

FILED  
Court of Appeals  
Division III  
State of Washington  
12/8/2017 2:48 PM

NO. 35146-7-III

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION THREE

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

SCOTT MATTHEW ELLIS,

Defendant/Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

The Honorable Linda Tompkins

REPLY BRIEF

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I. ARGUMENT.

A. **There Was Insufficient Evidence to Support a Unanimous Jury Verdict for the Unlawful Entry Alternative.**

The courts have recognized that, in some factual circumstances, a person can enter lawfully but remain unlawfully. *State v. Allen*, 127 Wn.App. 125, 131, 110 P.3d 849 (2005). As the *Allen* court discussed, in most burglary cases, the distinction between entering unlawfully and remaining unlawfully will make little difference because, where it is clear the defendant entered unlawfully (typically by breaking and entering), the fact that he also remained unlawfully ordinarily follows. *Allen* at 135.

However, “[u]nder certain circumstances, the distinction between entering and remaining unlawfully may be critical.” *Allen* at 127. The case at bar presents such a scenario: the evidence supported a finding that Ellis’s entry into the lot, if not also the motor home a moment or two later, to get away from the two men was not unlawful, and there was insufficient evidence Ellis intended to commit a crime against Chavez’s property when he entered it.

1. UNLAWFUL ENTRY.

Unlawful entry and criminal intent are separate elements which the State must independently prove. *State v. Howe*, 116 Wn.2d 466, 469, 805 P.2d 806 (1991); *Allen* at 131. To establish an unlawful entry, the State

must show the defendant was “not then licensed, invited, *or otherwise privileged* to so enter or remain.” RCW 9A.52.010(3) (emphasis added). Privilege is defined as something which “immunizes conduct that, under ordinary circumstances, would subject the actor to liability.” *Black’s Law Dictionary* (9th ed. 2009).

The common law defense of necessity affords a legal privilege to take action that would otherwise be criminal and, in the case of a burglary, provides a legal exception to an otherwise unlawful entry. *Howe* at 469 (“If a person is privileged to enter the building, then he cannot be convicted of burglary”); WPIC 18.02 (“If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty”).

2. THE EVIDENCE OF CRIMINAL INTENT WAS EQUIVOCAL.

Criminal intent may be inferred from conduct that “plainly indicates such intent as a matter of logical probability,” but not from conduct that is patently equivocal. *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985). The State cannot prove a burglary defendant’s intent to commit a crime merely with evidence that he entered the premises. *State v. Miller*, 90 Wn.App. 720, 725, 954 P.2d 925 (1998). Had Ellis been contacted by the police upon passing through the gate, there

would have been insufficient evidence to establish a burglary absent evidence of criminal intent.

His limited actions were consistent with entering the lot to get away from his pursuers, and it was more probable that he entered the lot in order to get away from someone following him than that he entered it with the intention of partially dismantling the interior of a motor home he had never laid eyes on before, especially since that did not occur until hours later. Absent evidence of contemporaneous criminal intent when Ellis entered the lot, there was insufficient evidence to prove the unlawful entry alternative. *Allen* at 137.

For the burglary charge, the State presented evidence of the defendant's presence in the lot and the crimes it accused him of committing "at some point" later inside the motor home, which occurred on someone else's property<sup>1</sup> 30-240 minutes after he entered the lot. Mere presence is insufficient to prove burglary, and presence plus the later commission of a crime that he could not have intended when he entered the lot is also insufficient to prove burglary. For example, in *People v. Avini*, 953 N.Y.S.2d 55, 100 A.D.3d 228 (Dept. 2 2005), where the government specified drug possession as the intended crime, the burglary

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<sup>1</sup> The law treats motor homes as "homes on wheels": the only difference between first-degree vehicle prowling and burglary is that one uses "building/dwelling" and the other "motor home." WPIC 60.04; WPIC 61.02; WPIC 61.02.02. Thus, the motor home and "building" should be treated as separate properties.

conviction was reversed for insufficient evidence because the government could not prove the defendant intended to unlawfully possess the heroin found in his bedroom when he entered the residence. *Avini* at 244-245. The fact that Ellis was charged with committing both alternatives, coupled with the State's argument that the burglary could be based on different acts/crimes, see RP 335-6, underscored the need for a unanimity instruction.

