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Division III
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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

BRIEF OF APPELLANT

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A. INTRODUCTION

Wendy Amezcua, Noah Balauro, and their children lived together in Mr. Balauro's home for five years. The relationship was somewhat rocky, and the two broke up after a domestic violence incident resulted in a restraining order which precluded contact except as provided in their parenting plan. The extent of Ms. Amezcua's subsequent presence in the home was a "gray area." She had keys to the house, kept most of her belongings there, and she and the children spent a significant amount of time at the residence. One night, after seeing Mr. Balauro with his new girlfriend, Mitzy Lopez, Ms. Amezcua went to the family home, damaging and taking items belonging to the family, as well as Ms. Lopez's items. The incident resulted in charges for residential burglary, malicious mischief, and theft. A charge of violation of a no contact order followed.

The trial reflected the emotional underpinnings of the situation. Mr. Balauro felt the breakup was forced by the State; he testified to the absence of formal living arrangements and the joint ownership of the property, giving only vague estimates as to its value. Ms. Lopez, by comparison, gave shockingly high but unexplained value estimates to unspecified personal belongings. The resulting convictions were unsupported by the evidence and obtained in violation of Ms. Amezcua's constitutional right to due process, requiring reversal by this Court.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to establish the offense of residential burglary as Ms. Amezcua had permission to enter the residence.

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.

3. The evidence was insufficient to establish the offense of second-degree malicious mischief as the State failed to prove the value of the property damaged exceeded \$750.

4. The evidence was insufficient to establish the offense of second-degree theft as the State failed to prove the value of the property taken exceeded \$750.

5. The evidence was insufficient to establish the offense of violation of a no contact order as there was no evidence of actual contact by Ms. Amezcua or a third party.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. A person who is licensed, invited, or otherwise privileged to enter a residence cannot, as a matter of law, be convicted of burglary for entering that residence. The State charged Ms. Amezcua with burglary for entering Mr. Balauro's home, where Ms. Amezcua lived with Mr. Balauro

and their children until shortly before the incident. Was the evidence insufficient to establish unlawful entry where Ms. Amezcua had the keys to the home, kept her belongings in the home, continued to spend some nights in the home, and was never informed that she could not enter the home?

2. Both the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee defendants in criminal cases the right to be informed of the nature of the charges against them. It is a well-settled rule that a defendant cannot be convicted of an uncharged offense. The State charged Ms. Amezcua with malicious mischief, alleging Mr. Balauro as the sole victim. Was Ms. Amezcua convicted of an uncharged offense where the State presented evidence that she damaged property belonging to both Mr. Balauro and Ms. Lopez and the to-convict instruction listed both Mr. Balauro and Ms. Lopez as the victims of the malicious mischief?

3. To establish second-degree malicious mischief, the State must prove beyond a reasonable doubt that the value of the property damaged exceeded \$750. Was the evidence insufficient to establish the required value where Mr. Balauro provided only limited, rough estimates for the value of damaged items, most of which were owned jointly with Ms.

Amezcuca, and no specific monetary value was assigned to Ms. Lopez's damaged property?

4. To establish second-degree theft, the State must prove beyond a reasonable doubt that the fair market value of the property taken exceeds \$750 dollars. Was the evidence insufficient to establish the required value where neither Mr. Balauro nor Ms. Lopez testified as to how they calculated the value of their items, and Ms. Lopez further failed to identify the specific items or purchase prices for the majority of her property?

5. The State charged Ms. Amezcua with violation of a court order, alleging she asked her sister to call Mr. Balauro on her behalf. Was the evidence insufficient to establish that Ms. Amezcua violated a provision of the order prohibiting contact where there was no specific evidence showing if and when Ms. Amezcua's sister actually placed calls to Mr. Balauro?

D. STATEMENT OF THE CASE

1. Underlying events

Wendy Amezcua and Noah Balauro lived together for five years, raising their children and doing their best to get by financially. They resided in a home owned by Mr. Balauro's parents; he worked, and, although she was briefly employed at McDonald's, they made the joint decision that it was financially easier for her to stay at home with the three

children rather than pay for childcare. RP 214. Instead, she would often work at home, making tamales or babysitting other children. RP 213.

