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FEB 14, 2017

Court of Appeals
Division III
State of Washington

NO. 34731-1-III

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

STATE OF WASHINGTON
v.
KEVIN SNOW

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

The Honorable John O. Cooney, Judge

APPELLANT'S OPENING BRIEF AMENDED

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the element of unlawful entry in the charge of second degree burglary.
2. The state failed to prove beyond a reasonable doubt the element of intent to commit a crime in the charge of second degree burglary.
3. The state failed to prove beyond a reasonable doubt the element of knowing possession stolen property.
4. Appellant was denied his right to effective assistance of counsel by his attorney's failure to request the lesser included offense of criminal trespass.
5. This Court should deny appellate costs.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt the element of unlawful entry in the charge of second degree burglary, where there was no evidence presented that Mr. Snow was ever notified that he was no longer allowed to access the premises?
2. Did the state fail to prove beyond a reasonable doubt the

element of intent to commit a crime in the charge of second degree burglary where the only evidence of intent to commit a crime came from a statement Mr. Snow made to police indicting that he only thought the snow mobiles could be stolen?

3. Did the state fail to prove beyond a reasonable doubt the element of knowing possession stolen property, where the only evidence of knowledge came from a statement Mr. Snow made to police indicting that he only thought the snow mobiles could be stolen?

4. Was Mr. Snow denied his right to effective assistance of counsel by his attorney's failure to request the lesser included offense of criminal trespass where both the law and facts supported the lesser included charge?

5. Should this Court deny appellate costs where Mr. Snow is presumed indigent?

B. STATEMENT OF THE CASE

Mr. Snow was charged and convicted of one count of burglary in the second degree and four counts of possession of stolen property. CP1-2, 44-48, 58-72. Empire Cycle and Power

Sport, a business in Spokane, reported stolen a cargo trailer and four snowmobiles. RP 48, 68, 70. The police determined that Mr. Snow was a suspect and obtained a warrant to search 2524 Wellesley. RP 50.

The police found the snow mobiles at this location in a garage in different states of assembly. RP 54. The cargo trailer was located two miles from the garage. RP 58.

Wells Fargo representative Stephanie Bradford testified that in 2015 the bank foreclosed this property formerly owned by Mr. Snow and two others. RP 37-38. The house associated with this property was unoccupied and boarded up but people continued to come and go from the premises. RP 55, 73.

The bank did not evict Mr. Snow but presented in court a deed of sale in the bank's favor. RP 37-38, 41-42, 44-45. The bank agreed that at times when property is foreclosed, the foreclosed owners can maintain access to the foreclosed property. RP 41-42.

There was no damage to any of the doors or locks or any evidence of forced entry into the garage located at 2524 Wellesley. RP 45. According to Officer Kenneth Scott, when he executed the

search warrant he interrogated Mr. Snow who stated that Stephen Murphy, a friend, asked Mr. Snow if he could store several snow mobiles in the garage. RP 55. Mr. Murphy drove a large black truck to the garage with the snow mobiles in tow. RP 55, 59. Mr. Snow did not know if the snow mobiles were stolen but was “reasonably sure” they could be stolen. RP 57.

Mr. Snow informed Officer Scott that he just knew that Mr. Murphy wanted to store the snow mobiles. RP 64. Mr. Snow helped Mr. Murphy unload the snow mobiles into the garage and hoped that he might be rewarded for his help. RP 57. Mr. Snow was cooperative with the police investigation. RP 64. The police did not find any finger prints linking Mr. Snow to the theft. RP 58.

The state did not present any evidence that Mr. Snow knew that he was not allowed to enter the garage.

Defense counsel did not request lesser included jury instructions to the burglary charge.

This timely appeal follows. CP 81-97.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE ALL
ESSENTIAL ELEMENTS OF THE CRIMES OF

BURGLARY IN THE SECOND DEGREE AND
POSSESSION OF STOLEN PROPERTY.

The State charged Mr. Snow with burglary and unlawful possession of stolen vehicles. CP 1-2. “Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Evidence is sufficient to support a conviction only if viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were

proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

In this case, the State failed to present sufficient evidence to prove that Mr. Snow committed burglary and possession of a stolen vehicles.

a. Burglary

“A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1).

b. Enter or Remain Unlawfully.