3. REVERSAL IS REQUIRED UNLESS THERE IS NO POSSIBILITY THE JURY RELIED ON THE UNSUPPORTED MEANS.

When a jury is instructed on alternative means of committing an offense, a general verdict of guilty does not raise due process concerns if the record contains sufficient evidence to find the defendant guilty of each means. However, if there is insufficient evidence to support any of the means, a "particularized expression" of jury unanimity is required and a reviewing court is compelled to reverse a general verdict unless it can rule out the possibility the jury relied on the unsupported means. *State v. Woodlyn*, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017); *Allen* at 130. Where the evidence supports only one means, a court reviewing a constitutional unanimity challenge may not assume the jury relied unanimously on the supported means. *State v. Todd*, \_\_\_ Wn. App. \_\_\_, 403 P.3d 867, 871 (2017) (citing *Woodlyn* at 162).

The State arguably conceded insufficiency for the unlawful entry alternative when it told the jury, “[w]e don’t necessarily know Mr. Ellis’s state of mind when he slipped through the gate and entered the storage yard . . .” RP 334. The property damage that occurred in the Brahams’ property several hours later could not be proof of criminal intent when he entered Chavez’s property. *Allen; Avini*, supra. The State argued both alternative means to the jury, see RP 332, 337, so reliance on the unsupported means cannot be ruled out. Since there was no unanimity instruction or expression of jury unanimity, and there was insufficient evidence to prove he entered the lot unlawfully with criminal intent, the burglary conviction must be reversed.

**B. The Defendant Was Denied Effective Assistance of Counsel.**

Although the failure to assert the necessity defense is the most compelling issue, the issues share a common thread of presenting a defense to the jury, a fundamental element of the constitutional guarantee of effective assistance of counsel.

**1. FAILURE TO REQUEST INSTRUCTION ON NECESSITY DEFENSE.**

**a) Ellis Was Entitled to the Instruction.**

Each side is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. *State v. Williams*,

132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Washington allows the defense of necessity even when the charging statute acknowledges no defense. *State v. Houfmuse*, 2017 WL 3877717 (unpublished<sup>2</sup> Div. III 2017). Although defense counsel did not request a necessity instruction, Ellis's testimony was sufficient to entitle him to one. WPIC 18.02; *Flowers v. State*, 51 So.3d 911 (Miss. 2010).

The *Flowers* decision is directly on point. Although *Flowers* involved burglary of a residence rather than a fenced lot, in both cases, the defendant testified his entry was motivated by fear of an armed individual. The State's argument about Ellis having alternatives to his non-forcible entry is similar to the argument rejected in *Flowers*. There, as in the present case, the prosecutor cross-examined the defendant about other options, but *Flowers* maintained someone was after him with a gun and he had to break into the house, which provided a prima facie showing of necessity and entitled him to the instruction. *Flowers* at 913; RP 119 (Chavez testified Ellis told him he had been chased into the lot); RP 248 (Ellis told deputy about being followed and threatened).

The State's Response mentions that the states' defenses contain different elements, but those differences weigh in Mr. Ellis's favor. In that

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<sup>2</sup> Pursuant to GR 14.1, unpublished opinions are not binding, but may be cited for such persuasive value as the Court deems appropriate. This opinion, which was issued after Appellant's Brief was filed, may be considered persuasive because, as discussed *infra*, it analyzed a legal issue very similar to the one presented in the case at bar.

regard, Mississippi's necessity defense is more restrictive than Washington's, requiring that (1) the act be done to prevent a "significant evil," (2) there be "no adequate alternative," and (3) the harm caused was not disproportionate to the harm avoided. *Flowers* at 913. By contrast, WPIC 18.02 requires the defendant reasonably believe committing a crime was necessary to avoid or minimize "a harm" and that no "reasonable legal alternative" existed.