The house was furnished primarily with Ms. Amezcua's furniture given to her by her brother-in-law. RP 173, 213. Then, as families do, Mr. Balauro and Ms. Amezcua acquired things jointly over the years. A large tax return allowed them to buy the kitchen table, as well as all of the furniture in the bedroom. RP 174. They bought a PlayStation, keyboard, and a puppy, Yuca, for the children. RP 175-76, 199, 218. The only items in Mr. Balauro's name and for which he made monthly payments were the washer/dryer and the stove. RP 174.

Unfortunately, Mr. Balauro and Ms. Amezcua had a tumultuous relationship and, in January 2018, Mr. Balauro was arrested on domestic violence charges. RP 167-69. A no-contact order was entered prohibiting Mr. Balauro from contacting Ms. Amezcua, but a subsequent parenting plan allowed for in-person contact related to the children. RP 168-70. Ms. Amezcua was not prohibited from entering the family home and, in fact, the two saw each other frequently. *See* RP 170-71. Mr. Balauro felt they were forcefully separated by the State and described their contact during this time as a "gray area," where they were just doing their best to work out their relationship in the context of his criminal charges. RP 215.

Although Ms. Amezcua and the children did not reside at the home, she

maintained keys to the residence, would often spend time at the home, and occasionally stayed the night. RP 214-16. There was no formal separation or explicit discussion about how frequently Ms. Amezcua and the children would be at the home. RP 170, 216-17. The children had their own bedrooms and, but for her immediate clothing, all of Ms. Amezcua's belongings remained at the home. RP 171-72, 197.

Ms. Amezcua and Mr. Balauro were not romantically involved after the January 2018 incident, and Mr. Balauro began to date Mitzy Lopez. RP 172. Ms. Lopez lived in Seattle but would visit Mr. Balauro on the weekends. RP 172. Mr. Balauro and Ms. Amezcua agreed that he would not allow the children to spend time with Ms. Lopez at that point in the relationship. RP 177.

On March 3, 2018, Ms. Lopez traveled to Omak to spend the night with Mr. Balauro. RP 233. She brought clothes, makeup, and hair products for her overnight stay. RP 223. Ms. Lopez also brought her own mattress, which she put on the bedframe. RP 196, 230. The mattress Ms. Amezcua previously shared with Mr. Balauro was placed outside the front of the home. RP 230.

Later that day, Ms. Amezcua came to the house to pick up the children. RP 177. She arrived early to find Ms. Lopez there and the mattress lying outside the house and began to fight with Mr. Balauro. *See*

RP 177, 230. Mr. Balauro was still under release conditions for the recent domestic violence incident and, concerned he would get in trouble if the situation escalated, called law enforcement. RP 177.

Ms. Amezcua left the residence, notifying Mr. Balauro that she would come back to pick up the children later that evening. RP 178. When she returned, the two again began to fight and, again concerned that he would get into legal trouble, Mr. Balauro called law enforcement. RP 178. Deputy Kevin Newport responded. RP 261. Smelling alcohol on Ms. Amezcua's breath, Deputy Newport offered her and the children a courtesy ride. RP 265-67. She had no trouble standing, walking, or answering questions, so he could not tell whether she was impaired, but nevertheless recommended she pick up her car the following day. RP 265, 267. Ms. Amezcua asked Deputy Newport to drop her and the children off at a motel approximately five miles from the family home. RP 266-67.

Mr. Balauro and Ms. Lopez left shortly thereafter to go to dinner at Ms. Lopez's brother's home; they drove Ms. Lopez's car because Mr. Balauro was unable to locate his keys. RP 180. Mr. Balauro could not remember whether he locked the door. RP 181. The two returned around 1:00 a.m. to find the home in disarray, with some items broken. RP 182-83. Ms. Lopez's mattress was also slashed. RP 231. Other items, including

a TV, a laptop, a PlayStation, and Ms. Lopez's personal items were missing. RP 183. Yuca was also gone from the home. *See* RP 210.

Suspecting Ms. Amezcua was responsible for the damage, law enforcement went to her motel room. RP 238. While initially denying the allegation, Ms. Amezcua later disclosed that she was responsible for the damage in the home. RP 241. Police arrested her and transported her to jail. RP 242. During a second interview with deputies, Ms. Amezcua reported that she used Mr. Balauro's house keys to enter the residence. RP 243.

