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Court of Appeals  
Division III  
State of Washington  
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No. 36383-0-III  
IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON  
Respondent

v.

WENDY AMEZCUA  
Appellant

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR OKANOGAN COUNTY  
THE HONORABLE HENRY A. RAWSON

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Wendy Amezcua and Noah Balauro dated for approximately five years. [RP 167]. As a product of that relationship, the parties produced one minor child named Soul. [RP 168]. Throughout the five year relationship, the parties mainly lived together at 93 Jaquish Rd. [RP 167-8]. This realty is owned by Mr. Balauro's parents, and throughout the duration of the relationship, Mr. Balauro paid all rent and mortgage. [RP 167, 171]. In addition, Mr. Balauro paid most of the bills for the utilities, food, and other items. [RP 171]. Ms. Amezcua contributed some furniture to the home that was given to her, and worked occasionally, but not full time. [RP 171, 173]. The parties purchased more furniture with victim's tax return in one of the years they were together; and Mr. Balauro continued to make the monthly payments for that furniture throughout the duration of the parties' relationship. [RP 173, 174, 175].

In January of 2018, Mr. Balauro was arrested on domestic violence related charges. [RP 169, 170]. While pending bail, a No contact order issued prohibiting Mr. Balauro from having contact with Ms. Amezcua. [RP 169, 170]. He was provided notice and a copy of the no contact order prior to bailing out of jail. [RP 169, 170]. Once he made bail, he returned to his home at 93 Jaquish Rd. [RP 169,

170]. The house was empty and no one was there. [RP 169, 170]. Almost immediately thereafter, Mr. Balauro was served with notice of Family Law proceedings, and a parenting plan was eventually issued in those matters. [RP 169, 170]. At this time, Mr. Balauro testified that the parties did not live together and were not together, but the parties did co-parent. [RP 170, 171]. Mr. Balauro then began to date again. [RP 172].

Sometime between January and March of 2018, Mr. Balauro met his new girlfriend, Mitzy. [RP 172]. Ms. Amezcua requested and Mr. Balauro agreed to limit contact between Mitzy and the parties' minor children until they knew each other better; Mr. Balauro agreed. [RP 177]. On March 3, 2018, Ms. Amezcua brought the children over to 93 Jaquish Rd. for a visit. [RP 172]. Mr. Balauro testified that Ms. Amezcua arrived for the children's exchange early, so Mr. Balauro did not have time to ask Mitzy to leave prior to the exchange. [RP 177]. Ms. Amezcua was enraged once she saw Mitzy, accused Mr. Balauro of violated the agreement, and then Mr. Balauro called the police. [RP 177]. The police arrived diffused the situation and told Ms. Amezcua that she had to leave the home and could not remain. [RP 177]. Ms. Amezcua left. [RP 177]. She then went to a bar,

imbibed alcohol, went to Burger King, and then returned to pick up the children at 93 Jaquish. [RP 177].

The police once again told Ms. Amezcua to leave the realty, but would not let her leave with her vehicle due to signs of intoxication. [RP 179]. Defendant could not find the keys to his house after Ms. Amezcua was told to leave the second time. [RP 180]. Mr. Balauro's keys were eventually found at the hotel where Ms. Amezcua stayed. [RP 180]. Even though Mr. Balauro could not find his keys, he and Mitzy locked the premises and went to a barbeque at Mitzy's brother in law. [RP 180]. Upon their return on March 4, 2019, Mr. Balauro came home to 93 Jaquish Rd. to find his home burglarized, vandalized, and ransacked. [RP 180-208]. Some of the stolen items were recovered with the help of Ms. Amezcua's children by a dumpster near the Nicholas Motel where Ms. Amezcua was staying at the time. [RP 208].

