

No. 34762-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**James Dunleavy,**

Appellant.

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Walla Walla County Superior Court Cause No. 16-1-00200-2

The Honorable Judge John W. Lohrmann

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial judge violated Mr. Dunleavy's Sixth and Fourteenth Amendment right to a jury trial.
2. The trial judge violated Mr. Dunleavy's state constitutional right to a jury trial under Wash. Const. art. I, §§21 and 22.
3. The trial court improperly coerced a verdict from the jury.
4. When the jury asked a question relating to the lack of unanimity on one count, the court should not have directed them to continue deliberating "in order to reach a verdict."
5. The trial judge violated CrR 6.15(f)(2).

**ISSUE 1:** After the start of deliberations, a trial judge may not instruct jurors in such a way as to suggest the need for agreement. Did the trial court infringe Mr. Dunleavy's state and federal constitutional right to jury verdicts free of judicial coercion?

6. Mr. Dunleavy's burglary conviction violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
7. The state failed to prove that Mr. Dunleavy entered or remained in a "building" separate from the jail itself and the unit where he lived.
8. The state failed to prove that Mr. Dunleavy's entry into a neighboring jail cell was "unlawful."

**ISSUE 2:** A conviction for second-degree burglary requires proof that the defendant unlawfully entered or remained in a building. Did the state fail to prove that Mr. Dunleavy "unlawfully" entered a neighboring inmate's jail cell, or that the jail cell qualified as a separate "building" for purposes of the burglary statute?

9. The trial court failed to properly determine Mr. Dunleavy's criminal history, offender score, and standard range.
10. The prosecution failed to prove that Mr. Dunleavy had prior felony convictions.
11. The trial court erred by including in Mr. Dunleavy's criminal history offenses that were not admitted, acknowledged, or proved.

12. The trial court erred by sentencing Mr. Dunleavy with an offender score of nine.
13. The trial court erred by adopting Finding of Fact No. 2.2.
14. The trial court erred by adopting Finding of Fact No. 2.3.

**ISSUE 3:** At sentencing, the state bears the burden of proving prior convictions. Did the court err by sentencing Mr. Dunleavy with an offender score of nine absent an acknowledgment or any evidence that he had prior felony convictions?

15. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because James Dunleavy is indigent, as noted in the Order of Indigency?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

James Dunleavy, an inmate at the Walla Walla County Jail, coveted his neighbor's burrito mix. RP 5. When a fight broke out in the common area of his unit, he took advantage of the chaos to sneak through that inmate's cell's open door to take the burrito mix. RP 5, 38-42, 57.

For this action, he was charged with burglary in the second degree.<sup>1</sup> CP 1-2.

At trial, the state's theory was that the entry into another inmate's cell was an unlawful entry. RP 144-158, 168-169. The defense countered that people enter each other's cells all the time, and that no one had ever been charged with criminal trespass for it. RP 14, 46, 68-69, 71-82, 95-96, 163. Jail staff testified that jail rules prevent entry into other people's cells, but no one knew whether or not Mr. Dunleavy had been notified of those rules. RP 21, 23, 43, 45.

During deliberations, the jury sent out a question: "Are the Walla Walla county jail policies legally binding? Are they considered law? What if we are not unanimous on a certain count?" CP 5. The court responded:

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<sup>1</sup> He was also charged, and was eventually acquitted, of being an accomplice in the fight. CP 1-2, 36. He was convicted of misdemeanor theft; that conviction is not at issue in this appeal. CP 1-2, 36.

“You are to review the evidence, the exhibits, and the instructions, and continue to deliberate in order to reach a verdict.” CP 5.

The jury later returned a verdict of guilty on the burglary charge. CP 36.

At the sentencing hearing, the state alleged that Mr. Dunleavy had over 10 points. RP 195-196. The state offered no exhibits to support the allegation, and the defense did not stipulate to the calculation. RP 190-208. Even so, the court sentenced Mr. Dunleavy with 9+ points to 51 months in prison. CP 38, 41.

Mr. Dunleavy timely appealed. CP 54.