Mr. Balauro and Ms. Lopez meanwhile went to the motel to pick up the children. RP 208. The children apparently reported to the deputies where the missing items could be located, and law enforcement asked the children to get into the car to direct them to the items. RP 208. Ms. Lopez's blue duffel bag was retrieved from a dumpster near the visitors' center. RP 209. The children then directed police to a nearby home where a friend of Mr. Balauro lived, but no one answered the door. RP 209-10. Mr. Balauro returned the next day and was able to recover the remainder of the items, including the TV, laptop, PlayStation, and Yuca. RP 210.

Ms. Amezcua remained in custody pending trial and a pretrial no contact order was entered prohibiting any contact with Mr. Balauro. Ex. 52. While in custody, Ms. Amezcua made various phone calls to her sister

and children, in which she acknowledged making bad choices and expressed remorse over what happened. RP 298-303. She did not describe the incident in detail, but at one point noted that she still received mail at the house and “basically I was still living there.” RP 310. During another call, she provided her sister with Mr. Balauro’s telephone number. RP 306. Ms. Amezcua requested her sister contact Mr. Balauro, initially to ask him to spend more time with the children while she was incarcerated. RP 306; Ex. 54 (file 63658757, starting at 10:02)¹. It was unclear in later conversations whether or when Ms. Amezcua’s sister made any phone calls to Mr. Balauro or whether she spoke with Mr. Balauro. *See* Ex. 54 (file 64008002, starting at 2:42).

The State charged Ms. Amezcua with residential burglary – domestic violence (count 1), first-degree malicious mischief – domestic violence (count 2), second-degree theft (count 3), taking a pet (count 4), and violation of a no contact order – domestic violence (count 5). The Information listed Mr. Balauro as the sole victim in counts 1, 3, and 5. Both Mr. Balauro and Ms. Lopez were listed as victims in count 3.

¹ Exhibit 54 contains several files, cataloguing all calls made by Ms. Amezcua. The State only elected to play brief excerpts from select files at trial, the majority of which are transcribed as (inaudible). Counsel for Appellant has reviewed Exhibit 54 and attempted to identify the file and start times for the relevant portions of the calls to aid in this Court’s determination.

2. Trial proceedings

Beyond presenting evidence relating to the underlying incident, the State dedicated much of its case at trial to establishing the value of the property damaged or taken, to support the charges of malicious mischief and theft, respectively.

Mr. Balauro was clear that the vast majority of the items damaged were jointly owned with Ms. Amezcua. RP 211. While he was the primary breadwinner during their time together, they agreed her contribution would be staying home with the children. RP 174, 216-17. In fact, he felt she only targeted things that the two of them had bought together. RP 211-12. The community property² included a full bedroom set, kitchen table, and keyboard, only some of which was damaged. Mr. Balauro specified that all of the kitchen and bedroom furniture was purchased for \$2,500 at least a year or two prior to the incident using a tax return based primarily on claiming the children as dependents. RP 205-06, 216-17.

Prior to trial, Mr. Balauro provided police with “rough” estimates of the value of the damaged property. RP 204. He estimated the value of

² Ms. Amezcua and Mr. Balauro were unmarried but in a “meretricious relationship” and the property “is presumed to be owned by both parties.” *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995). Specifically, “income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during a marriage.” *Id.* Appellant therefore refers to property obtained during their relationship as “community property.”

the kitchen tabletop was approximately \$500; he did not testify as to how he reached that figure, but it appears to be an estimate of what he believed the table likely cost at purchase. RP 205. He believed the keyboard was perhaps worth \$300, but was unsure as it was made in 2001 and he was previously unable to sell it for \$400. RP 205-07. He estimated the damage to the bed, wood frame,³ and Ms. Lopez's mattress as totaling approximately \$500, but did not break down the costs further. RP 205. He did not give estimates for the damage to any other items.

As for his personal property, Mr. Balauro testified that the value of the stove was approximately \$200. RP 207. This appeared to be based on the purchase price of \$600 minus \$400-worth of preexisting damage. RP 207. He noted that the washer/dryer cost \$3,500 new, but that only the glass on the washer needed repair and that the dryer was not damaged. RP 205. He did not give an estimate for the cost of the repairs. *See* RP 205.