Although the statement of facts is short on details, the burglary in *Flowers* occurred in a residential neighborhood, yet the court did not deprive the defendant of the necessity defense because he could have stopped a passing motorist, knocked on a neighbor's door, used his cellphone earlier, or run to a local convenience store or gas station. Even though Mississippi's defense requires there be no adequate alternative, the court held the issue of whether the elements of the necessity defense were proven should have been submitted to the jury. *Flowers* at 913. Likewise, whether there was a "reasonable legal alternative" is committed to the jury's determination by WPIC 18.02(4).

To show that no reasonable legal alternative existed, the defendant must show "he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefits of the alternative." *State v. Parker*, 127 Wn.App. 352, 355, 110 P.3d 1152

(2005) (quoting *United States v. Harper*, 802 F.2d 115 (5th Cir.1986)).

The issue is not whether someone can, upon calm reflection days or months later, conceive of a possible alternative but whether, under the circumstances presented to the defendant, which in this case included the risk of being shot, there was an alternative that was both legal and reasonable. The State's argument would preclude the defense in any case that occurred in either a commercial or residential area.

Ellis testified to his futile attempts to lose his pursuers and, as described in his testimony, the driver's decision to park across the street left him trapped against a fence with no other avenue for escape. RP 226-7. The fact that he did not damage the gate or fence would have supported a conclusion that his actions were reasonable under the circumstances.

In *State v. Cordero*, 170 Wn. App. 351, 284 P.3d 773 (2012), the failure to instruct on a statutory defense was upheld because the instructions already contained language requiring the jury to consider the defense that the defendant had been invited in, and thus "provided the jury with the applicable law and allowed Mr. Cordero to argue his theory that he had been invited into Ms. Garcia's room and was therefore at the premises lawfully." *Cordero* at 370. In this case, because Ellis's counsel did not request a necessity instruction, and none of the instructions contained language about necessity, the jury could not consider the legal

significance of Ellis's testimony as it related to whether he was guilty of burglary for entering the lot. *Houfmuse* at 10.

Had counsel requested the instruction, the court would have been obligated to consider the evidence supporting it in the light most favorable to the defendant. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). Consequently, the fact that Ellis had secured the motor home's door to keep someone from getting in before the police even arrived provided additional support for the defense. RP 152, 170, 229. The defendant has a constitutional right to have the jury instructed on his theory of the case, but that right was infringed by counsel's failure to request an instruction that would have explained the legal significance of the defendant's testimony about why he entered the lot.

b) Defense Counsel's Failure to Consider or Present the Defense was Not Tactical.

The State's claim that the defense made a tactical decision to forego a necessity defense is unsupported by the record, which shows counsel never considered it, even though she elicited relevant testimony from Ellis and the State's witnesses and included a necessity-type argument. Her opening statement told the jury Ellis was "running away from someone who was trying to hurt him" and that he entered the lot "to get to a safe place." RP 75-76. Ellis testified to the same effect, that he

was scared and was “trying to hide” when he entered the lot. RP 226; 238 (entered lot because he figured that “would keep them out”); 237 (entered motor home “to feel safe”). The State fails to explain how the defendant’s “theory and credibility would have been seriously undermined” by an instruction that was in line with that testimony, and cannot since the necessity defense was consistent with his testimony and counsel’s arguments. See *Flowers*, supra.