### **ARGUMENT**

#### **I. THE TRIAL JUDGE SHOULD NOT HAVE RESPONDED TO A QUESTION REGARDING THE JURY’S LACK OF UNANIMITY ON ONE CHARGE BY INSTRUCTING JURORS TO CONTINUE DELIBERATING “IN ORDER TO REACH A VERDICT.”**

The state and federal constitutions protect an accused person’s right to a jury trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§21 and 22. Among other protections, these provisions secure “the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel.” *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978). A judge

presiding over a criminal trial may not interfere in the jury's deliberative process. *Id.*, at 737.

Once deliberations begin, the court may not instruct the jury "in such a way as to suggest the need for agreement." CrR 6.15(f)(2). Any suggestion that a juror "should abandon his conscientiously held opinion for the sake of reaching a verdict invades [the jury] right." *Boogaard*, 90 Wn.2d at 736.

This is true "however subtly the suggestion may be expressed." *Id.* The rule is intended "to prevent judicial interference in the deliberative process... [T]he jury should not be pressured by the judge into making a decision." *Id.*, at 736.

A claim that judicial coercion affected a verdict may be raised for the first time on review. *State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (citing RAP 2.5(a)(3)). To prevail, the appellant must show a reasonably substantial possibility that the verdict was improperly influenced. *Id.*

In *Boogaard*, for example, the trial judge asked jurors who had deliberated into the night if they thought they could reach a verdict within half-an-hour. When eleven of the jurors thought it possible, the court instructed the jury to continue deliberating for 30 minutes. *Boogaard*, 90 Wn.2d at 735. The Supreme Court reversed the defendant's conviction

because the court's questions "unavoidably tended to suggest to minority jurors that they should 'give in' for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour." *Id.*, at 736.

Here, after deliberations began, the jury asked "What if we are not unanimous on a certain count?" CP 5. The accompanying questions suggest that jurors were struggling with the burglary charge. CP 5.

The court's response improperly suggested a "need for agreement." CrR 6.15(f)(2). By telling jurors to deliberate "in order to reach a verdict," the court applied subtle pressure suggesting the jury ought to reach a decision. *See Boogaard*, 90 Wn.2d at 736.

This violated Mr. Dunleavy's state and federal constitutional rights. *Id.*; U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. Although the first part of the court's answer properly directed jurors to review their materials and continue to deliberate, the final clause—"in order to reach a verdict"—crossed the line into "judicial interference in the deliberative process." *Id.*

Because of the timing of this directive, there is "a reasonably substantial possibility that the verdict was improperly influenced." *Ford*, 171 Wn.2d at 188. Similar language can properly be given *before* deliberations commence. *See, e.g.*, CP 10 (admonishing jurors to act

“with an earnest desire to reach a proper verdict”); CP 11 (telling jurors of their duty “to deliberate in an effort to reach a unanimous verdict,” but directing them not to surrender their honest beliefs or change their minds “just for the purpose of reaching a verdict”).

However, the court gave this supplemental instruction after the jury started deliberating, in response to a question relating to their lack of unanimity. The court’s answer implied to jurors in the minority “that they should ‘give in’ for the sake of [reaching a verdict.]” *Boogaard*, 90 Wn.2d at 736.

The error deprived Mr. Dunleavy of his right to a jury trial. *Id.* His convictions must be reversed and the case remanded for a new trial. *Id.*

## **II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. DUNLEAVY OF SECOND-DEGREE BURGLARY.**

Due process requires the state to prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *State v. Mau*, 178 Wn.2d 308, 312, 308 P.3d 629 (2013). Failure to do so requires dismissal with prejudice. *Id.*, at 317.

Conviction for second-degree burglary requires proof that the defendant entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). Here, the state failed to prove that Mr. Dunleavy, by stepping into an open

jail cell, “unlawfully” entered or remained in a “building” separate from the jail itself. His burglary conviction must be reversed and the charge dismissed with prejudice. *Id.*

A. The state failed to prove that Mr. Dunleavy entered or remained in a “building” separate from the jail itself.

Issues of statutory interpretation are reviewed *de novo*. *Matter of Marriage of Zandi*, 92296-9, 2017 WL 727876, at \*2 (Wash. Feb. 23, 2017). A statute that is susceptible to more than one reasonable interpretation is ambiguous. *State v. Jacobs*, 154 Wn.2d 596, 600-601, 115 P.3d 281 (2005). Courts must interpret ambiguous statutes in favor of the accused, absent contrary legislative intent. *Id.*, at 603.

