No. 46382-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN HIGHSMITH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ADDITIONAL ASSIGNMENT OF ERROR

1. In imposing legal financial obligations upon Ms. Highsmith and ordering that she would be able to pay appellate costs, the trial court failed to conduct an adequate inquiry into Ms. Highsmith's ability to pay.[1]

B. ADDITIONAL ISSUE

1. The trial court imposed discretionary legal financial obligations. The court also ordered that an award of costs for an appeal may be added to the total legal financial obligations. Before imposing legal financial obligations, however, the sentencing court must make an inquiry as to the defendant's ability to pay. As the Washington Supreme Court recently held, appellate courts may exercise their discretion and address a trial court's failure to conduct this inquiry for the first time on appeal. Cries for reform of broken legal financial systems demand that appellate courts exercise this discretion. While imposing legal financial obligations against Ms. Highsmith, the sentencing court did not inquire on the record as to her ability to pay. Following our Supreme Court's lead, should this Court exercise its discretion and remand for a proper determination as to Ms. Highsmith's ability to pay legal financial obligations?

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[1] Ms. Highsmith has filed a motion asking this Court to allow this supplemental assignment of error.

C. ARGUMENT

1. The State failed to prove beyond a reasonable doubt that Ms. Highsmith entered a "dwelling" on or about December 16, 2013.

a. The State was required to prove that the building entered was used or ordinarily used for lodging, not that it was a type of building that could be used for lodging.

Under the "to-convict" instruction for residential burglary, the State bore the burden of proving beyond a reasonable that "on or about the 16th day of December, 2013 the defendant, or an accomplice, entered or remained unlawfully in a *dwelling*." CP 54 (emphasis added). "Dwelling" was defined for the jury to mean "any building or structure that is used or ordinarily used by a person for lodging." CP 50. Thus, the State had to prove that the property Ms. Highsmith was accused of burglarizing was, on or about the 16th day of December, used or ordinarily used by a person for lodging.

The State incorrectly advocates for a test that examines the *type* or *nature* of building, rather than the *use* of the building. Br. of Resp't at 10 ("Washington's statute includes both the use and the nature of the structure."). Accordingly, the State focuses on the nature of the structure at issue rather than its use. Br. of Resp't at 9 ("There is no dispute that the building was a house. It was not a garage, a factory, a barn or a retail

establishment."). The State does not support its argument with citation to pertinent authority. Br. of Resp't at 7-9. Arguments that are not supported by any citation to the record or to authority need not be considered by this Court. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In any case, this test is not supported by the plain language of the statute. See State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (courts give statutes their plain meaning). The plain, unambiguous language of the statute makes the *use* of the building the focus, not the nature of the building. Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). Moreover, that the legislature excluded "vehicles" from residential burglary, even though they could qualify as "dwellings" (through a person's use or ordinary use), supports this conclusion. RCW 9A.52.025 ("A person is guilty of residential burglary if . . . the person enters or remains unlawfully in a dwelling *other than a vehicle*.") (emphasis added).

This Court's recent opinion in State v. McPherson, __ Wn. App. __, 344 P.3d 1283 (2015) shows that it is the *use* of a building that

controls, not its *type*. There, the defendant was convicted of residential burglary after burglarizing a jewelry store. McPherson, 344 P.3d at 1283. A person used an area above the store as an apartment, which was only accessible through the store and was not secured as a separate unit. McPherson, 344 P.3d at 1285. Accordingly, the evidence was sufficient to prove that the jewelry store was a "dwelling." McPherson, 344 P.3d at 1285. If it was simply the *type* of building which controlled, the defendant's insufficiency argument might have prevailed.

Other jurisdictions make this distinction. As argued in the opening brief, Utah is one. Br. of App. at 12-13; State v. Francis, 284 P.3d 720, 721 (Utah Ct. App. 2012) ("the key inquiry is the actual use of the particular structure that is burglarized, not the usual use of similar types of structures.") (internal quotation omitted).[2] Another jurisdiction is California. People v. Burkett, 220 Cal. App. 4th 572, 579, 163 Cal. Rptr. 3d 259 (2013) ("for burglary of the highest degree, it is the nature of the current use of the building, which is to say the use at the time of the entry

[2] Under Utah law, burglary is elevated from third degree to second degree if the offense was committed in a "dwelling." Utah Code § 76-6-202. "Dwelling" means a "building which is usually occupied by a person lodging in the building at night, whether or not a person is actually present." Utah Code § 76-6-201(2).

rather than the design of the building, its customary use, or its current occupancy that is important.") (internal citation omitted).[3]

The State also incorrectly argues that the statutory language "is ordinarily used" means the focus is not on the day of the crime. Br. of Resp't at 10. The statute uses the word "is," not "was." Thus, the focus is on the present, not the past. Moreover, the jury instructions are the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Under these instructions, the State had to prove beyond a reasonable doubt that Ms. Highsmith burglarized a "dwelling" on or about December 16, 2013. CP 54. Proving that Ms. Highsmith burglarized property that was a "dwelling" in the past is insufficient.

In accordance with the statute, this Court should hold that it is the use or ordinary use of a structure or building by a person that is controlling, not the type or nature of the building. The Court should also hold that the focus is the date of the alleged crime, not the past.