The State’s argument closely resembles the argument rejected in *Houfmuse*, where defense counsel failed to raise the necessity defense or request a necessity instruction, and the issue on appeal was whether counsel’s failure amounted to deficient performance. The Court couldn’t determine from the record if counsel was unaware the necessity defense applied or made a conscious decision to withhold the defense, but held that, because the evidence was sufficient to warrant the instruction, counsel’s failure to request it was deficient performance. Similar to the State’s argument in the present case, the government argued the failure to raise the defense was tactical because the defense would have emphasized the defendant’s version, which was contradicted by every other witness – in other words, it would have undermined his credibility. *Houfmuse* at 8.

Although a different crime is involved, a similar analysis applies here. The State’s argument is weaker because, unlike *Houfmuse*, where

every other witness disputed the defendant's version, no witness disputed Ellis's testimony about what happened before he entered the lot. Contrary to the State's argument, necessity was not inconsistent with a general denial.

In light of his testimony about being pursued to the storage lot and entering it out of fear, the necessity defense was consistent with the defendant's testimony. It was also consistent with counsel's arguments that Ellis was not guilty of burglary because he didn't intend to commit a crime when he entered the lot to escape his pursuers. RP 76, 352-54.

With a necessity instruction, counsel could have argued the jury could hold Ellis accountable for his actions inside the motor home by convicting him of vehicle prowling, but it must acquit him of the more serious burglary charge based on the law of necessity. Since there was no dispute the defendant was present in the lot that night and the statutory defenses were unavailable, necessity was the defense that provided his best chance for acquittal. See *Houfmuse* at 10 (because the defendant's testimony established the elements of the crime, necessity provided his only hope for acquittal); *United States v. Alferahin*, 433 F.3d 1148, 1161 (9th Cir. 2006) (counsel ineffective for failing to obtain instruction on element of charged crime, thereby abandoning "one of his client's most promising defenses.").

The State contends the absence of the defense and instruction doesn't matter because the jury rejected Ellis's testimony as not credible, but the jury must have found him credible to some degree since it acquitted him of the theft charge. *Houfmuse* at 10 (concluding jury found defendant credible because it acquitted him of the assault charge). If the jury found his testimony about being threatened and followed credible – which cannot be determined because the issue was never presented to the jury - the defense would apply to at least the burglary charge.

Counsel presented relevant testimony and included a necessity-type argument, RP 350-52, but without the instruction, the jury had no basis to consider the legal significance of his testimony and her arguments. *Flowers* at 913. This case is like *State v. Powell*, 150 Wn.App. 139, 206 P.3d 703 (2009), where counsel presented relevant testimony and made a closing argument pertaining to a “reasonable belief” defense, but never requested the appropriate instruction, which was held to be deficient and prejudicial. *Powell* at 155-56.

The failure to argue necessity is also related to the failure to request a unanimity instruction because, together, they would have required the jury to consider and make a particularized expression about whether the State proved Ellis entered the lot unlawfully. Without the necessity instruction, the jury had no basis to consider his reason for

entering the lot, and thus no option to acquit him for that reason. *Powell* at 156; *Houfmuse* at 10; *Alferahin* at 1162 (counsel’s refusal of materiality instruction “prevented the jury from considering the very theory of the case on which the attorney was relying.”).

The most reasonable conclusion is that counsel failed to consider whether the necessity defense applied, which explains not requesting the instruction and the absence of any mention of necessity or justification in the trial court record. Given her statements and the defendant’s testimony, there was no tactical reason to fail to request an instruction consistent with his testimony and theory of the case.

## 2. FAILURE TO CALL DEFENSE WITNESS.

In contrast to *State v. Warnick*, 121 Wn. App. 737, 90 P.3d 1105 (2004), where the witnesses were named and discussed on the record and defense counsel expressed that not calling the witnesses was a matter of trial strategy, *Warnick* at 746, Ellis’s attorney mentioned a witness without naming him/her and stated Ellis wished to have that witness testify, then inexplicably never mentioned him/her again. RP 262. Assuming Ms. Johnson was the additional witness, her testimony would have likely met ER 401’s low relevance threshold.