#### ARGUMENTS

1. Ms. Amezcua was Properly Convicted of Residential Burglary

The trial court did not err in convicting Ms. Amezcua of Residential Burglary in Count 1 because the evidence presented at trial was more than sufficient to convict Ms. Amezcua of Residential Burglary. When reviewing a challenge to the sufficiency of the

evidence, courts must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A person is guilty of Residential Burglary with a Domestic Violence tag if he or she knowingly enters or remains unlawfully in a residence with the intent to commit a crime (RCW 9A.52.025(1)), and the residence entered was one where the defendant and other persons shared the residence in an intra familial relationship (RCW 10.99.020(3)).

The evidence was more than sufficient for the jury to find Ms. Amezcua guilty of Residential Burglary. First, Ms. Amezcua admitted to committing the burglary. [RP 243]. When using a confession against a defendant, often times the prosecution must prove the

corpus delicti. The corpus delicti must be proved by evidence sufficient to support the inference that a crime took place; a defendant's confession alone is not sufficient to establish that a crime took place. *State v. Cardenas-Flores*, 189 Wash. 2d 243, 401 P.3d 19 (2017). Specifically, the State must present other independent evidence that the crime a defendant described in a confession actually occurred. *Id.* Essentially, corpus delicti is a corroboration rule that prevents defendants from being unjustly convicted based on confessions alone. *Id.* Ms. Amezcua knowingly and voluntarily waived her *Miranda* warnings after being informed of them. [RP 25]. Ms. Amezcua did not make a full confession, but during the questioning, Ms. Amezcua admitted to returning to and burglarizing the residence at 93 Janquish Rd. [RP 26-31] [RP 241-243]. In fact, Ms. Amezcua stated that she used Mr. Balauro's house keys to get into the residence. [RP 243]. Those were the same keys that Mr. Balauro could not find. [RP 180].

Second, Ms. Amezcua not arrived at 93 Jaquish Rd. for an exchange of the parties' children for visitation. This creates a strong presumption that she did not reside at 93 Janquish Rd., and Mr. Balauro was adamant that she did not. [RP 171]. In fact, Mr. Balauro described in detail the reasons the parties split up, Ms. Amezcua

moved, and the relationship ended. [RP 170]. At that time, Ms. Amezcua operated under a parenting plan for visitation that she filed for and sought. Furthermore, Ms. Amezcua knew that the relationship between Mr. Balauro and her was over because she discussed the parties' children not meeting or socializing with Mr. Balauros' new girlfriend Mitzy. She occasionally visited 93 Jaquish Rd. at that point during visitations between the children. Finally, Mr. Balauro and Ms. Amezcua share a child in common and this fact was uncontroverted at trial.

Third, after the altercation which caused the police to respond twice and ordered Ms. Amezcua to leave the premises both times, coupled with the fact that Ms. Lopez, Mr. Balauro was staying at the realty that weekend, no reasonable factfinder would conclude that Ms. Amezcua had permission to be in the home at that time. In addition, Ms. Amezcua knew that she did not live at the home because even in her brief, her counsel states that she was not "openly living in the home." Appellants Brief Pg. 16. Even if Ms. Amezcua believed that at times she had permission to be in the home, surely she did not believe this to be true when Mr. Balauro had his new girlfriend Ms. Lopez staying with him whom Ms. Amezcua did not want to be around her older children.

Fourth, Ms. Amezcua took Mr. Balauro's keys without permission, and used them to enter the home. While inside, she damaged a plethora of personal belongings of Mr. Balauro and Ms. Lopez. Ms. Amezcua stole multiple items, specifically, Mr. Balauro's PlayStation 4, laptop computer, keys, and other items were recovered at the dumpster of the Nicholas Motel where Ms. Amezcua was staying.

As happened in this case, any reasonable factfinder could easily conclude that Mr. Amezcua, despite the fact that the parties share children in common, did not have permission to lawfully be in the residence on March 3-4, 2018, did not have permission to destroy or steal property, and therefore, Ms. Amezcua's conviction should be upheld.