The State similarly sought to present evidence relating to the value of missing items owned by Mr. Balauro, items owned jointly by Mr. Balauro and Ms. Amezcua, and items owned by Ms. Lopez.

The only item that was exclusively owned by Mr. Balauro was the laptop. At the time it was taken, he estimated that the laptop was worth

³ It was not clear whether the wood frame refers to the box spring, which belonged to Ms. Lopez, or a separate part of the bed/bedframe. *See* RP 195, 205.

approximately \$500. RP 184. The community property taken – the TV and the PlayStation – was estimated to be worth approximately \$200 total. RP 184. Mr. Balauro listed the purchase prices, but believed the items would have depreciated in the intervening time. *See* RP 184-85. He did not testify as to how he reached the estimated level of depreciation. *See* RP 184-85.

Ms. Lopez, by comparison, attributed a startlingly high monetary value to her items. Although she was only staying for one night, she testified she had packed a significant amount of clothes and estimated the value of her used clothing at \$1,000. RP 227-28, 234. She valued a two-year old Paul Mitchell hair iron at \$500. RP 228, 233. She assessed her year-old Revlon hair-dryer as being worth \$40, and a several-month old make-up kit as being worth \$100. RP 228-29, 233. She acknowledged that all of the items were frequently used. RP 233.

At the conclusion of trial, the court instructed the jury on the crimes charged as well as on the lesser-included offenses of criminal trespass, second and third-degree malicious mischief, and third-degree theft. CP 94-96. Although the Information identified Mr. Balauro as the victim of the malicious mischief, the to-convict instruction for that charge listed both Ms. Lopez and Mr. Balauro as the victims and allowed the jury to combine the value of their property in considering whether the State met its burden. CP 74.

The jury found Ms. Amezcua guilty of residential burglary, second-degree malicious mischief, second-degree theft, and violation of a no-contact order, but acquitted her on the charge of taking a pet. CP 42-43. Ms. Amezcua timely appeals her conviction and sentence.

E. ARGUMENT

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

The evidence at trial was insufficient to establish residential burglary as Ms. Amezcua was authorized to be in the home she formerly shared with Mr. Balauro. Due process demands the State prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Requiring the State to bear the burden of proving guilt beyond a reasonable doubt is “indispensable” in protecting a defendant’s presumption of innocence. *Winship*, 397 U.S. at 363-64.

Whether the State has met its burden is a question of law and is reviewed de novo. *Rich*, 184 Wn.2d at 903 (citing *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014)). The question on review is whether “any rational trial 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.” *Rich*, 184 Wn.2d at 903 (quoting *Jackson*, 443 U.S. at 319).

Entering or remaining unlawfully in a building is an essential element of residential burglary. RCW 9A.52.025(1); *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005). As such, the State bears the burden of proving unlawful entry beyond a reasonable doubt. *State v. Cordero*, 170 Wn. App. 351, 361, 284 P.3d 773 (2012). The State cannot meet its burden to show an individual’s entry is unlawful where the person is invited, licensed, or otherwise privileged to be present. RCW 9A.52.010(2). Whether the State has met its burden to show unlawful entry depends on the particular facts of the case. *See State v. Wilson*, 136 Wn. App. 596, 607-09, 150 P.3d 144 (2007).

Here, Mr. Balauro and Ms. Amezcua clearly had an understanding that she was allowed access to the home which had been hers up until two months prior to the incident. For five years, Ms. Amezcua, Mr. Balauro, and their children lived together in the residence. RP 167. Although Mr.

Balauro testified that he was the only one living at the home at the time of the incident, he felt Ms. Amezcua's departure was essentially forced by the State. RP 214-15. Even after the issuance of the no contact order, the two remained in routine contact in order to co-parent; the court order did not preclude Ms. Amezcua from being at the home and she and the children frequently spent time at the home, including overnights. RP 170, 214-16.

That Ms. Amezcua may have intended to harm or take property inside the home is insufficient to establish unlawful entry or unlawful remaining. "A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur." *Allen*, 127 Wn. App. at 137.

