No. 44744-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Geoffrey Lawson,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00713-4

The Honorable Judge Steven Dixon

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ARGUMENT

I. THE CHARGING DOCUMENT DID NOT PROVIDE NOTICE OF THE FACTS ALLEGED.

To be constitutionally sufficient, a charging document must do two things. First, it must outline the essential elements of the crime charged. Second it must notify the accused person of the underlying facts alleged. *State v. Leach*, 113 Wn.2d 679, 689, 699, 782 P.2d 552 (1989); *Auburn v. Brooke*, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992). Here, the Information failed to include specific facts supporting each essential element. CP 2-7. Mr. Lawson requested a bill of particulars, but the court denied his request. RP (1/4/13) 86.

Without citation to authority, Respondent suggests that the probable cause statement cured any deficiency. Brief of Respondent, pp. 9-13. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

The factual deficiency in the information requires reversal of Mr. Lawson's convictions. *Leach,* 113 Wn. 2d at 690.

II. THE TRIAL COURT SHOULD HAVE GRANTED MR. LAWSON'S MOTION FOR A BILL OF PARTICULARS.

The state constitution explicitly protects a defendant's right to "demand the nature and cause of the accusation against him." Wash. Const. art. I, § 22. A bill of particulars can cure factual deficiencies in the Information. *State v. Maurer*, 34 Wn. App. 573, 577-578, 663 P.2d 152 (1983). A bill of particulars "is an integral part of the State's pleadings." *Id.,* at 578. It enables the court and the parties to "determine, before trial, all the State expects to prove." *Id.* Furthermore, a bill of particulars operates to limit a party's evidence to proof of the grounds stated therein. *Wray v. Young*, 122 Wash. 330, 333, 210 P. 794 (1922). A bill of particulars restricts a party's proof "to the matters therein set out." *Anderson v. Rucker Bros.*, 107 Wash. 595, 597, 183 P. 70 (1919) *aff'd,* 107 Wash. 595, 186 P. 293 (1919).

Here, the Information alleged only two facts particular to Mr. Lawson's case: the date and the county. CP 1-8. The trial court's refusal to grant a bill of particulars infringed Mr. Lawson's state constitutional right "to demand the nature and cause of the accusation against him."Art. I, § 22.

Under the state constitution, it is irrelevant that Mr. Lawson had ready "access" to the evidence to be introduced at trial. Brief of

Respondent, pp. 13-14. A bill of particulars can limit the state's evidence and even the theory upon which the state may proceed. Even if Mr. Lawson had "access" to the facts, this does not mean the state would be held to a particular theory—for example unlawful entry vs. unlawful remaining, or entry through the loading dock vs. entry into the women's restroom. A written bill of particulars would have required the state to outline the legal significance of the facts it sought to prove. It also would have narrowed the issues and focused the prosecution on the precise conduct the state alleged to constitute each crime. *Wray,* 122 Wash. at 333; *Anderson*, 107 Wash. at 597.

The superior court should have granted Mr. Lawson a bill of particulars. His convictions must be reversed. The case must be remanded with instructions to grant Mr. Lawson's motion for a bill of particulars. *Maurer*, 34 Wn. App. at 577-578.

III. THE STATE FAILED TO PROVE BURGLARY (COUNTS ONE, THREE, AND FIVE) AND VOYEURISM (COUNT FOUR).

A. Starkey had no reasonable expectation of privacy when she stood near the restroom sink, and the state did not prove that Mr. Lawson successfully viewed her when she was in the bathroom stall.

Mr. Lawson viewed Starkey when she stood by the sink in the public part of the restroom. RP (1/17/13) 271-278. The sink was not a place where she had a reasonable expectation of privacy. Furthermore,

nothing in the record proves that he *successfully* viewed her when she was in the bathroom stall. Accordingly, the state did no more than prove a substantial step toward the commission of voyeurism when she was in the stall. RP (1/17/13) 271-278.

The state failed to prove the completed crime under either alternative set forth in RCW 9A.44.115(2). Respondent erroneously suggests that the evidence was sufficient under several different theories. Brief of Respondent, pp. 18-20. Respondent's assertions rest on speculation and an error of law.

In order to conclude that Mr. Lawson actually viewed Starkey while she was in the stall next to his, the jury would have had to speculate (1) that he looked into the stall, (2) at a time when Starkey was in the stall, (3) from an angle that permitted him to successfully view her.[1] But speculation cannot provide sufficient evidence to sustain a conviction. *State v. Garcia*, 318 P.3d 266, 274 (Wash. 2014). Instead, any inferences drawn from the evidence "must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

Nor does the state's reliance on ER 404(b) evidence prove that he successfully viewed Starkey while she was inside the stall. Mr. Lawson's

[1] The "intimate areas" alternative would require even greater speculation about the timing and angle of his effort to view her intimate areas.

motive and any "common scheme" do not prove that he actually successfully viewed Starkey when she was inside the stall; they only suggest that he attempted to do so. The state's first theory—that he viewed her while she used the stall next to his—rests on speculation, and cannot support a conviction. *Garcia*, 318 P.3d at 274; *Vasquez*, 178 Wn.2d at 16.