The definition of “building” specifies that “each unit of a building consisting of two or more units separately secured or occupied is a separate building.” RCW 9A.04.110(5). None of the words in this phrase are defined (other than the word “building” itself). *See* RCW 9A.04.110;

The Court of Appeals has found this phrase ambiguous. *State v. Thomson*, 71 Wn. App. 634, 642, 861 P.2d 492 (1993). The rule of lenity requires an interpretation in Mr. Dunleavy’s favor. *Jacobs*, 154 Wn.2d at 603. Such an interpretation is confirmed by the provision’s legislative history (outlined in *Thomson*).

In *Thomson*, the court held that the rooms of a house were not separate buildings, even if equipped with locks and separately occupied by unrelated people at the time of the offense. *Thomson*, 71 Wn. App. at 635-636, 644-646. After examining the provision’s legislative history, the court found that this portion of the definition applies to units “occupied or intended to be occupied by different *tenants* separately.” *Id.*, at 644 (emphasis added).

In evaluating whether multiple rooms in a building qualify as separate buildings, the *Thomson* court placed great weight on the privacy interests of the occupants. According to the court, a family dwelling is a single building because each family member has the same privacy interest in the entire house, and that privacy interest in the entire house is shared by the other family members. *Id.* By contrast, occupied hotel rooms and apartments are separate buildings because each tenant has a privacy interest in a single unit that is separate from the interests of other tenants. *Id.*

The *Thomson* court’s reasoning requires reversal of Mr. Dunleavy’s burglary conviction. Inmates, including pretrial detainees, have no legitimate expectation of privacy in their jail or prison cells. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393 (1984); *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227,

3234, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556, 99 S. Ct. 1861, 1883, 60 L. Ed. 2d 447 (1979).

Indeed, “it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.” *Lanza v. State of N.Y.*, 370 U.S. 139, 143, 82 S. Ct. 1218, 1221, 8 L. Ed. 2d 384 (1962). Instead, “[n]o situation imaginable is as alien to the notion of privacy than an arrestee sitting in a jail cell.” *State v. Cheatam*, 150 Wn.2d 626, 638, 81 P.3d 830 (2003) (internal quotation marks and citation omitted).

Upon arrival at jail, an arrestee’s possessions are inventoried, and may later be seized as evidence without a warrant. *Id.*, at 635. The arrestee may be strip searched on a showing of reasonable suspicion. *State v. Audley*, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995). Inmate telephone calls are not considered private, and may be recorded. *See State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008).

The cells of Unit E of the Walla Walla County Jail hold two people. RP 3-4, 20. Inmates do not get to choose their cell assignments or their roommates. They do not have control over the locks on their doors. RP 14, 23-25. Cameras and microphones record their movements and conversations. RP 25. They are under constant observation by corrections officers. RP 26-28, 54. Their cells, personal belongings, and bodies may

legally be searched at any time. *See Block*, 468 U.S. at 589; *Wolfish*, 441 U.S. at 556; *see also Palmer*, 468 U.S. at 526.

Because jail inmates have no reasonable expectation of privacy in their jail cells, the cells are not analogous to the hotel rooms described by the *Thomson* court. They are not “separate buildings” under RCW 9A.04.110(5).

Nor can jail inmates be described as legal “tenants” of their cells. A “tenant” is one who “holds or possesses lands or tenements by any kind of right or title.” *Black's Law Dictionary* (10th ed. 2014).<sup>2</sup> Inmates have no right or title to their cells, which are owned and controlled by the government.

Only one tenant—the Walla Walla Corrections Department—occupies the Walla Walla County Jail. *See State v. Deitchler*, 75 Wn. App. 134, 137, 876 P.2d 970 (1994) (“As far as the record shows, the police station was occupied by a single tenant, and thus was not a building consisting of two or more units separately secured or occupied.”) Mr. Dunleavy is not charged with unlawfully entering an area separately occupied by a tenant other than the corrections department.