2. Ms. Amezcua was Properly Convicted of Malicious Mischief in the Second Degree and not Convicted of Crimes that were not Charged

The jury did not err in finding Ms. Amezcua guilty of Malicious Mischief in the Second Degree. Ms. Amezcua was charged with Malicious Mischief in the First Degree. Pursuant to *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Ms. Amezcua's trial counsel requested a jury instruction regarding the lesser included

offense of Malicious Mischief in the First Degree. The lesser included offense of Malicious Mischief in the First Degree is Malicious Mischief in the Second Degree.

“Under Washington rule, a defendant is entitled to an instruction on lesser included offense if two conditions are met. First, each of the elements of the lesser included offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 448, 584 P.2d 382 (1978). “Under the law of the case doctrine, jury instructions not objected to become the law of the case. *State v. Jussila*, 392 P.3d 1108, 1114, 197 Wash.App. 908 (2017). To convict Ms. Amezcua of Malicious Mischief in the First Degree, the State had to prove that Ms. Amezcua intentionally damaged the property belonging to another causing damage in an amount over \$5,000.00.

In this case, Ms. Amezcua was charged in Count 2 of the Information with Malicious Mischief in the First Degree. [CP 10]. Ms. Amezcua, prior to trial, requested a jury instruction for the lesser included offense of Malicious Mischief in the Second Degree. [CP 26]. Malicious Mischief in the Second Degree contains all of the elements of Malicious Mischief in the Second Degree. Literally, the

only difference is the amount of monetary damages caused by the crime. RCW 9A. If the amount of damages caused by the malicious mischief in less than \$5,000.00 but more than \$750.00 then the person committed Malicious Mischief in the Second Degree. Any malicious mischief that causes more than \$5,000.00 is Malicious Mischief in the First Degree. Each and every other element is the same.

In addition, the State did not object to the requested lesser included offense instruction; the Court granted the request. Therefore, the jury instruction became the law of the case allowing the jury to find that Ms. Amezcua committed the offense of Malicious Mischief in the First Degree or in the alternative, Malicious Mischief in the Second Degree in the event that the jury concluded that the amount of damages did not exceed \$5,000.00.

During trial, the State advanced the following evidence to support its theory that Ms. Amezcua committed Malicious Mischief. First, Mr. Balauro and Ms. Lopez both testified as to all of the items in the home that were damaged or destroyed by Ms. Amezcua. [RP 178-189]. Both Mr. Balauro and Ms. Lopez testified as to the purchase price of each of these items and their general condition prior to being destroyed. [RP 171-200]. Mr. Balauro specifically

testified to the damage to his mirror, bed, washer, and dryer being damaged. The washer and dryer alone cost Mr. Balauro \$3,500.00. [RP 205]. The rest of the furniture cost \$2,500.00. [RP 205-6]. This testimony established the market value at the time of purchase. Even with depreciation, the jury had more than enough evidence to conclude that the damages to Mr. Balauro's personal property was enough to amount to Malicious Mischief in the Second Degree, and the television, laptop, and PlayStation 4 alone were worth more than \$750.00 when purchased and in their condition when Ms. Amezcua stole them also providing the jury with ample evidence to convict.

Furthermore, Ms. Amezcua confessed to all of the crimes with which she was charged. When using a confession against a defendant, often times the prosecution must prove the corpus delicti. The corpus delicti must be proved by evidence sufficient to support the inference that a crime took place; a defendant's confession alone is not sufficient to establish that a crime took place. *State v. Cardenas-Flores*, 189 Wash. 2d 243, 401 P.3d 19 (2017). Specifically, the State must present other independent evidence that the crime a defendant described in a confession actually occurred. *Id.* Essentially, corpus delicti is a corroboration rule that prevents

defendants from being unjustly convicted based on confessions alone. *Id.*

In this case, Ms. Amezcua knowingly and voluntarily waived her *Miranda* warnings after being informed of them. [RP 25]. Ms. Amezcua did not make an immediate full confession, but during the questioning, Ms. Amezcua slowly admitted to returning to and burglarizing the residence at 93 Janquish Rd. [RP 26-31] [RP 241-243]. In fact, Ms. Amezcua stated that she used Mr. Balauro's house keys to get into the residence, and she cut herself while inside. [RP 243 and RP 251]. Finally, Deputy Newport encouraged Ms. Amezcua not to return to 93 Janquish Rd. that evening as she had no reason to be there. [RP 268].