The state's second theory erroneously presumes that Starkey had a reasonable expectation of privacy the entire time she was in the restroom, including when she was in the sink area. Brief of Respondent, p. 19. This is not so: the sink area was a non-private part of the restroom. Respondent's theory expands the crime to cover areas where a person does not have a reasonable expectation of privacy but can expect to be segregated from people of a different gender. Respondent cites no authority for this expansion, and is presumed to have found none after diligent search. *Coluccio,* 136 Wn. App. at 779.

The state failed to prove voyeurism in count four. Mr. Lawson's conviction must be reversed, and the case dismissed with prejudice. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

B. The evidence was insufficient to prove burglary because no rational jury could have found beyond a reasonable doubt that Mr. Lawson intended to commit a crime "against persons or property" when he entered or remained in the women's public restroom.

Mr. Lawson rests on the argument set forth in Appellant's Opening Brief.

C. Mr. Lawson was not "in immediate flight" from the women's public restroom when he allegedly assaulted Nace.

Mr. Lawson encountered Nace after leaving the restroom, in another part of the building. RP (1/17/13) 345-350. Nace took his arm, and led him at least a few steps toward the hospital lobby. RP (1/17/13) 347. A second officer took his other arm. The group then rounded a corner. Only after this did the alleged assault take place. RP (1/17/13) 347.

Mr. Lawson was not "in immediate flight" from the women's restroom, and thus not guilty of first-degree burglary. RCW 9A.52.020. The state erroneously argues that Mr. Lawson was in immediate flight because he tried to get away from the security officers. Brief of Respondent, pp. 23-24. But Mr. Lawson's intent to get away from the officers does not prove that he was in immediate flight from a burglary. Under Respondent's reasoning, any burglary would automatically qualify as a first-degree burglary if the suspect assaults an officer shortly after committing the crime.

Under the circumstances, Mr. Lawson's "flight" ended, at the very latest, when the officers took custody of him. He did not assault anyone while in immediate flight from the restroom. The evidence was insufficient to convict Mr. Lawson of first-degree burglary. His conviction must be reversed and the charge dismissed with prejudice. *Budik*, 173 Wn.2d at 733.

IV. MR. LAWSON'S BURGLARY CONVICTIONS AND VOYEURISM CONVICTION (COUNT FOUR) INFRINGED HIS RIGHT TO A UNANIMOUS VERDICT AS TO EACH OFFENSE.

A. The court should have given a unanimity instruction as to count one (burglary).

In a "multiple acts" case, the court must give a unanimity instruction.[2] Wash. Const. art. I, § 21; *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Here, testimony showed Mr. Lawson entered the hospital through a nonpublic door, and later entered the women's restroom. RP (1/17/13) 289-291, 296. The state relied on both entries as a basis for the burglary during closing argument. RP (1/24/13) 536, 556-560. Under these circumstances, the lack of a unanimity instruction denied Mr. Lawson his right to a unanimous verdict. *Coleman,* 159 Wn.2d at 511.

[2] In the alternative, the state may elect a single act as the basis for the charge.

The failure to provide a unanimity instruction infringed Mr. Lawson's right to a unanimous verdict. art. I, § 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). His conviction in count one must be reversed, and the case remanded for a new trial. *Kitchen,* 110 Wn.2d at 409.

B. The state introduced insufficient evidence to establish one alternative means of committing voyeurism (count four) and each burglary.

Courts presume unanimity as to alternative means of committing an offense when sufficient evidence supports each alternative.[3] *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994). Insufficient evidence as to any alternative means submitted to the jury requires reversal. *Lobe*, 140 Wn. App. at 903-905.

1. Insufficient evidence supports the "unlawful entry" means of committing burglary.

Here, the jury considered two alternative means of committing burglary: unlawful entry and unlawful remaining. CP 517-518, 524-525, 530-531; *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). No

[3] Unanimity as to means may also be shown through a special verdict.

evidence proved that Mr. Lawson committed burglary by unlawfully entering a building.[4]

Respondent erroneously claims sufficient evidence supports the "unlawful entry" alternative means. Brief of Respondent, pp. 29-30. According to Respondent, each restroom qualified as a separate building that Mr. Lawson unlawfully entered. Brief of Respondent, pp. 29-30. This is incorrect. Except in limited circumstances, the various rooms of a building are not separate buildings. *State v. Thomson*, 71 Wn. App. 634, 645-646, 861 P.2d 492 (1993). Only when a building consists of "two or more units separately secured or occupied" does a separate unit qualify as a building.[5] RCW 9A.04.110(5).

Although insufficient evidence supports the "unlawful entry" alternative means, there is a risk some members of the jury voted to convict based on unlawful "entry" of the restroom. This is especially true given the prosecutor's closing argument. RP (1/25/13) 552-570. If Mr. Lawson exceeded an invitation or license by going into the women's restroom, then doing so constituted unlawful remaining, not unlawful

---

[4] As to count one, the state did not prove that Mr. Lawson unlawfully entered the hospital: nothing established that the public was barred from entering through the loading dock door. RP (1/17/13) 291, 306, 318.

