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Court of Appeals
Division III
State of Washington
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NO. 36383-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent

v.

WENDY AMEZCUA,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ARGUMENT 1

1. Ms. Amezcua could not be convicted of burglary as she was permitted to be in the home..... 1

2. Ms. Amezcua was convicted of a crime for which she was never charged in violation of her rights under the Sixth Amendment and article I, section 22 of the Washington Constitution. 4

3. The evidence at trial was insufficient to establish second-degree malicious mischief. 7

4. The evidence at trial was insufficient to establish second-degree theft..... 10

5. The evidence at trial was insufficient to establish Ms. Amezcua violated a no contact order. 12

6. The constitutional violations were not harmless..... 14

C. CONCLUSION..... 14

TABLE OF AUTHORITIES

United States Supreme Court

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560
(1979) 2

Washington Supreme Court

In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012)
..... 10

State v. Coria, 146 Wn.2d 631, 48 P.3d 980 (2002) 9

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 2

State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000) 7

State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016) 2

State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005)..... 14

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013) 2, 14

State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003)..... 13

Washington Court of Appeals

State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986) 5

State v. Ehrhardt, 167 Wn. App. 934, 276 P.3d 332 (2012) 8

State v. Garcia, 65 Wn. App. 681, 829 P.2d 241 (1992)..... 4

State v. Jain, 151 Wn. App. 117, 210 P.3d 1061 (2009)..... 5, 7

State v. Kirwin, 166 Wn. App. 659, 271 P.3d 310 (2012)..... 4

State v. Morales, 174 Wn. App. 370, 298 P.3d 791 5

State v. Williams, 199 Wn. App. 99, 398 P 3d 1150 (2017).....8, 12

United States Constitution

U.S. Const. amend. VI.....4

Washington Constitution

Const. art. I, § 224

Statutes

RCW 9A.48.010 8
RCW 9A.48.080 7
RCW 9A.52.010 3
RCW 9A.56.010 10
RCW 9A.56.040 10

A. INTRODUCTION

Wendy Amezcua, Noah Balauro, and their children lived together in Mr. Balauro's home for five years. After the two separated, Ms. Amezcua retained her keys, kept most of her belongings at the home, and continued to spend a substantial amount of time there, including occasionally staying the night. One evening, after seeing Mr. Balauro with his new girlfriend, Mitzy Lopez, Ms. Amezcua went to the home, damaging and taking various items. Ms. Amezcua was ultimately convicted of residential burglary, second-degree malicious mischief, second-degree theft, and violation of a no contact order.

At trial, the State failed to establish that Ms. Amezcua unlawfully entered the home, or that the market value of the items damaged or taken exceeded \$750, as required by statute. Nor was the evidence sufficient to establish an actual violation of a no contact order. Finally, the jury instructions allowed Ms. Amezcua to be convicted of an uncharged crime. Each of these errors requires reversal.

B. ARGUMENT

1. Ms. Amezcua could not be convicted of burglary as she was permitted to be in the home.

The evidence presented at trial was insufficient to convict Ms. Amezcua of residential burglary as she had permission to enter the home.

The question of review is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Although the evidence is viewed in the light most favorable to the prosecution, “[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). “A ‘modicum’ of evidence does not meet this standard.” *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting *Jackson*, 443 U.S. at 319).

The Respondent’s reliance on Ms. Amezcua’s statements to law enforcement erroneously assumes that she would have been familiar with the legal definition and elements of residential burglary. Br. of Resp’t at 4. Although Deputy Lee testified that Ms. Amezcua admitted to the burglary, at no point did she state that she was not allowed to enter the home. *See* RP 240-43. Deputy Lee was explicit that he never actually asked Ms. Amezcua whether she had permission to enter the residence. RP 254. Instead, Ms. Amezcua admitted to damaging property and taking items from the home. RP 241, 243.

Contrary to the Respondent’s argument, whether Ms. Amezcua was living in the home is not determinative. *See* Br. of Resp’t at 5-6.

Under RCW 9A.52.025, the question is not whether she was living with Mr. Balauro, but whether the State proved beyond a reasonable doubt that she lacked permission enter the home at all. RCW 9A.52.025(1) (“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[.]”); RCW 9A.52.010(2) (a person “enters or remains unlawfully” when “he or she is not then licensed, invited, or otherwise privileged to enter or remain”).

Ms. Amezcua shared the house with Mr. Balauro and their children for the five years preceding the incident. RP 167. She initially left because a no contact order precluded Mr. Balauro from having contact with her. RP 167. However, the no contact order did not preclude Ms. Amezcua from being at the family home and allowed contact between her and Mr. Balauro as needed to co-parent. *See* RP 169-70. In fact, Ms. Amezcua was frequently at the home with the children, and occasionally stayed the night. RP 215-16. Mr. Balauro did not give Ms. Amezcua explicit permission to reside in the home, but the parameter of her presence were never discussed because it was a “super-gray” area, given the no contact order. RP 170.