State v. Wilson is instructive. 136 Wn. App. 596. In *Wilson*, the defendant and his girlfriend continued to reside together despite a no-contact order which, although precluding contact between the parties, did not bar him from being near the home. *Id.* at 600. After getting into an argument, Wilson's girlfriend locked him out. *Id.* Wilson responded by kicking in the door, assaulting her and threatening to kill her with splinters from the broken door. *Id.* at 601. This Court nevertheless found the evidence insufficient to establish unlawful entry; while Wilson clearly intended to commit a crime inside the home – for which he was also

prosecuted – he nevertheless resided in the home and had a right to enter.

Id. at 612.

Although not openly living at the home, Ms. Amezcua maintained a presence similar to that of a resident. Like the defendant in *Wilson*, Ms. Amezcua had keys to the home, kept all of her belongings in the home, and the State did not present evidence of a separate, primary residence. RP 171-72, 214-16. Indeed, the State made great efforts at trial to establish that Ms. Amezcua did not have permission to be in the home, but to no avail. Mr. Balauro did not explicitly tell Ms. Amezcua she had permission to be at the home at all times, but this was primarily because they declined to discuss the issue, considering it a “super-gray area” that may cause Mr. Balauro to get into trouble. RP 170. According to Mr. Balauro, they never made any formal decisions around the parameters of Ms. Amezcua’s presence in the home. RP 170, 216. Ultimately, the best the State was able to elicit was that Mr. Balauro did not give her permission to destroy or take the property. RP 211. While this may suffice for theft or malicious mischief, it does not establish residential burglary beyond a reasonable doubt.

Because the State failed to meet its high burden to prove the essential element of unlawful entry, the burglary conviction cannot stand

as matter of law. This Court should reverse and dismiss with prejudice.

See Wilson, 136 Wn. App. At 612.

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 in the second degree 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); *see also Von Atkinson v. Smith*, 575 F.2d 819 (10th Cir. 1978) ("It is axiomatic that due process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified"). Thus, 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).

Moreover, Washington courts have consistently held that 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. For example, in *State v. Jain*, the State charged the defendant with money laundering, listing two specific properties in connection with the charge. 151 Wn. App. 117, 121-23, 210 P.3d 1061 (2009). At trial, the State presented evidence of money laundering involving five properties and the jury instructions failed to identify any specific property. *Id.* at 123. This Court reversed, finding that “the jury . . . could have returned a guilty verdict by finding that Jain committed acts not charged in the information.” *Id.* at 124.

Similarly, in *State v. Brown*, the defendant’s convictions were reversed after the jury instructions failed to identify the specific coconspirators elected in the information. 45 Wn. App. 571, 575-76, 726 P.2d 60 (1986). While the identities of the coconspirators were not an essential element of the offense, once the State specifically named individuals in the charging document, jury instructions could not allow convictions based upon conspiracy with additional or differing coconspirators. *Id.* at 577; *see also State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010) (same); *State v. Morales*, 174 Wn. App. 370, 383-84, 298

P.3d 791 (2013) (jury improperly allowed to convict defendant of uncharged alternative where information listed single victim of harassment but to-convict instruction identified two possible victims).⁴

In this case, the Information charged Ms. Amezcua with malicious mischief in the first degree – domestic violence. CP 13. The specific allegations were that Ms. Amezcua caused physical damage to the property of Noah Balauro, and that the two were members of the same family or household as defined under RCW 10.99.020(3). CP 13. The charge makes no reference to Ms. Lopez. CP 13.

Nevertheless, 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

⁴ Unpublished cases over the last decade have repeatedly confirmed this principle. *State v. Conner*, 168 Wn. App. 1003, 2015 WL 3541098 at *13 (2015) (citing *Brown* for proposition that conspiracy instruction may not be more far-reaching than charge in information and noting identity of co-conspirators is not an element of the crime); *State v. Farzad*, 198 Wn. App. 1018, 2017 WL 1055729 at *3 (2017) (reversible error where two victims listed in information, State presented evidence of three victims, and jury instruction did not specify identity of victim). Under GR 14.1, unpublished opinions by the Court of Appeals filed after March 1, 2013, may be cited as persuasive authorities.

Mitzi [sic] Lopez Orta[.]” CP 74. In so doing, the instruction allowed Ms. Amezcua to be convicted of a damaging Ms. Lopez’s property, a crime for which she was never charged.