[5] Thus, for example, a locked bedroom in a house occupied by a single tenant is not itself a building. *Thomson,* 71 Wn. App. at 645-646.

entry. *Thomson,* 71 Wn. App. 645-636; *see also State v. Crist*, 80 Wn. App. 511, 514-515, 909 P.2d 1341 (1996).

The burglary convictions infringed Mr. Lawson's right to a unanimous verdict. *Lobe*, 140 Wn. App. at 903-905. The convictions must be reversed. On retrial, the prosecution may not pursue conviction based on unlawful entry. *Budik*, 173 Wn.2d at 733.

2. Insufficient evidence supports the "intimate areas" alternative means of committing voyeurism (count four).

The jury considered two alternative means of committing voyeurism. CP 522-524, 527-528, 536-537; RCW 9A.44.115(2). The state did not prove that Mr. Lawson viewed Starkey's "intimate areas."

To convict under the "intimate areas" alternative means, the jury would have had to speculate (1) that Mr. Lawson looked into the stall adjoining his, (2) that he did so at a time when Starkey was in the stall and her intimate areas were visible, and (3) that he had an unobstructed view from an angle that permitted him to successfully view her intimate areas. Contrary to Respondent's assertion,[6] this trail of speculation cannot support conviction under the "intimate areas" alternative means. *Garcia*, 318 P.3d at 274; *Vasquez*, 178 Wn.2d at 16.

[6] Brief of Respondent, pp. 31-32.

The court should not have submitted both alternatives to the jury. Mr. Lawson's conviction in count four must be reversed. On retrial, the state may not seek conviction under the "intimate areas" means. *Budik*, 173 Wn.2d at 733.

V. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. LAWSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY ADMITTING PROPENSITY EVIDENCE.

Mr. Lawson rests on the arguments set forth in Appellant's Opening Brief.

VI. MR. LAWSON'S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING COURT FAILED TO PROPERLY DETERMINE HIS OFFENDER SCORE AND STANDARD RANGE.

Mr. Lawson presents no additional argument.

VII. THE COURT UNLAWFULLY IMPOSED CERTAIN COSTS.

A. The court exceeded its statutory authority.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[7] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs)

[7] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

beyond what the legislature has authorized. RCW 9.94A.760. Here, the sentencing court exceeded its statutory authority by ordering payment of attorney fees and a contribution to an expert witness fund.

Attorney fees. No statute authorizes a sentencing court to order payment of attorney fees. Nor may a court order payment of any expenses (1) that were not specially incurred in the prosecution, (2) that inhere in providing a constitutionally guaranteed jury trial, or 3) that are connected with the maintenance and operation of government agencies, and which must be made regardless of specific crimes committed. RCW 10.01.160. Here, the court exceeded its statutory authority by imposing attorney fees.

In addition, the record does not establish that fees were specially incurred in this prosecution. Furthermore, the assistance of counsel inheres in providing a constitutionally guaranteed jury trial. Finally, the state did not show whether or not appointed counsel belonged to a publicly funded defense agency and thus received a salary paid as part of a regular operational budget.

The attorney fees were imposed without statutory authority, and in violation of RCW 10.01.160. The order imposing fees must be vacated.

Expert witness fund. No statute authorizes a sentencing court to order contribution to an expert witness fund. Respondent does not argue otherwise. Brief of Respondent, pp. 42-44. The absence of argument on

this point can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, the sentencing court exceeded its authority, and the $100 contribution must be vacated.[8]

B. The court violated Mr. Lawson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

Mr. Lawson rests on the arguments set forth in Appellant's Opening Brief.

C. Mr. Lawson may raise these issues for the first time on review.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing

[8] Respondent correctly notes that the domestic violence assessment and crime lab fee were not imposed in the judgment and sentence. Brief of Respondent, p. 44.

court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[9]

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* These cases do not govern Mr. Lawson's claim that the court lacked constitutional and statutory authority.

Furthermore, Mr. Lawson's right-to-counsel argument involves a manifest error affecting a constitutional right, and thus may be raised for the first time on review. RAP 2.5(a)(3). Finally, the Court of Appeals has discretion to review any issue raised on appeal. *See State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

---

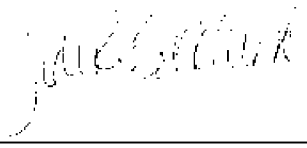
[9] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

CONCLUSION

Mr. Lawson's convictions must be reversed. The burglary charges and the voyeurism in count four must be dismissed with prejudice. In the alternative, the charges must be remanded for a new trial. If the convictions are not reversed, the costs and fees unlawfully imposed must be vacated.

Respectfully submitted on April 14, 2014,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

"established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Geoffrey Lawson, DOC #334928
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

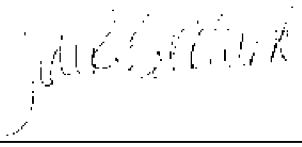
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 14, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 14, 2014 - 10:22 AM

Transmittal Letter

Document Uploaded: 447444-Reply Brief.pdf

Case Name: State v. Geoffrey Lawson
Court of Appeals Case Number: 44744-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us