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<sup>2</sup> Washington’s landlord-tenant law defines “tenant” as “any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.” RCW 59.18.030(27).

Unlike hotel guests or apartment-dwellers, inmates are not “tenants,” and have no right to privacy in their assigned cells. This precludes a finding that each cell in a jail is a separate building. *Thomson*, 71 Wn. App. at 642.

At the time of the offense, Mr. Dunleavy was lawfully inside the Walla Walla County Jail. He did not enter or remain in a separate building when he went inside another inmate’s cell. Accordingly, the evidence was insufficient to convict him of burglary. His conviction must be reversed and the charge dismissed with prejudice. *Mau*, 178 Wn.2d at 312, 317.

B. The state failed to prove that Mr. Dunleavy entered or remained “unlawfully” in a neighboring cell.

Conviction for burglary requires proof that the accused person entered or remained “unlawfully.” RCW 9A.52.030(1). By itself, a defendant’s intent to commit a crime does not transform lawful presence in a building into unlawful presence. *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005) (citing *State v. Miller*, 90 Wn. App. 720, 954 P.2d 925 (1998)). Were this not so, every crime committed indoors would be a burglary.

Instead, a person enters or remains unlawfully “when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.”

RCW 9A.52.010(2).<sup>3</sup> A reasonable belief that a person with authority “would have licensed” the defendant to enter or remain negates the unlawfulness element of burglary. RCW 9A.52.090(3); *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005); *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

Under the common law,<sup>4</sup> a license to enter property may be implied. *State v. C.B.*, 195 Wn. App. 528, 538, 380 P.3d 626 (2016). A license to enter may arise “through conduct, omission, or by means of local custom, as well as through oral or written consent.” *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997) (addressing premises liability).

Even when taken in a light most favorable to the state, the evidence does not show that Mr. Dunleavy unlawfully entered the neighboring cell. The state did not prove that he could not have reasonably believed he had an implied license to access the neighboring cells. The “local custom” in the jail, along with the corrections department’s

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<sup>3</sup> The statute clarifies that “[a] license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public.” RCW 9A.52.010(2). This provision has no application here; none of the areas involved were open to the public.

<sup>4</sup> The common law supplements penal statutes “insofar as [it is] not inconsistent with the Constitution and statutes.” RCW 9A.04.060.

“conduct [and] omission[s]” allowed inmates to reasonably believe they had an implied license to access cells assigned to other inmates. *Id.*

Inmates routinely entered neighboring cells without consequence. RP 13-14, 46, 91, 99. One inmate testified that he often interacts with corrections officers while visiting cells assigned to someone else. RP 99. Although entries into other cells are “[n]ot within policy” and staff tries to keep such visits to a minimum, “[t]hey go on all the time.” RP 66-67.

Under these circumstances, Mr. Dunleavy could have reasonably believed he had an implied license to enter cells assigned to other inmates. The jury clearly had questions about the alleged unlawfulness of his entry, as evidenced by their question about the jail policy. CP 5.

The state failed to prove Mr. Dunleavy unlawfully entered or remained in his fellow inmate’s cell, and thus the evidence was insufficient to prove burglary. RCW 9A.52.090(3); *J.P.*, 130 Wn. App. at 895; *Widell*, 146 Wn.2d at 570. The conviction must be reversed and the charge dismissed with prejudice. *Mau*, 178 Wn.2d at 312.

C. The court should not grant the unpublished *Kalac* opinion persuasive value under GR 14.1(a).

Division II has upheld a burglary conviction stemming from an assault inside a jail cell. *State v. Kalac*, 195 Wn. App. 1060 (2016), *review*

*denied*, 187 Wn.2d 1011, 388 P.3d 486 (2017) (unpublished). This court should not accord *Kalac* persuasive value<sup>5</sup> in Mr. Dunleavy's case.

1. This court should distinguish *Kalac* on its facts.

The record in *Kalac* included facts proving that the defendant in that case unlawfully entered a separate building when he assaulted the victim in that case. This distinguishes *Kalac* from Mr. Dunleavy's case.