In this case, the state had no proof that Mr. Snow knew that he was unauthorized to enter the abandoned garage. The state established that Mr. Snow owned the house associated and garage years earlier but that property had been abandoned, the house boarded up and unoccupied, the garage left unlocked. The state did not present any evidence that Mr. Snow was ever evicted from the house. The state did present

evidence that the bank that held title to the property. RP 73.

There were no signs of forced entry and Mr. Snow had unfettered access to the abandoned garage that he once owned, without being evicted. RP 45. This evidence does not establish beyond a reasonable doubt unlawful entry or remaining in a building.

c. Possible Possession of Stolen Property

The fact that Mr. Snow allowed someone to store snow mobiles he believed were likely stolen, does not establish an intent to commit a crime inside the building because the mere possession of recently stolen property does not establish a burglary without corroborating evidence. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217(1982). In *Mace*, the court recognized that “proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary.” *Mace*, 97 Wn.2d at 843.

To support a burglary conviction, the State must also show at least slight corroborative evidence of other inculpatory circumstances. *Id* (quoting *State v. Portee*, 25 Wn.2d 246, 253-54,

170 P.2d 326 (1946)). Such inculpatory circumstances include “presence of the accused near the scene of the crime,” or “flight, improbable or inconsistent explanations, the giving of fictitious names or circumstantial proof of entry.” *Mace*, 97 Wn.2d at 843-45. *State v. Ehrhardt*, 167 Wn. App. 934, 939-40, 276 P.3d 332 (2012).

Here, while Mr. Snow was near the garage, this was not adequate inculpatory evidence of a burglary because Mr. Snow had owned the building, there was no evidence he was aware that he could not enter the building, and he was not certain that the property was stolen.

The State’s evidence provided that Mr. Murphy drove a large black truck towing a trailer with four snow mobiles to the garage located at 2524 Wellesley. RP 55, 59. Mr. Snow assisted his friend in unloading the snow mobiles; Mr. Snow believed the snow mobiles were likely stolen, but did not know for certain; and Mr. Snow allowed the snow mobiles to be stored in the garage with the hopes of some sort of reward. RP 57. The trailer located at a different location contained snow mobile helmets and other gear

associated with the snow mobiles that was never delivered to the garage. RP 58.

These facts do not prove that Mr. Snow intended to commit a crime inside the garage. Rather, the State's evidence amounts to nothing more than Mr. Snow's presence at the garage with a belief the snow mobiles might be stolen. RP 57.

These facts alone cannot support a conviction to the crime of burglary because in Mr. Snow's mind there was only the possibility that the snow mobiles were stolen. Mr. Snow could not have intended to commit a crime inside the garage unless he knew that the snow mobiles were stolen, facts not presented in this case. This Court must reverse for dismissal with prejudice because the state failed to present sufficient evidence in support of each element of the crime of burglary in the second degree.

d. Unlawful Possession of Stolen Vehicles.

The State alleged that Mr. Snow possessed four stolen snow mobiles. CP 1-2. The charging document did not contain the RCW statute allegedly violated. Id. Under RCW 9A.56.140(1); RCW 9A.56.068(1), A person is guilty of possessing a stolen vehicle

if they knowingly “receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and . . . withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” *Id.*

Mr. Snow did not steal the snow mobiles and according to Officer Scott, Mr. Snow only thought that they could be stolen, but he did not know this to be true. *RP 57*. Allowing someone to store potentially stolen property does not establish that the defendant knowingly received stolen property. Under *RCW 9A.56.140(1)*; *RCW 9A.56.068(1)*. A belief in the possibility that something is stolen is not the same as knowing. “Knowing” as defined in jury instruction #16 means the person “is aware of the fact”. The jury was also legitimately permitted to infer Mr. Snow acted with knowledge based on his belief that the snow mobiles could have been stolen. *Id.*

The State’s evidence does not however establish that a reasonable person would have known items were stolen just because it was a possibility. Here for example, there was no evidence that Mr. Snow acted in concert with Mr. Murphy or that he

planned to commit a crime. Rather, Mr. Snow unwittingly allowed Mr. Murphy to store snow mobiles that Mr. Snow believed could have been stolen. This establishes a possibility but not knowledge that the snow mobiles were stolen.

Accordingly, the State failed to present sufficient facts to prove that Mr. Snow knowingly retained, possessed, or concealed the snow mobiles. Mr. Snow's unlawful possession of stolen vehicle convictions must be reversed.

2. APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON CRIMINAL TRESPASS TO THE CHARGE OF BURGLARY IN THE SECOND DEGREE.

a. Criminal trespass is a lesser included offense to burglary in the second degree.