The instructional error was undoubtedly prejudicial. “When the jury is instructed on an uncharged crime, a new trial is appropriate when it is possible that the defendant was mistakenly convicted of an uncharged crime.” *Kirwin*, 166 Wn. App. at 669. Here, because the State was required to prove that value of the damaged property exceeded \$750, it is possible if not probable that the jury convicted Ms. Amezcua of second-degree malicious mischief based partially upon the damage to Ms. Lopez’s mattress.

As argued in section E(3) below, the evidence of the value of the community property or property belonging solely to Mr. Balauro was vague at best. Mr. Balauro’s general estimates to law enforcement appeared to include purchase prices for some items, his assessment of the current value of other items, or the value associated with preexisting damage. For some items, he did not specify who owned the property. Nor did he identify a cost to repair or replace any of the items.

Meanwhile, the prosecutor urged the jury to assign a large financial cost to Ms. Lopez’s mattress. Mr. Balauro estimated approximately \$500 in damage to the bed, bedframe and mattress, but did

not specify the value of the mattress individually. RP 205. The prosecutor nevertheless mentioned the mattress three times during closing, listing the mattress in his argument that the value of the damaged items exceeded \$5,000. RP 376-78. The prosecutor later reasoned that, even if the evidence was insufficient to establish first-degree malicious mischief, the value of the damaged property exceeded \$750, “when you look at the – the items that were destroyed all throughout the house, things like mattresses, which – for whatever reason mattresses cost a lot of money.” RP 377.

Under these circumstances, it is certainly possible that Ms. Amezcua was mistakenly convicted of second-degree malicious mischief based upon the aggregated value of the personal property belonging to both Mr. Balauro and Ms. Lopez. Accordingly, this Court should reverse and remand for a new trial. *Jain*, 151 Wn. App. at 124.

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

Even aggregating the damage to both Mr. Balauro’s and Ms. Lopez’s property, the evidence remains insufficient to establish second-degree malicious mischief. Namely, the State failed to present any evidence whatsoever on either the market value or any cost of repairs to the property damaged.

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. Although, unlike theft, the statutory definition of malicious mischief does not refer to market value, once included in the jury instructions, the assessment of “market value” became the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468, 476 n. 1, 6 P.3d 1160 (2000). RCW 9A.48.010(1)(b), which additionally defines damages as “any diminution in the value of property,” was not included in the jury instructions.

“Market value” is “the price which a well-informed buyer would pay to a well-informed seller, when neither is obliged to enter into the transaction.” *State v. Williams*, 199 Wn. App. 99, 105, 398 P.3d 1150 (2017) (citing *State v. Clark*, 13 Wn. App. 782, 787, 537 P.2d 820 (1975)). While the evidence of the price paid is relevant in determining the value of an item, the State must still prove the market value beyond a reasonable doubt. *Williams*, 199 Wn. App. at 105-06. Testimony of an item’s cost, in itself, is insufficient to enable the jury to determine the value at the time of the malicious mischief. *See State v. Ehrhardt*, 167 Wn. App. 934, 947, 276 P.3d 332 (2012). An owner’s rough estimate of an item’s value at the time

of the incident is similarly insufficient to establish market value. *Williams*, 199 Wn. App. at 105, 111.

In this case, the State presented absolutely no evidence of the market value of the damaged items. The lack of evidence is analogous to *State v. Williams*, in which the owner testified that a “rough estimate” of the value of the property, which included a laptop, Bluetooth speaker, shoes, and jewelry, was approximately \$800. 199 Wn. App. at 103. In finding the testimony insufficient to establish the market value, the court emphasized that the prosecutor asked the owner only about the “value” of the items, and not the “fair market value.” *Id.* at 107. Importantly, the owner did not describe how he calculated the value of the items, including whether it was based on the purchase price, replacement costs, or some other intrinsic value to the owner himself. *Id.* at 111.

Here, too, Mr. Balauro gave only “rough” estimates for the value of the property damaged. RP 204. He did not specify how he calculated the estimated value for many items. Instead, he testified that the entire cost of both the kitchen and bedroom furniture “at least a year or two” before the incident was \$2,500. It appears as though the \$500-value estimate for the kitchen table was the amount of its purchase price, and Mr. Balauro did not explain how he came to the estimate of \$500 for the bed and mattress. The \$200 estimate for the stove appeared to be reached by

subtracting the value of previous damage from the purchase price. RP 207. In fact, the only arguable evidence of market value related to the keyboard. RP 206-07. Namely, Mr. Balauro testified that he was recently unable to sell the keyboard for \$400, but believed that “maybe” he could sell it for \$300. RP 207.