This Court should additionally reject the Respondent’s argument that Ms. Amezcua’s use Mr. Balauro’s keys to enter the home establishes

unlawful presence. Br. of Resp't at 7. Mr. Balauro was fully aware that Ms. Amezcua had her own set of keys and did not change the locks or ask her to return the keys. RP 214-15. Taking Mr. Balauro's keys is therefore reflective of Ms. Amezcua's intent to return to the home, and not Mr. Balauro's revocation of her permission to enter. Under these circumstances, the State failed to establish the element unlawful entry, and this Court should reverse and dismiss with prejudice.

2. Ms. Amezcua was convicted of a crime for which she was never charged in violation of her rights under the Sixth Amendment and article I, section 22 of the Washington Constitution.

Ms. Amezcua was convicted of malicious mischief based, in part, upon damage to Ms. Lopez's personal property, a crime for which she was never charged. Both the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee defendants in criminal proceedings the right to be informed of the nature of the charges against them. U.S. Const. amend. VI; Const. art. I, § 22. "It is a well-settled rule in this state that a party cannot be convicted for an offense with which he was not charged." *State v. Garcia*, 65 Wn. App. 681, 686, 829 P.2d 241 (1992).

Where the charging document alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012); *see also*

State v. Brown, 45 Wn. App. 571, 575-76, 726 P.2d 60 (1986) (A jury instruction “may not be more far-reaching than the charge in the information.”). Thus, once the charging document identifies specific conduct or a specific victim as a basis of a charge – even if not an essential element of the offense – jury instructions cannot be worded in a way that would allow for conviction based upon uncharged conduct. *State v. Morales*, 174 Wn. App. 370, 381-84, 298 P.3d 791 (2013) (reversible error where the charging document listed a single victim of harassment but jury instructions identified two possible victims, allowing for conviction on uncharged alternative); *State v. Jain*, 151 Wn. App. 117, 121-23, 210 P.3d 1061 (2009) (reversible error where jury instructions allowed for conviction based upon properties different than those listed in the charging document); *Brown*, 45 Wn. App. at 575-76 (reversible error where jury instructions allowed for conviction based upon co-conspirators different than those listed in the charging document).

The Respondent fails to address Ms. Amezcua’s argument that she was convicted of an uncharged crime against Ms. Lopez. *See* Br. of Resp’t at 7-9. Instead, the Respondent argues Ms. Amezcua was properly convicted of second-degree malicious mischief as it is a lesser-included offense of the charged crime of first-degree malicious mischief. Br. of Resp’t at 7-9. This argument misses the mark; the constitutional violation

is not rooted in the *degree* of the offense, but rather the *identity of the victim and damaged property*.

Here, the Information charged Ms. Amezcua with second-degree malicious mischief, alleging that that Ms. Amezcua caused physical damage to the property of Noah Balauro. CP 13. It makes no reference to Ms. Lopez or her personal property. CP 13. Meanwhile, the to-convict instruction identified both Mr. Balauro and Ms. Lopez as victims and allowed the jury to aggregate the total value of the property belonging to both Mr. Balauro and Ms. Lopez. Specifically, the instruction required the jury to find Ms. Amezcua guilty if it agreed “(1) That on or about March 4th 2018, the defendant caused physical damage to the property of another in an amount exceeding \$750, to wit: *combined value of various items belonging to Noah Balauro and Mitzi [sic] Lopez Orta[.]*” CP 74 (emphasis added). It is undebatable that this instruction allowed Ms. Amezcua to be convicted based upon damage Ms. Lopez’s property, a crime for which she was never charged.

Nor does the Respondent address the resulting prejudice. *See* Br. of Resp’t at 7-9. If anything, the Respondent’s brief actually emphasizes the likelihood of an erroneous conviction, arguing that “Mr. Balauro and Ms. Lopez both testified as to all the items in the home that were damaged or destroyed by Ms. Amezcua.” Br. of Resp’t at 9. For the reasons argued in

Appellant's Opening Brief, it is likely that the jury convicted Ms. Amezcua of second-degree malicious mischief based partially on the value of the damage to Ms. Lopez's property. Br. of App. at 20-21. Reversal is required. *Jain*, 151 Wn. App. at 124.

3. The evidence at trial was insufficient to establish second-degree malicious mischief.

The State failed to prove that the damage to the items within the family home exceeded \$750 in market value. Both RCW 9A.48.080 and the to-convict instruction for second-degree malicious mischief required the jury to find that Ms. Amezcua damaged property in an amount exceeding \$750 in "value." CP 74. The jury was later instructed that "value means the market value of the property at the time and in the approximate area of the act." CP 82. Under the law of the case doctrine, once defined in the jury instructions, "value" equated "market value" for the purpose of establishing malicious mischief. *See State v. Perez-Cervantes*, 141 Wn.2d 468, 476 n. 1, 6 P.3d 1160 (2000).