In *Kalac*, residents on upper and lower floors were segregated from each other. *Id.*, at \*1. Inmates on the lower floor were locked down while a shared dayroom was used by inmates residing on the upper floor and vice versa. *Id.* Lower floor residents were not allowed on the upper floor, and no inmate was allowed in another inmate's cell. *Id.*

Residents received a rulebook outlining these rules when they arrived at the jail. *Id.*, at 6. The defendant testified that he knew he was not supposed to enter another inmate's cell. *Id.* He disabled the locking mechanism of his own cell door at the start of lockdown, so that he'd be able to leave his cell while his intended victim was accessible. *Id.*, at \*2.

To get from his cell, on the lower floor, into the assault victim's upper-floor cell, the defendant left his cell in violation of the lower-floor lockdown. *Id.* He climbed the stairs, violating the ban on lower-level

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<sup>5</sup> See GR 14.1(a).

residents reaching the upper floor. *Id.* He then entered the victim's cell, knowingly violating another prohibition set forth in the rule book. *Id.*

These facts distinguish *Kalac* from Mr. Dunleavy's case. Unlike the *Kalac* defendant, Mr. Dunleavy was not on lockdown in his assigned cell. Mr. Dunleavy did not travel to a different floor or another general area from which he knew he was banned. Nor did the state prove that anyone told him about the jail's seldom-enforced policy of barring inmates from cells assigned to others.

Unlike Mr. Dunleavy, the *Kalac* defendant could not have had a reasonable belief that he had an implied license from the jail or anyone else to enter his victim's cell. Here, by contrast, "local custom" combined with the corrections department's conduct and omissions created an implied license to enter the cells of other inmates. *C.B.*, 195 Wn. App. at 538; *Singleton*, 85 Wn. App. at 839; RCW 9A.52.090(3); *J.P.*, 130 Wn. App. at 895; *Widell*, 146 Wn.2d at 570.

Because of these differences, *Kalac* should not be applied to the facts of Mr. Dunleavy's case.

2. The *Kalac* court misinterpreted *Thomson* and its progeny.

In *Thomson*, the court concluded that the statutory language dividing multi-unit structures into separate buildings is ambiguous. *Thomson*, 71 Wn. App. at 642 (discussing RCW 9A.04.110(5)). The *Kalac*

court ignored the ambiguity recognized in *Thomson*, and declared that the same language “unambiguously includes a jail cell.” *Id.*, at \*4.

The *Kalac* court did not review the legislative history outlined by the *Thomson* court, and failed to address the important distinction *Thomson* drew between “tenants” and “individuals” in that case. This distinction was crucial to the examples discussed in *Thomson* and the court’s holding.

The victim’s home in *Thomson* was a single building rather than a collection of multiple separate buildings, in part because only one *tenant* had occupancy. *Thomson*, 71 Wn. App. at 643-646. Thus, the houseguest who stayed in a separate bedroom was in the same building as the tenant, who slept in her own locked bedroom. *Id.* By breaking the lock and entering the tenant’s bedroom, the houseguest did not commit burglary. *Id.* The house was not “occupied or intended to be occupied by different *tenants* separately,” even though it was occupied by unrelated individuals on the night of the offense. *Id.*

The *Kalac* court equated “tenants” with “individuals.” Under the *Kalac* court’s reasoning, the locked bedroom in *Thomson* would qualify as a separate building, as would every occupied bedroom in a house rented or owned by one family.

The *Thomson* court concluded that the legislature did not intend to separately criminalize the unlawful entry into each bedroom of a home occupied by a single tenant. *Thomson*, 71 Wn. App. at 643-646. The *Kalac* court made no distinction between “individuals” and “tenants,” and thus departed from the careful reasoning in *Thomson*. *Kalac* is inconsistent with *Thomson*, and should not be given any weight in this case.