Johnson stated that Ellis had been living and working with her on or near the date of the incident, and her first-hand testimony about the

repeated threats made by his ex-wife<sup>3</sup> would have corroborated Ellis's testimony about the events that caused him to enter the storage lot, which was relevant to both the necessity defense and to whether the State proved the unlawful entry alternative. Her testimony would have been relevant to Ellis's credibility and made it less likely that he entered the lot in order to commit a crime inside.

Since defense counsel did not identify the witness or the substance of her testimony, and because the record indicates counsel never told Johnson about the trial, RP 406, the record does not support the State's argument that counsel made a tactical decision to not call the witness Ellis wanted to testify on his behalf. Johnson never testified or answered any questions, so the full extent of her knowledge is unclear, but lack of investigation is evidenced by counsel's statement that she spoke to Johnson for the first time on the day of sentencing, RP 395.

### 3. FAILURE TO INVESTIGATE DIMINISHED CAPACITY.

Defense counsel's failure to consider alternate defenses constitutes deficient performance "when the defense attorney 'neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for

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<sup>3</sup> Contrary to the State's argument, the ex-wife's threats would have qualified as an exception to the hearsay rule, either because they were statements against penal interest or showed her state of mind. ER 803(a)(3); ER 804(b)(3). Alternatively, they could have been offered to show their effect on Ellis. The defendant's constitutional right to present evidence would also militate in favor of admitting evidence of these repeated threats as they pertained to his intent when he entered the lot.

failing to do so.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 722, 101 P.3d 1 (2004) (quoting *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002)). The trial court record contains no evidence that a mental defense was explored, and no showing of strategic reasons for failing to investigate a defense that could, with appropriate expert testimony, result in an acquittal on some or all of the charges.

Although the State asserts there is nothing in the record to support a diminished capacity claim, Respondent’s Brief at 26, this overlooks Ellis’s “erratic” actions, the testimony of its own witness that Ellis’s actions were “not rational,” RP 170, the defendant’s testimony about being “freaked out,” RP 233, 239, defense counsel’s forceful contentions that his actions were not rational, RP 348, and the *DSM-V*’s diagnostic criteria.

A diminished capacity defense was not inconsistent with a general denial of culpability, or even a necessity defense. The jury could have believed Ellis’s testimony that he entered the lot in order to escape the two men pursuing him, and found he suffered from diminished capacity hours later when he was surrounded, hit with two cans of OC spray and repeatedly threatened with the dog (Ellis testified to his fear of the dog, RP 232-33).

The issue is not whether there was enough evidence to require the instruction – expert testimony would be needed – but whether the record

indicates counsel investigated the defense or a showing of strategic reasons for failing to investigate it. No such indications appear in the record and the defense should have been investigated.

4. FAILURE TO REQUEST BILL OF PARTICULARS.

The State fails to address the most significant fact that shows a bill of particulars would have made a difference in the outcome: the jury acquitted Ellis of theft. Had counsel requested a bill of particulars, and the State specified theft as the intended crime, his acquittal would have called the burglary and vehicle prowling convictions into question as inconsistent.

Although the State emphasizes malicious mischief on appeal, it emphasized theft at trial. RP 139, 179-80, 209-11, 213, 367. Furthermore, since the malicious mischief occurred on/in the Brahams' property hours after he entered the lot – and 30-60 minutes after the police arrived - the malicious mischief could not have been his intent when he entered Mr. Chavez's property. *Avini*, supra. By requiring the State to specify the intended crime, counsel would have laid the groundwork to set aside the burglary conviction based on the jury's acquittal on the theft charge.

The State's assertion that there was "no doubt" about which crime(s) the burglary charge was based on overlooks the fact that the State did not charge Ellis with malicious mischief until a few hours before trial

commenced. CP 4-5. Prior to the morning of trial, it could be said there was no doubt that the burglary and vehicle prowling charges were based on the theft allegation.

