

FILED
Court of Appeals
Division III
State of Washington
10/16/2019 11:26 AM

NO. 36734-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

DESTINY AHENAKEW,
Appellant.

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

The Honorable Tracy L. Staab, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
ERIN C. SPERGER, WSBA No. 45931
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
B. ISSUE PRESENTED ON APPEAL.....	1
C. STATEMENT OF THE CASE.....	1
1. Procedural History.....	1
2. Substantive Facts.....	2
D. ARGUMENT.....	3
1. THE TRIAL COURT VIOLATED AHENAKEW'S FIFTH AND FOURTEENTH AMENDMENT AND ART. I, § 3 DUE PROCESS RIGHTS WHEN IT ACCEPTED AHENAKEW'S PLEA OF GUILTY TO FIRST DEGREE BURGLARY	3
E. CONCLUSION.....	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Keene,
95 Wn.2d 203, 622 P.2d 360 (1980)..... 4

Matter of Taylor,
31 Wn. App. 254, 640 P.2d 737 (1982)..... 4

State v. Buckman,
190 Wn.2d 51, 409 P.3d 193 (2018)..... 3

State v. Montague,
10 Wn. App. 911, 521 P.2d 64 (1974) 5, 6

State v. R.L.D.,
132 Wn. App. 699, 133 P.3d 505 (2006)..... 3

State v. S.M.,
100 Wn. App. 401, 996 P.2d 1111 (2000)..... 4, 6

State v. Saas,
118 Wn.2d 37, 820 P.2d 505 (1991)..... 4

FEDERAL CASES

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709 (1969)..... 3

McCarthy v. United States,
394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) 3, 4

RULES, STATUTES, AND OTHERS

CrR 4.2 4

RCW 9A.44.010..... 4

RCW 9A.44.073..... 4

TABLE OF AUTHORITIES

Page

RULES STATUTES, AND OTHERS, continued

RCW 9A.52.020 1, 5, 6

U.S. Const. Amend. V 1, 3

U.S. Const. Amend. XIV 1, 3

Wash. Const. art. I, § 3 1, 3

A. ASSIGNMENT OF ERROR

1. The trial court violated Ahenakew's Fifth and Fourteenth Amendment and Wash. Const. art. I, § 3 rights to Due Process when it accepted Ahenakew's guilty plea to first degree burglary.

B. ISSUE PRESENTED ON APPEAL

1. Did the trial court violate Ahenakew's Fifth and Fourteenth Amendment and art. I, § 3 rights to Due Process when it accepted Ahenakew's guilty plea to first degree burglary when the facts in the record are contradictory and therefore do not clearly support the elements of the crime?

C. STATEMENT OF THE CASE

1. Procedural History

Destiny Ahenakew pled guilty to First Degree Burglary (RCW 9A.52.020). CP 1. In the plea agreement Ahenakew checked the box authorizing the court to review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis of the plea. CP 19. The court found Ahenakew's plea was knowing and voluntary and entered Ahenakew's plea of guilty. RP 11. This timely appeal follows. CP

41.

2. Substantive Facts

According to the statement of probable cause the following facts took place:

Sewell heard noises in her hallway, so she opened the door to her unit and observed Ahenakew in her storage closet. CP 3. Ahenakew said the storage closet belonged to Ahenakew. CP 3. Sewel confronted Ahenakew who attempted to leave with a suitcase and a bag belonging to Sewell. CP 3. When Sewell attempted to prevent Ahenakew from leaving with the property Ahenakew grabbed Sewell's hair, punched Sewell in the face, and kicked her several times. CP 3.

Corporal Baldwin responded and observed Ahenakew at a nearby intersection. CP 5. Officer Lynch responded to the intersection to assist Corporal Baldwin and when he arrived Lynch questioned Ahenakew about whether she believed the property in the storage closet belonged to her. Ahenakew answered "no." CP 6. Lynch then transported Ahenakew to jail and booked her without incident. CP 6.

Ahenakew pled guilty to first degree burglary. CP 18. At the

plea hearing, the court reviewed the statement of probable cause statement but did not inquire about the nature of the charges. RP 10.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED AHENAKEW'S FIFTH AND FOURTEENTH AMENDMENT AND ART. I, § 3 DUE PROCESS RIGHTS WHEN IT ACCEPTED AHENAKEW'S PLEA OF GUILTY TO FIRST DEGREE BURGLARY

The trial court violated Ahenakew's Fifth and Fourteenth Amendment and art. I, § 3 rights to Due Process when it accepted Ahenakew's guilty plea to first degree burglary.