The second problem with *Kalac* is its failure to acknowledge the lack of privacy enjoyed by inmates in a jail cell. A lack of privacy inheres in a jail cell. *See Hudson*, 468 U.S. at 526. The purpose of a jail cell is to keep its occupants confined rather than to protect their privacy; that is why “a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.” *Lanza*, 370 U.S. at 143. Furthermore, inmates are assigned cells and cellmates; they don’t get to choose where they reside and can be moved from one cell to another at any time.

Each inmate has the same nonexistent privacy interest in his own jail cell as he has in his neighbor’s jail cell. *See Matter of Pers. Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998). This lack of a privacy interest extends to the common areas and all other parts of a jail or prison as well.

A group of inmates is thus like the members of a family, when determining how privacy intersects with the classification of a multi-

roomed structure. *See Thomson*, 71 Wn. App. at 645. Each inmate’s privacy interest in the structure is coextensive with his neighbors’, just as every family member shares the same privacy interest in the family home. *See Thomson*, 71 Wn. App. at 645 (“[E]ach family member has a privacy interest in the entire house, and that interest is not different from the interests of other family members.”)

*Kalac*’s failure to address the shared lack of privacy among inmates led the court to incorrectly pronounce that “inmates have an interest in their respective jail cells that are ‘separate from the interests of [the] other tenants,’ where those ‘other tenants’ are the other inmates.” *Kalac*, 195 Wn. App. at \*5 (alteration in *Kalac*) (quoting *Thomson*, 71 Wn.App. at 645).<sup>6</sup>

Inmates are not tenants: they do not occupy their jail cells “by any kind of right or title.” Black’s Law Dictionary (10th ed. 2014). If inmates maintain some diminished expectation of personal privacy in their own bodies, this expectation does not extend to their possessions, much less the cells assigned by the agency confining them.

The *Kalac* court erred by treating inmates as tenants with a right to privacy in their assigned cells. This court should not follow *Kalac*.

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<sup>6</sup> The *Kalac* court used the word “tenant” interchangeably with “individual.” *Id.*, at \*4-5.

**III. THE TRIAL COURT ERRED BY FINDING THAT MR. DUNLEAVY HAD AT LEAST NINE PRIOR FELONY CONVICTIONS.**

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). In determining the offender score, due process permits the court to rely only on what has been “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The burden is on the prosecution to establish the accused’s criminal history by a preponderance of the evidence. *Id.*

A prosecutor’s “bare assertions, unsupported by evidence do not satisfy the state’s burden to prove the existence of a prior conviction.” *Id.* at 910. This is true even when defense counsel does not object. *Id.* at 915.

Here, the state did not present evidence that Mr. Dunleavy has any prior convictions. RP 190-208. Despite this, the court found that Mr. Dunleavy had an offender score of nine, based on prior felony convictions stretching back to 1998. CP 38.

Because the state failed to prove that Mr. Dunleavy had any criminal history, the court's findings and offender score are not supported by the evidence. The findings regarding Mr. Dunleavy's criminal history, offender score, and standard range must be vacated. *Id.* His sentence must be reversed, and the case remanded for a new sentencing hearing. *Id.*

**IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

The Court of Appeals should decline to award appellate costs because Mr. Dunleavy “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Dunleavy indigent at the end of the proceedings in superior court. CP 51-52. That status is unlikely to change, especially given his felony history and 51-month prison term. CP 37-41. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

**CONCLUSION**

For the foregoing reasons, Mr. Dunleavy's convictions must be reversed, and the burglary charge must be dismissed with prejudice. In the alternative, the case must be remanded for a new trial. If the convictions are not reversed, the felony sentence must be vacated and the case remanded for a new sentencing hearing.

Regardless of the outcome, the Court of Appeals should decline to impose appellate costs.

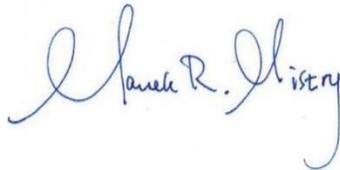
Respectfully submitted on April 7, 2017,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

James Dunleavy, DOC #842776  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Walla Walla County Prosecuting Attorney  
jnagle@co.walla-walla.wa.us

and to

tchen@co.franklin.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 7, 2017.



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# BACKLUND & MISTRY

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## Transmittal Information

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