**C. Sentencing Errors.**

1. RCW 9.94A.500 CONTROLS SENTENCING PROCEDURES AND REQUIRED A PRESENTENCE REPORT.

The State's Response (p.30-31) references several statutes and cases related to whether a sentencing court has authority to impose crime-related prohibitions and conditions, but none of them apply to the issue presented: whether, in light of the evidence presented and the court's findings, RCW 9.94A.500(1) required a presentence report be ordered prior to imposing sentence. None of the statutes the State cites pertain to when a presentence report or chemical dependency screening is required, nor do they supersede RCW 9.94A.500(1)'s plain, unambiguous language regarding when such reports must be ordered. When read in conjunction with RCW 9.94A.500, however, they underscore the importance of ordering a presentence report to investigate and address issues like mental health and chemical dependency. See RCW 9.94A.505(9) (order requiring mental health evaluation or treatment must be based on presentence report).

The State's assertion that there is no evidence that chemical dependency or PTSD contributed to or influenced the offenses, Resp. Brief at 32, fails to account for the sentencing court's findings, the uncontroverted evidence presented at the sentencing hearing, and the *DSM-V*'s list of diagnostic criteria. The record does not contain a mental health evaluation or drug evaluation because no presentence report or chemical dependency screening was ordered. See CrR 7.1(b); *State v. Brown*, 178 Wn.App. 70, 85, 312 P.3d 1017 (2013), *rev. denied*, 180 Wn.2d 1004 (2014) (had the court followed the statute and ordered a presentence report, the investigator charged with preparing the report would have reached out to victim to seek her input).

The State asks the Court to imply that the court waived the presentence requirement due to (1) defense counsel's failure to request a presentence report, and (2) the court's rejection of the defendant's request for a DOSA. Resp. Brief at 33. As to (1), RCW 9.94A.500 does not require the defense to request a report. As evidenced by the contrasting statutory language, the court's rejection of Ellis's request for a DOSA - a permissive alternative authorized by a different statute - does not alter RCW 9.94A.500's mandatory language requiring that a chemical dependency screening be ordered. *Compare* RCW 9.94A.500(1) (court "shall order the department to complete a chemical dependency screening.

. .”) with RCW 9.94A.660(4) (court “may” order department to complete chemical dependency screening report to assist it in determining if DOSA is appropriate).

The State’s argument conflicts with the statutory language, which requires a presentence report and chemical dependency screening “[u]nless specifically waived by the court.”<sup>4</sup> The word “specifically” modifies “waived,” and the State’s contention that there can be an unspoken or implied waiver is at odds with that language. The record establishes the court never specifically waived the statutory requirements, either for a presentence report or a chemical dependency screening, and the court’s failure to order the required reports cannot be deemed harmless error. *Brown* at 81. As a result, the sentence was outside the trial court’s authority. *Id.* at 85, n.6.

## 2. THE DEFENDANT’S SERVICE TO HIS COUNTRY.

The State’s argument that the record is barren of any request to continue sentencing and that the defense made no request for additional time ignores the context of counsel’s statements, as well as the judge’s immediate rejection of her suggestion that Ellis should have more time to obtain the records. RP 411. Under any reading of the transcript, the court decided it was too late and no additional time would be afforded to Ellis.

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<sup>4</sup> The State’s quotation of the statute omits the modifier “specifically.” Resp. Brief at 33.

The State's argument that his service must be directly linked to the crime itself appears to conflict with *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), a case the State's Brief does not address. In *Mulholland*, the 55-year-old defendant returned to commit a drive-by shooting and six first-degree assaults several hours after threatening a young man during a verbal dispute over a TV. *In re Mulholland* at 325. The opinion referenced the judge's comments and a victim's comments about the effect the defendant's military service had on him. *Id.* at 333. This was the basis for the Court's holding that, had the trial court known it could run the sentences concurrently, a different sentence might have been imposed because of the defendant's service. *Id.* at 333-34. The State's argument that the court could not consider Ellis's military service without a direct link to his conduct that night, Resp. Brief at 38, does not align with the Court's analysis and holding. Indeed, it is difficult to fathom how Mulholland's military service could have been directly related to his decision to drive by and shoot into a home where six people were quietly eating dinner.