Again, the Respondent fails to address the crux of Ms. Amezcua's argument in any meaningful fashion. Specifically, the Respondent declines to even acknowledge the jury instruction requiring the State to prove the value of the property at the time of the act, instead arguing that evidence established the "market value at the time of purchase." Br. of Resp't at 9-

10. While evidence of the price paid is relevant in determining the value of an item, the State must still prove the market value at the time of the incident beyond a reasonable doubt. *State v. Williams*, 199 Wn. App. 99, 105-06, 398 P 3d 1150 (2017). Testimony of an item’s purchase price, without more, is insufficient to enable the jury to determine market value, particularly where the purchase is remote in time. *See State v. Ehrhardt*, 167 Wn. App. 934, 944-46, 276 P 3d 332 (2012). Indeed, even an owner’s rough estimate of an item’s value at the time of the incident is insufficient to establish market value where the State fails to show the basis of the owner’s estimate. *Williams*, 199 Wn. App. at 111.

The Respondent declines to discuss any of the cases cited in Appellant’s Opening Brief and makes only a single reference to Mr. Balauro’s testimony regarding purchase price. Br. of Resp’t at 9-10. The Respondent’s uncited assertion that “even with depreciation,” the evidence was sufficient to establish \$750 in property damage is meaningless as the Respondent is unable to identify any evidence of the cost of depreciation.¹ Br. of Resp’t at 10. Mr. Balauro testified that the majority of the furniture was purchased “at least a year or two” before the incident, and did not estimate the current value. *See* RP 216. Although the washer and dryer

¹ Notably, the jury was not instructed that “damages” includes RCW 9A.48.010(1)(b), which additionally defines damages as “any diminution in the value of property.” RCW 9A.48.010(1)(b).

cost \$3,500 new, only the glass on the washer was damaged, and no evidence was presented as to the cost of the repair. *See* RP 205. The Respondent's references to the value of the television, laptop, and PlayStation as exceeding \$750 should be completely disregarded as the items were not damaged and therefore not encompassed in the malicious mischief charge. Br. of Resp't at 10.

The Respondent's argument that Ms. Amezcua confessed to the crime again sidesteps the true issue of the State's failure to establish market value. Br. of Resp't at 11-12. The argument blurs the *fact* of property damage with the *value* of the property damage. Although Ms. Amezcua made statements that she was responsible for the damage, she never acknowledged causing over \$750 in damages. *See* RP 239-43.

Critically, the Respondent did not even mention the issue of community property. *See* Br. of Resp't at 7-11. An individual can be held liable for damage to community property; however, the value accorded to that damage in the prosecution for malicious mischief has yet to be decided. *State v. Coria*, 146 Wn.2d 631, 48 P.3d 980 (2002). As discussed in the Appellant's Opening Brief, the majority of the damaged property in question was purchased with a large tax refund based primarily on claiming Ms. Amezcua's children as dependents. RP 174, 216-217.

For the reasons discussed in Appellant's Opening Brief, the

evidence was utterly insufficient to establish that the market value of the items exceeded \$750. This Court should reverse the conviction of malicious mischief in the second degree, and remand for entry of a judgment and sentence on the lesser-included offense of malicious mischief in the third degree. *See In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012).

4. The evidence at trial was insufficient to establish second-degree theft.

The State similarly failed to prove beyond a reasonable doubt that the “fair market value” of the items taken from the home exceeded \$750, as required to establish second-degree theft. RCW 9A.56.040(1)(a); RCW 9A.56.010(21)(a).

The Respondent’s argument on sufficiency falls short on many levels. First, the Respondent lumps together items the value of items taken and the value of the items damaged. Br. of Resp’t at 12. While the former is properly considered in evaluating the sufficiency of the evidence for second-degree theft, the latter is wholly irrelevant.² The items taken included the television, PlayStation, and laptop; thus, the only question for

² The items damaged were not removed from the home and are relevant only to the charge of malicious mischief.

this Court is whether the State proved the market value of the electronics at the time of the incident exceeded \$750.

Second, the Respondent mischaracterizes the record. It appears as though the damaged furniture and washer were purchased with the \$7,000 tax refund or from Rent A Center, not the electronics. *See* RP 174, 197-98. Moreover, even if the family used the tax refund to buy the electronics, it was not – as alleged by the Respondent – “[Mr. Balauro’s tax return[.]” Br. of Resp’t at 12. Mr. Balauro clearly testified that “we” got the tax return through claiming the children – two of which were not biologically related to Mr. Balauro – as dependents. RP 216-17.

