence proposition that RCW 36.18.020(2)(h) "mandate[s] the fees regardless of the defendant's ability to pay"). These decisions misapprehend the meaning of the word "liable" and overlook the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of

[8] Undersigned counsel has filed a petition for review in Gonzales in hopes to resolve the issue once and for all.

RCW 36.18.020(2), and at least one other criminal statute that provides a convicted defendant "shall be liable" for all costs of the proceedings against him or her. The $200 criminal filing fee is discretionary, not mandatory.

a. The word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Liability is a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

In Gonzales, Division Two reasoned that because the statute states "shall be liable," it "clarifies that there is not merely a risk of liability" given that the word "shall" is mandatory. 2017 WL 986208, at *2. This clarifies nothing, however, because it ignores the meaning of the word "liable." There is no difference in meaning between "shall be liable" and "may be liable." From mandatory liability a mandatory obligation does not follow; a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must pay the monetary amount or that the amount cannot be waived or otherwise resolved. Again, liability

is, by definition, something that might or might not impose a concrete obligation. The use of the word "liable" in RCW 36.18.020(2)(h) shows the criminal filing fee to be discretionary. Only by avoiding the meaning of the word "liable" could the Gonzales court reach its contrary result.[9]

In any event, given the contingent meaning of the word "liable," the meaning of the phrase "shall be liable" is, at best, ambiguous. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Mr. Pugh's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015).

b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Mr. Pugh's interpretation that "shall be liable" does not impose a mandatory obligation

Mr. Pugh's plain language interpretation is supported by the language of other provisions of RCW 36.18.020(2).

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists various fees in subsections (a) through (i). With the exception of RCW

[9] The Gonzales court also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Gonzales, 2017 WL 986208, at *2 n.4. This is not so. "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions . . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229, 92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) ("While [legislative acquiescence] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.").

36.18.020(2)(h), the fees are listed directly without reference to the word "liable" or "liability." E.g., RCW 36.18.020(2)(a) ("In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . . ." (emphasis added)); RCW 36.18.020(2)(b) ("Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(c) ("For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(d) ("For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars." (emphasis added)); RCW 36.18.020(2)(e) ("For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(f) ("In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(g) ("For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as

provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars." (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word." Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.").

The Gonzales decision conflicts with these cases and this canon of statutory interpretation. Because RCW 36.18.020(2)(h) contains the only provision in the statute where "liable" appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

c. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

> Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime "shall be liable" for all the costs of the proceedings.

Even though RCW 10.46.190 employs the same "shall be liable" language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs "unless the defendant is or will be able to pay them." Our supreme court confirmed this in Blazina, holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). 182 Wn.2d at 838-39. Even though a defendant "shall be liable" for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies the legislature's use of the phrase "shall be liable" does

not impose a mandatory obligation but a waivable one. RCW 36.18.020(2)(h)'s criminal filing fee should be interpreted as discretionary.

d. The legislature knows how to make legal financial obligations mandatory and chose not to do so with respect to the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, "When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed. The DNA collection fee is likewise unambiguous. It states, "Every sentence imposed for a crime specific in RCW 43.43.754[10] must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). There can be no question that the legislature mandated a $100 DNA fee and a $500 VPA to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. It does not state that a criminal sentence "must include" the fee or that the fee "shall be imposed," but that the defendant is merely liable for the fee. The legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, and the legislature did not do so in this statute.

[10] RCW 43.43.754(1)(a) requires the collection of a biological sample from "[e]very adult or juvenile individual convicted of a felony . . . ."

The Washington Supreme Court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), noting the criminal filing fee had merely "been treated as mandatory by the Court of Appeals." That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction.

e. To the extent he must argue *Lundy*, *Stoddard*, and *Gonzales* are incorrect and harmful for this court not to follow them, Mr. Pugh so argue

Mr. Pugh is mindful of the perplexing problem regarding the application of stare decisis among various divisions of the Court of Appeals, and appreciates the court's recent discussion of the issue in In re Personal Restraint of Arnold, ___ Wn. App. ___, ___ P.3d ___, No. 34018-0-III (Apr. 25, 2017). Mr. Pugh agrees with Judge Becker in Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015), and with Judge Siddoway in Arnold, slip op. of Siddoway, J., that the "incorrect and harmful" standard does not apply in the Court of Appeals—panels within the same division or among the three divisions should feel unconstrained to disagree with each other given that disagreements are oftentimes necessary, appropriate, and

helpful to advance and explicate the law.[11] Nonetheless, to the extent Mr. Pugh must argue that Gonzales, Stoddard, and Lundy are incorrect and harmful under the standard announced in In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), to persuade this court to disagree with these decisions, Mr. Pugh so argues.

Gonzales, Stoddard, and Lundy are incorrect. None of the cases provides any reasoned statutory analysis nor addresses any of the arguments Mr. Pugh advances here. Instead, the cases simplistically conclude that because the word "shall" appears in the statute, the criminal filing fee must be mandatory. This is not valid statutory interpretation. Gonzales, Stoddard, and Lundy were incorrectly decided.

These decisions are also harmful for all the reasons discussed in Blazina, where our supreme court recognized that "Washington's LFO system carries problematic consequences." 182 Wn.2d at 836. Because the Washington Supreme Court has documented the harms of Washington's LFO system, see id. at 836-37, it is a forgone conclusion that case law requiring imposition of certain LFOs without a clear legislative mandate is

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[11] As the Grisby court acknowledged, "if the first panel to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review . . . . [T]he existence of splits within the Court of Appeals [serves] the positive function of alerting the high court to unsettled areas of the law that are in need of review." Grisby, 190 Wn. App. at 810 (paraphrasing Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455, 504-05 (2012/13).

harmful. Because Gonzales, Lundy, and Stoddard are incorrect and harmful, this court should not adhere to them.

Mr. Pugh asks this court to hold that the criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory, may be waived, and that the trial court should consider a defendant's ability to pay the fee before imposing it.

D. CONCLUSION

There was insufficient evidence to sustain a second degree theft conviction, requiring reversal of this conviction and dismissal of this charge with prejudice. The trial court failed to secure and knowing and intelligent waiver of the right to counsel, refused to instruct the jury on Mr. Pugh's abandonment theory, and admitted damaging ER 404(b) evidence without conducting the proper analysis, necessitating reversal of the convictions and retrial. In addition, restitution and discretionary LFOs were erroneously imposed and should be vacated.

DATED this 16th day of May, 2017.

Respectfully submitted,

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