In addition, with all of Ellis's prior felonies occurring after he completed his military service in 2007<sup>5</sup>, his service and related issues

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<sup>5</sup> Of the eight felonies, two occurred within a few days in September, 2008, three occurred between 9/28-10/4/12, and the remaining three occurred on the same day (1/2/14). See CP 56.

could also be relevant to his criminal history, a recognized basis for an exceptional sentence. RCW 9.94A.390; *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005). Had the court ordered a presentence report, it would have explored whether, and to what extent, his service and related conditions affected his culpability for the 2016 offenses, as well as his prior history.

Finally, the court's comments demonstrate it would have considered his service as a mitigating factor had he been able to procure official documentation in the few weeks before sentencing, and that it would have resulted in a different sentence. RP 413. It was manifestly unreasonable for the court to declare that certain records would result in a different sentence, then add that, even though it was nearly impossible to obtain those records before the hearing, no more time would be afforded to obtain them.

3. ABERRATIONAL BEHAVIOR AND FACTS THAT DISTINGUISH ELLIS'S OFFENSE FROM OTHER BURGLARIES.

The State unfairly characterizes the defendant's argument as an argument that his crimes were "de minimis," but distinguishing a defendant's crime from others in the same category is a well-established basis for a mitigated sentence. *State v. Ha'Mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997). In the case the State relies on, *State v. Garcia*, 162 Wn.

App. 678, 256 P.3d 379 (2011), *rev. denied*, 173 Wn.2d 1008 (2012), the Court considered a different issue: whether the “de minimis” nature of the defendant’s violation of the sex offender reporting statute had been taken into account by the legislature when it set the standard range. *Garcia* at 685. Even so, it noted that multiple courts have found a downward departure justified by the presence of multiple mitigating factors, and then considered that same factor in conjunction with other mitigating factors to affirm the exceptional sentence. *Id.* at 687-88. As detailed in Appellant’s Brief, multiple mitigating factors supported a downward departure, including facts demonstrating the less egregious nature of the burglary.

Traversing a property to enter a different property is, as argued *supra*, not legally sufficient to establish a burglary, and no evidence was presented that Ellis did more than that *vis-à-vis* Chavez’s property. A malicious mischief that occurred up to several hours after he entered the Brahams’ property cannot be the basis for the burglary. *Allen; Avini*, *supra*. Finally, Ellis’s reason for entering the lot and how he entered it distinguishes it from most burglaries. The distinguishing facts and circumstances were sufficient to warrant a downward departure, but the court’s comments indicate it failed to analyze whether this burglary was less egregious than the vast majority of burglaries when it refused to grant an exceptional mitigated sentence.

4. CONCLUSION.

The statute's plain language required the court to order a presentence report and chemical dependency screening. Had the court ordered the reports, Mr. Ellis's military service and related PTSD and chemical dependency would have been investigated, and the reports would have explored the extent to which those factors impacted the night in question and his criminal history. Due process requires a meaningful opportunity to be heard, and the court's refusal to allow him additional time to obtain the records it had just informed him were needed to consider his sentencing request deprived him of that opportunity.

II. CONCLUSION.

For the reasons set forth above and in Appellant's Brief, Ellis requests the Court reverse his convictions or, in the alternative, reverse his sentence and remand for a new sentencing hearing.

DATED: December 7, 2017. Respectfully submitted:

  
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 8, 2017, having obtained prior permission, I served a copy of Appellant's Reply Brief as follows:

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On that same date, I also mailed a copy of the Reply Brief to:

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**Appellate Court Case Title:** State of Washington v Scott Matthew Ellis  
**Superior Court Case Number:** 16-1-03379-3

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