A jury may convict a defendant of any lesser degree of a crime or any lesser included crime. RCW 10.61.003; *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998). A "defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily included in the charged offense and (2) the evidence in the case supports an inference that

the defendant committed only the lesser crime.” *In re PRP of Crace*, 157 Wn. App. 81, 106, 236 P.3d 914 (2010); citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); accord, *State v. Smith*, 154 Wn. App. 272, 277-78, 233 P.3d 1262 (2009).

Here, the legal prong was met because our appellate courts have held that legally, criminal trespass is a lesser included offense of burglary in the second degree. *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014); *State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986) (holding burglary in the second degree includes criminal trespass in the first degree). A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1).

The facts also support the lesser included instruction because a rational inference existed that Mr. Snow only committed the lesser offense. The evidence was equivocal regarding whether Mr. Snow knowingly entered or remained unlawfully in the garage, as well as being equivocal regarding whether he intended to commit a crime.

The evidence presented established that the bank owned

the building but no evidence that this was ever served on Mr. Snow. RP 37-44. There was also evidence that a neighbor knew the bank owned the building but continued to see many people coming and going in the years since the bank took ownership. RP 72-73. This evidence does not however link any knowledge of bank ownership to Mr. Snow, or that Mr. Snow knew he was not permitted to enter the garage.

In light of the equivocal, limited evidence, the jury could have determined either that Mr. Snow did not intend to commit a crime because he did not know the snow mobiles were stolen, or that he did not know that he was not allowed to enter the building. Under either circumstance, the facts supported the lesser included instruction on criminal trespass. *Crace*, 157 Wn. App. at 106 (citing *Workman*, 90 Wn.2d at 447-48).

In sum, the facts did not overwhelmingly establish that Mr. Snow entered the building to commit a crime or that he really knew that he was unauthorized to enter. Accordingly, Mr. Snow was entitled to an instruction on the lesser included offense. *Id.*

- b. Trial Counsel Was Ineffective For Failing to Request Lesser Included Instruction.

To prove ineffective assistance of counsel, a defendant must show (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) that this deficient conduct resulted in prejudice to the defendant—that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would be different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Maynard*, 183 Wn.2d 253, 260, 351 P.3d 159 (2015).

“Although courts strongly presume that defense counsel's conduct was not deficient, a defendant rebuts this presumption when no conceivable legitimate tactic exists to explain counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Strickland recognized the Sixth Amendment's guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense”. This means that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct.1473, 176 L.Ed.2d 284

(2010) (quoting *Strickland*, 466 U.S. at 688, 694); See also *Hinton v. Alabama*, ___ U.S. ___, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014) (alterations in original); accord *State v. Henderson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The United States Supreme Court recently characterized the first step of this test as follows:

“The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ “ *Padilla, supra*, at 366 (quoting *Strickland, supra*, at 688). “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland, supra*, at 688.

Hinton, 134 S.Ct. at 1088.

Under *Strickland*, “strategic choices” “are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Hinton*, 134 S.Ct. at 1088 (failure to request funds for adequate expert prejudicial ineffective assistance of counsel)

(quoting *Strickland*, 466 U.S. at 690-91).

An attorney must also know and research the relevant law. *Hinton*, 134 S.Ct. at 1088; *In re Morris*, 176 Wn.2d 157, 176, 288 P.3d 1140 (2012). “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton*, 134 S.Ct. at 1088; *Morris*, 176 Wn.2d at 176 (appellate counsel’s failure to research the public trial issue was deficient performance, because the law was readily available).

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) holds otherwise but is distinguishable. In *Grier*, the court analyzed the appropriate test for effective assistance of counsel and rejected the three prong approach used by the Court of Appeals. *Grier*, 171 Wn.2d at 38-42. When the Supreme Court applied the *Strickland* test, it determined that under the *Workman* test, the facts presented supported the lesser included instruction but that Grier’s initial request and later withdrawal of the request for a lesser included instruction, coupled with counsel’s vigorous self-defense and denial

that Grier was armed, established that counsel made a tactical choice not to request the lesser included instruction. *Grier*, 171 Wn. 2d at 26-28, 42-43.