3. The Evidence Introduced at Trial was More Than Sufficient to Convict Ms. Amezcua of Theft in the Second Degree

The State must prove that Ms. Amezcua, without permission or privilege, took the property of another, and that property had a value of \$750.00 or more. RCW 9A.56.040(a). To determine the value of a thing, the State can use the market value of the property or services at the time and in the approximate area of the criminal act. *State v. Longshore*, 5 P.3d 1256, 1264, 141 Wash.2d 414 (2000). Washington defines market value as “the price which a well-informed

buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction. *Id.* at 1264.

In this case, Mr. Balauro testified how as to what specific items were taken and how much they cost when purchased. Mr. Balauro testified that the washer, dryer, bed, laptop, television, PlayStation 4, a dog, and other items totaling \$7,000.00 in value were purchased on a rent to own basis from Rent A Center (RAC). Mr. Balauro used his tax return funds to purchase these items for the home. Mr. Balauro also testified to each of the items current value since the items damaged and stolen were no longer new. Not only did the purchase price establishes a market value of the items damaged and stolen, Mr. Balauro also depreciated the items. Finally, Mr. Balauro also testified to the cost of replacing such items. Ms. Lopez provided very similar testimony regarding her personal items that were damaged. Many of the items that Ms. Amezcua stole were found at her hotel with the help of Mr. Balauro and Ms. Amezcua's children.

4. The Evidence Introduced at Trial was More Than Sufficient to Convict Ms. Amezcua of Violation of a No Contact Order

A temporary no contact order was issued in this matter on March 12, 2018. The Domestic Violence No-Contact Order was delivered to March 12, 2018 and she signed it. At trial, the State

demonstrated through jail calls that Ms. Amezcua encouraged a female to contact Mr. Balauro in order to determine whether he wanted to continue on with criminal charges or whether he would appear at trial. [RP 311-317]. This allowed the jury to conclude that the Ms. Amezcua violated the No Contact Order.

5. If any Errors Occurred in Sentencing they were Harmless

Error

A trial court's erroneous admission of evidence in a criminal trial constitutes harmless error if the error did not prejudice a substantial right of the defendant and the appellate court is able to conclude beyond a reasonable doubt that the error in no way affected the outcome of the case. *State v. Hines*, 87 Wash. App. 98 at 102, 941 P.2d 9 at 11 (1997).

A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832, 613 P.2d 1139 (1980) citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not

unattainable perfection, but rather fair and correct judgments .... When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it .... As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing *United States v. Blevins*, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

*State v. Jamison*, 93 Wn.2d 794, 800-801, 613 P.2d 776 (1980) citing *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). Even exclusion of witnesses is subject to harmless error review. *Jones v. City of*

*Seattle*, 179 Wash. 2d 322 at 356, 314 P.3d 380 (2013). A violation of the defendant's right to control his own defense may be subject to review for harmless error. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

If the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is un-attributable to the error. *Id.* citing *Neder v. United States*, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Cunningham*, 93 Wn.2d at 832 citing *Rogers*, 83 Wn.2d

553; *State v. Rhoads*, 35 Wash. App. 339, 343, 666 P.2d 400 (1983),  
*aff'd*, 101 Wn.2d 529 (1984).

#### CONCLUSION

Based on the foregoing, Respondent requests that this court  
affirm Appellant's convictions.

Dated this 3<sup>rd</sup> day of October, 2019.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Arian Noma", written over a horizontal line.

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**OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE**

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