Due process requires that a guilty plea be voluntary, knowing, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969); *State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018); U.S. Const. Amends. V, XIV; art. I, § 3.

To be voluntary, the defendant must understand the law in relation to the facts of his or her case. *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Put another way, the defendant must "not only know the elements of the offense, but also must understand that the alleged criminal

conduct satisfies those elements.” *State v. R.L.D.*, 132 Wn. App. 699, 704, 133 P.3d 505 (2006) (citations omitted).

As a constitutional safeguard, CrR 4.2(d) requires the trial court to determine there is a sufficient factual basis for the guilty plea. *Matter of Taylor*, 31 Wn. App. 254, 256, 640 P.2d 737 (1982) (citing CrR 4.2(d)). Although, the court need not be convinced of the defendant’s guilt beyond a reasonable doubt, it must determine the conduct which the defendant admits constitutes the offense charged in the information. *Taylor*, 31 Wn. App. at 256-57 (citing *In re Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (citing *McCarthy*, 394 U.S. at 467)). The court may consider any reliable source of information in the record including a prosecutor’s statement of the facts. *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991).

When the facts in the record create an ambiguity about whether the admitted conduct supports an essential element there is an insufficient factual basis for the plea unless the trial court ensures the defendant understood the law in relation to the facts of his or her case by inquiring further. *State v. S.M.*, 100 Wn. App. 401, 413–15, 996 P.2d 1111 (2000).

In *S.M.*, a juvenile was charged with rape of a child, which requires penetration. *S.M.*, 100 Wn. App. at 403; RCW 9A.44.010(1), .073. *S.M.* admitted he had “sexual contact” with his brother, but the court did not ask if he understood this required “penetration” and *S.M.* did not know the meaning of the word “penetration”. This created an ambiguity about whether penetration actually occurred. *S.M.*, 100 Wn. App. at 403-04, 415. Because the record did not affirmatively demonstrate *S.M.* understood the law of rape of a child in relation to the facts of his case, the trial court violated *S.M.*’s right to due process when it accepted the plea. *S.M.*, 100 Wn. App. at 415.

Here, *Ahenakew* pled guilty to first degree burglary. A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, [she] enters or remains unlawfully in a building and ... while ... in immediate flight therefrom, [she] ... assaults any person. RCW 9A.52.020. Unlawful entry implies a “guilty mind” which includes the “absence of every mental pattern sufficient in law to exculpate” the actor including a reasonable mistake of fact. *State v. Montague*, 10 Wn. App. 911, 918-19, 521 P.2d 64 (1974).

Although Ahenakew agreed the court could rely on the facts in the statement of probable cause to establish a factual basis those facts are contradictory. According to Sewell, Ahenakew believed the property belonged to Ahenakew. CP 3. In contrast, according to Officer Lynch, Ahenakew knew the property did not belong to her. CP 6. This created ambiguity.

Even if the facts according to Lynch were sufficient to establish unlawful entry, the existence of contradictory facts creates an ambiguity about whether Ahenakew understood she committed the crime charged. Like in *S.M.*, because the trial court failed to clarify that Ahenakew ascribed to the version which established the elements of the crime. This ambiguity at the plea hearing does not affirmatively show that Ahenakew understood the law on burglary in relation to the facts of her case. Accordingly, the trial court violated Ahenakew's right to due process when it accepted the plea. This Court must reverse the plea and dismiss the first degree burglary charge. *S.M.*, 100 Wn. App. at 415.

E. CONCLUSION

Destiny Ahenakew respectfully requests that this court reverse her plea of guilty to first degree burglary and remand for

dismissal.

DATED this 16th day of October 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant



ERIN C. SPERGER, WSBA No. 45931
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAappeals@spokanecounty.org and Destiny Ahenakew/#19J-09153, Yakima County Jail, 111 N Front Street, Yakima, WA 98901 a true copy of the document to which this certificate is affixed on October 16, 2019. Service was made by electronically to the prosecutor and Destiny Ahenakew by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

October 16, 2019 - 11:26 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36734-7
Appellate Court Case Title: State of Washington v. Destiny Louise Ahenakew
Superior Court Case Number: 18-1-05346-4

The following documents have been uploaded:

- 367347_Briefs_20191016112449D3663095_5617.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Ahenakew AOB FINAL.pdf

A copy of the uploaded files will be sent to:

- erin@legalwellspring.com
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Please disregard the previously filed brief. It was an incorrect version. Thank you.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20191016112449D3663095