The evidence is even murkier when considering the reduced value of community property. The vast majority of the property damaged was purchased with a large tax refund. RP 174. It was unclear whether the taxes were filed jointly, and Mr. Balauro acknowledged that the size of the refund was based on the ability to claim dependents, two out of three of whom were not the biological children of Mr. Balauro. RP 168, 216-17.

Although an individual can be held liable for damage to community property, the value accorded to that damage in a prosecution for malicious mischief has yet to be decided. *State v. Coria*, 146 Wn.2d 631, 48 P.3d 980 (2002); RCW 9A.48.010(1)(c). In *Coria*, the dissent cited *Haley v. Highland*⁵ and *Keene v. Edie*⁶ for the proposition that it should be divided in half, while the majority declined to address the issue as it was unnecessary to determine the instant case. *Id.* At 641-42. Here, it is unclear if the jury relied upon the value of Ms. Amezcua’s ownership

⁵ 142 Wn.2d 135, 12 P.3d 119 (2000).

⁶ 131 Wn.2d 822, 935 P.2d 588 (1997).

interest in the property in its assessment and, if so, what value it was accorded. Notably, the jury clearly considered titleship and ownership interest important as it acquitted Ms. Amezcua of taking a pet after being instructed on good faith claim of title. CP 42, 90.

Finally, although the prosecution emphasized the likely cost of the damage to Ms. Lopez's mattress, no specific monetary value – much less market value – was assigned. This Court should accordingly reverse the second-degree malicious mischief conviction and remand for entry of a judgment and sentence on malicious mischief in the third degree.⁷ *See In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012) (remand for imposition of lesser-included conviction proper where jury instructed on lesser-included offense).

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

As with second-degree malicious mischief, to establish second-degree theft, the State must show that the “fair market value” exceeds \$750 dollars. Again, the State failed to do so. Both the Information and the to-convict instructions aggregated the value of the goods taken from both

⁷ RCW 9A.48.090(1)(a) provides that a person is guilty of third-degree malicious mischief if he “[k]nowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the second degree[.]” Malicious mischief in the third degree is a gross misdemeanor. RCW 9A.48.090(2).

Ms. Lopez and Mr. Balauro. CP 13, 79. However, the State failed to present any evidence as to the market value of Ms. Lopez's belongings. Indeed for many of the items, Ms. Lopez failed to even identify the specific items lost, give the purchase price, or explain how she came to her assigned value. Ms. Lopez assigned a bulk value of \$1,000 to the clothes in her weekend bag, but did not specify the number of items, 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, simply stating the clothes "still had good value on them." RP 228.

Nor did the State establish the fair market value of her hair products. While the fact that Ms. Lopez assigned a ludicrously high purchase price of \$500 to a hair iron should put the initial cost in doubt, the more important failure on the part of the State was the absence of any evidence as to the market value in Omak for a regularly-used, two-year-old hair iron.⁸ *See* RP 233. Without giving a purchase price, she valued her hair dryer at "roughly" \$40. RP 229-30. Similarly, Ms. Lopez accorded a \$100 value to her used make-up, but did not list the specific

⁸ The testimony suggests that the iron was purchased at a home gathering and not from a retail outlet. RP 229. Although not presented at trial, it appears as though the true cost of a *new* Paul Mitchell hair iron ranges from \$105-180 dollars. https://www.paulmitchell.com/all-products/?_bc_fsnf=1&Type=Iron&sort=bestselling&page=2.

items, or clarify whether the value was the price paid or whether she believed it was the current value, and the State presented no evidence as to what a well-informed buyer would pay for a used, several-month-old make-up kit. RP 228, 233. Ms. Lopez did not have any receipts for her purchases. RP 234.

Again, *Williams* is instructive. Like the owner in *Williams*, Ms. Lopez “provided no low end estimate, gave little description of the property, and testified to no trade value.” *Id.* at 109. Like the owner in *Williams*, her testimony included the term “rough,” and with the exception of the hair iron purchased via a home sale, she gave no purchase prices for the items. *Id.* at 109. Finally, like the owner in *Williams*, Ms. Lopez’s method of calculating the current value was unspecified. *Id.* at 111.