The Respondent again fails to address the issue of community property, including the television and PlayStation, which Mr. Balauro estimated as being worth \$200. Br. of Resp’t at 11-12; RP 184, 218. Mr. Balauro estimated the value of his personal laptop as \$500, generally citing depreciation, but did not specify in detail how he reached the figure. RP 183-85. Even assuming his testimony was sufficient to establish the market value of the laptop, it does not exceed the requisite \$750 dollars.

Finally, the Respondent declines to substantively address Appellant’s argument regarding the insufficiency of the evidence to establish the market value of Ms. Lopez’s items. *See* Br. of Resp’t at 12. The Respondent’s failure to cite to any caselaw supporting its argument as

to Ms. Lopez’s testimony or to address *State v. Williams*³ is telling. Br. of Resp’t at 11-12. As outlined in Appellant’s Opening Brief, Ms. Lopez could not identify all of the specific items taken and did not describe how she came to the frankly outlandish estimates for the value of her property. Ms. Lopez assigned a bulk value of \$1,000 to the clothes in her weekend bag, simply stating she had “multiple pairs of shirts, jeans, shoes and – women’s clothing.” RP 234. She gave no dates of purchase, brand names, or purchase price for the items of clothing, but insisted the items “still had good value on them.” RP 228. As the testimony in *Williams*, Ms. Lopez’s testimony did not satisfy the State’s burden of proving market value beyond a reasonable doubt. *Williams*, 199 Wn. App. at 111.

Where the State failed to present sufficient evidence of the market value of the items taken, Ms. Amezcua’s conviction for second-degree theft cannot stand; this Court should reverse and remand for the entry of a judgment and sentence on the lesser-included offense of third-degree theft.

5. The evidence at trial was insufficient to establish Ms. Amezcua violated a no contact order.

The State failed to establish a violation of the pretrial no contact order as there was no evidence that Ms. Amezcua’s sister actually contacted Mr. Balauro.

³ 199 Wn. App. 99, 111, 398 P 3d 1150 (2017).

The Respondent dedicates a single paragraph in its brief to this argument. Br. of Resp't at 12-13. As with many of the other arguments, the Respondent cites no caselaw, simply asserting the evidence was sufficient to establish Ms. Amezcua violated a no contact order. Br. of Resp't at 12-13. And, as with the other arguments, the Respondent's bare assertion that that the evidence was sufficient does not make it so.

More importantly, even assuming the truth of the Respondent's argument that the evidence established "Ms. Amezcua encouraged a female to contact Mr. Balauro," encouraging the violation of a no contact order is insufficient to establish an actual violation of the order. To establish a completed violation of a no contact order, the State should present evidence that the restrained party or an intermediary took some affirmative action to actually contact the protected party. *See State v. Ward*, 148 Wn.2d 803, 816, 64 P.3d 640 (2003) (evidence sufficient to support violation where restrained party called protected party's home and conveyed information to protected party's wife).

Notably, the trial court in Ms. Amezcua's case acknowledged that, to the best of its recollection, "there's no evidence that the sister – these phone conversation ever confirmed that she actually made contact." RP 412. The jury, too, struggled with the question of whether the evidence established an actual versus attempted violation of the order, and whether

an attempt to violate the order was sufficient to convict Ms. Amezcua. CP 99.

As discussed in Appellant’s Opening Brief, a close review of the jail calls reveals that, based upon the evidence presented, her conviction rested on an inference of contact based purely upon “speculation.” *Vasquez*, 178 Wn.2d at 16. This Court should reverse and dismiss with prejudice.

6. The constitutional violations were not harmless.

The Respondent does not address what errors it believes to be harmless in subsection five of its brief. *See* Br. of Resp’t at 13-16. However, the primary assignment of error in Ms. Amezcua’s case – the failure to present evidence sufficient to support a conviction – is not subject to a harmless error analysis. If the evidence is insufficient to support the convictions, reversal is required. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). This Court should reject any argument to the contrary.

C. CONCLUSION

The convictions for residential burglary, violation of a no contact order, and second-degree theft are unsupported by the evidence. As such, this Court should reverse the convictions, dismiss the first two, and remand the theft conviction for entry of a judgment and sentence on the

lesser-included offense of third-degree theft. This Court should reverse the malicious mischief conviction and remand for a new trial as the inclusion of Ms. Lopez in the to-convict instruction allowed Ms. Amezcua to be convicted of a crime for which she was not charged. In the alternative, this Court should reverse the second-degree malicious mischief conviction as unsupported by the evidence and enter a judgment and sentence for the lesser-included offense of third-degree malicious mischief.

DATED this 6th day of December, 2019.

Respectfully submitted,

s/Devon Knowles

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WENDY AMEZCUA,)	
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APPELLANT.)	

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