In *Smith, supra*, the defendant was charged with first degree animal cruelty but Smith successfully presented evidence that called into question whether he intentionally failed to seek medical care or not. *Smith*, 154 Wn. App. at 278-79. Because the evidence suggested that Smith may have only committed animal cruelty in the second degree. Counsel was ineffective to Mr. Smith's prejudice. *Id.* See also *State v. Pittman*, 134 Wn. App. 376, 387-89, 166 P.3d 729 (2006) (failure to request lesser included offense instruction was ineffective assistance because defendant committed a crime similar to the one charged but the jury had no option other than to convict or acquit).

Here by contrast to *Grier* and similar to *Smith*, counsel did not argue a vigorous denial and the facts did not support a vigorous denial. Rather the defense argued that the state failed to present evidence that Mr. Snow knew the snow mobiles were stolen and that he knew he was not allowed to enter the garage. RP 103, 105.

Even though the evidence of all charges was weak, the defense chose a flawed all-or-nothing approach that was not a legitimate tactical decision but rather that prejudicial deficient representation.

The law is clear that criminal trespass is a lesser included offense of burglary in the second degree, and the facts in this case support the lesser included offense, not the greater. *Olson*, 182 Wn. App. at 375; *Soto*, 45 Wn. App. at 840-41. Accordingly, under *Hinton*, there cannot be a tactical reason to fail to request an instruction that is both supported by the law and the facts. *Hinton*, 134 S.Ct. at 1088; *Morris*, 176 Wn.2d at 176; *Reichenbach*, 153 Wn.2d at 130.

Here, counsel's decision not to request a lesser included instruction was not tactical and appears to be the result of a failure to research and understand the applicable law. Accordingly, Mr. Snow was prejudiced by counsel's deficient performance. To remedy this error, this Court must reverse and remand for a new trial.

3. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

This Court has discretion not to allow an award of appellate

costs if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Sinclair*, 192 Wn.2d 380, 388-89, 367 P.3d 612 (2016); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This Court should exercise its discretion and disallow appellate costs should the state substantially prevail.

The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, 192 Wn.2d at 389. Here, the trial court determined that Mr. Snow is indigent and does not have the ability to pay legal financial obligations. CP 83-84.

The Rules of Appellate Procedure allow the State to request appellate costs if it substantially prevails. RAP 14.2. A "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially

prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1). RCW 10.73.160(1) states, “[t]he court of appeals, Supreme Court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.” (emphasis added).

In *Sinclair*, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in appropriate cases. *Sinclair*, 191 Wn.2d at 388-89.

Under *Sinclair*, when the defendant raises an objection to the imposition of LFO’s, appellate courts are obligated to exercise discretion to approve or deny the state’s request for costs. *Sinclair*,

191 Wn.2d at 388. Thus, “it is appropriate for this Court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *Sinclair*, 191 Wn.2d at 389.

Under RAP 14.2, the Court should exercise its discretion in a decision terminating review...” *Sinclair*, 191 Wn.2d at 389. The Court should deny an award of appellate costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, 191 Wn.2d at 388-89.

The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Sinclair*, 191 Wn.2d at 391 (citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). “It is entirely appropriate for an appellate court to be mindful of these concerns.” *Sinclair*, 191 Wn.2d at 391.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at state expense, finding

Sinclair was “unable by reason of poverty to pay for any of the expenses of appellate review,” and “the defendant cannot contribute anything toward the costs of appellate review.” *Sinclair*, 191 Wn.2d at 391. Given Sinclair’s poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. *Sinclair*, 191 Wn.2d at 393. Accordingly, the Court ordered that appellate costs not be awarded. *Id.*

Similarly here, the trial court again at the end of trial and a matter of months before the filing of the opening brief on appeal, determined that Mr. Snow was indigent for purposes of appeal. CP 79-80. During sentencing the trial court did not impose discretionary LFO’s which also supports the court’s acceptance of Mr. Snow’s indigent status and inability to pay discretionary LFO’s. Mr. Snow’s sentence is 56 months. CP 58-72. This Court should deny an award of appellate costs.

D. CONCLUSION

Kevin Snow respectfully requests this Court vacate his convictions and remand for dismissal with prejudice based on the state’s failure to

prove all of the essential elements of second degree burglary, and all of the essential elements of possession stolen property. Alternatively, Mr. Snow requests this Court reverse and remand for violation of his right to the effective assistance of counsel based on counsel's attorney's failure to request the lesser included offense of criminal trespass where both the law and facts supported the lesser included charge.

DATED this 14th day of February, 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor at SCPAAppeals@spokanecounty.org and Kevin Snow/DOC#849787, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed, on February 14, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Kevin Snow.



Signature