While slightly more thoughtful than Ms. Lopez’s estimates, Mr. Balauro’s testimony regarding the value of the property taken was similarly insufficient to establish market value. *See* RP 183-84. The three items at issue were the television, the PlayStation, and his laptop; he provided purchase prices, but not dates of purchase for the items. RP 183-84. Mr. Balauro estimated the combined value of the community property of the television and PlayStation as “probably” \$200. RP 184. Although significantly less than he originally paid for the products, he based his estimates on the quick depreciation of used electronics and the competitive

pricing at big box stores. RP 184-85. He did appear to contemplate street value in estimating the current value of the used laptop as approximately \$500, but did not specify how he reached that figure. RP 183-84.

In the absence of evidence beyond a reasonable doubt that the market value exceeded \$750, Ms. Amezcua's conviction for second-degree theft cannot stand. Because the jury was instructed on third-degree theft, this Court should reverse and remand for entry of a conviction on the lesser-included offense.⁹

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

The State failed to establish beyond a reasonable doubt that Ms. Amezcua – through her sister – actually contacted Mr. Balauro. Ms. Amezcua was charged with violation of a pre-trial no contact order precluding her from having “contact [with] the protected person, directly, indirectly, in person or through others, by phone, mail or electronic means[.]” Ex. 52, p. 1. At trial, the State played brief excerpts of jail calls made by Ms. Amezcua to her sister, in which she gave her sister Mr. Balauro's number and ask her to contact him, primarily to encourage him to spend time with the children. RP 306; Ex. 54 (file 63658757, starting at

⁹ RCW 9A.56.050(1) defines theft in third degree as theft of property or services not exceeding \$750. Third-degree theft is a gross misdemeanor. RCW 9A.56.050(2).

10:02). Although subsequent jail calls included references to what were presumably communications between Ms. Amezcua's family and Mr. Balauro and his lack of responsiveness, Ms. Amezcua's sister did not reference any specific attempts to contact Mr. Balauro, when any contact may have occurred, or whether any other individuals were involved. Ex. 54 (file 64008002, starting at 2:42).

Tellingly, the jury appeared to struggle with the question of whether the facts established only an attempt to violate the order, and whether an attempted violation was enough to convict Ms. Amezcua. During deliberations, the jury inquired: "Is attempting to violate a restraint provision of the order prohibiting contact with a prohibited party a violation of a court order, or must the person succeed in violating the restraint provision to be guilty?" CP 99. Defense argued the court should answer the question in the negative as attempting to violate a court order is not the legal equivalent to actual violation of the order. RP 409-10. While acknowledging that, to the best of the court's recollection, "there's no evidence that the sister – these phone conversations ever confirmed that she actually made contact," the court ultimately decided to respond by referring the jury back to the language of the no contact order to determine whether a violation occurred. RP 410-12, 416.

A review of the jail calls confirms that the evidence is sorely lacking. The completed crime of violation of a protection order requires proof that an accused actually committed the conduct – here, “contact” with the protected party.¹⁰ RCW 25.50.110(1); *see* Ex. 52. Although it is not necessary that the protected party answer or be aware that the call occurred to establish the violation of a no contact order, the restrained party – or an intermediary – must actually call the protected party. *See State v. Ward*, 148 Wn.2d 803, 816, 64 P.3d 640 (2003). Here, after Ms. Amezcua gave her sister Mr. Balauro’s number, the conversations include only vague references to Mr. Balauro’s responsiveness or willingness to spend time with the children, without any statements confirming if and when Ms. Amezcua’s sister placed a call. At worst, Ms. Amezcua’s resulting conviction was potentially based upon the jury’s confusion about whether an attempt was sufficient to satisfy a completed offense; at best, it was an inference based on “speculation.” *Vasquez*, 178 Wn.2d at 16. This Court should reverse and dismiss with prejudice.

F. CONCLUSION

¹⁰ The requirement of actual contact stands in stark contrast to the immediately preceding restriction, precluding a defendant from causing, attempting to cause, or threatening to cause bodily injury. Ex. 52 at 1.

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 12th day of July, 2019.

Respectfully submitted,

s/Devon Knowles

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36383-0-III
)	
WENDY AMEZCUA,)	
)	
APPELLANT.)	

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