[3] Under California law, a person is guilty of the first degree of burglary if the person commits a burglary of an "inhabited dwelling house." Cal. Penal Code § 460. "Inhabited" means "currently being used for dwelling purposes, whether occupied or not." Cal. Penal Code § 459.

b. In reviewing a sufficiency of the evidence challenge, only reasonable inferences are drawn in the State's favor. Unfavorable facts to the State are not ignored.

When reviewing a sufficiency of the evidence challenge, the question is, after viewing the evidence in the light most favorable to the prosecution, could a rational trier of fact 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); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Only *reasonable* inferences are drawn in favor of the State. Jackson, 443 U.S. 319. "[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). Moreover, facts unfavorable to the State are not ignored. State v. Davis, 182 Wn.2d 222, 235, 340 P.3d 820 (2014) (Stephens, J. dissenting).[4] This "standard of review is . . . designed to ensure that the fact finder at trial reached the 'subjective state of near certitude of the guilt of the accused,' as required by the Fourteenth Amendment's proof beyond a reasonable doubt standard." State v. Rich, __ Wn. App. __, 347 P.3d 72, 77 (2015) (quoting Jackson, 443 U.S. at 315).

[4] This portion of Justice Stephens's dissent received four concurring votes, making it precedent. Davis, 182 Wn.2d at 232-33 (Wiggins, J. concurring in part, dissenting in part) (concurring with dissent in that evidence was insufficient to sustain firearm possession convictions).

c. The State failed to prove that the building was used or ordinarily used as a dwelling on December 16, 2013.

The State did not meet its burden. On December 16, 2013, when the building was purportedly burglarized by Ms. Highsmith, the evidence established that no one was using the property for lodging. RP 96. As for whether the structure was "ordinarily used" for lodging on that date, the evidence was that the owners were no longer living there and had moved out. RP 155-56. While they returned to work on the property once or twice a month, there was no testimony elicited by the State that they slept there. The last time they had worked on the property was about three weeks prior to December 16, 2013. RP 159. The only owner who testified, Ms. Foss, did not testify that she or her family planned to return and lodge there. RP 153-71.

In contesting this argument, the State exaggerates (if not misrepresents) the pertinent evidence. Without citation to the record, the State asserts there was no dispute that the Fosses continued to live at their former residence when they returned to work on it. Br. of Resp't at 9. Similarly, the State does not cite to the record in supporting its contention that, "[w]hen in Port Orchard, they stayed in the house." Br. of Resp't at 7. As these arguments are not supported by any citation to the record or to

authority, they need not be considered. Cowiche Canyon, 118 Wn.2d at 809.

While all inferences are drawn in the State's favor, these inferences must be reasonable. That there were furnishings and other items at the property does not establish that the Fosses were still using the property as a dwelling. As Ms. Foss testified, these items were kept on the property for staging purposes (to help sell the place) and because the Fosses did not have room at their actual residence for all their possessions. RP 156. And contrary to the State's contention, a witness testified that the he was trying to get the furnace to work shortly before December 16th, plainly implying that it was not working. RP 109.

Additionally, "[m]erely asking the jury to presume a fact necessary for conviction does not satisfy the requirements of the proof beyond a reasonable doubt guarantee of the Fourteenth Amendment's due process clause." Rich, 347 P.3d at 81 (state failed to present evidence from which the trier of fact could infer that defendant's driving created a substantial risk of death or serious physical injury). If the Fosses were still lodging at the property when they returned to work on it, all the State needed to do to establish this was ask. The State's failure to do so indicates that the State did not meet its burden of proof.

A holding from this Court that the evidence was insufficient is consistent with decisions from other jurisdictions interpreting similar burglary statutes. Thus, the Utah Court of Appeals held that a fully functional, but never occupied house that had been on the market for eight months did not qualify as a "dwelling." State v. McNearney, 246 P.3d 532, 533, 535 (Utah Ct. App. 2011). Similarly, the California Court of Appeals held that the evidence was insufficient to establish that a burglarized residence was an "inhabited dwelling house" because there was "no evidence that the burglarized residence was inhabited, that it was currently being used by someone for dwelling purposes." Burkett, 220 Cal. App. 4th at 582. It was "not enough to show the home was suited for use as a residence and its owner had declared his intent to move in, or that it had been recently used or would be imminently used." Burkett, 220 Cal. App. 4th at 582. The same reasoning applies in this case.

Because the evidence was insufficient to prove that Ms. Highsmith burglarized a "dwelling," this Court should reverse.

2. By failing to raise the strong defense that the building was not a dwelling, the defendant was deprived of her right to effective assistance of counsel.

Alternatively, if the evidence was sufficient, this Court should reverse for ineffective assistance of counsel because trial counsel failed to make the obvious and strong argument that the property was not a

"dwelling." Br. of App. at 15-17. The evidence tending to show that the property was a dwelling was, if not insufficient, certainly meager. See State v. McDonald, 123 Wn. App. 85, 90, 96 P.3d 468 (2004) (defendant entitled to lesser included offense instruction for second degree burglary because jury could have rationally found that house was not a dwelling). Despite this obvious and strong defense, Ms. Highsmith's counsel failed to make this argument to the jury. RP 373-82.

"The brief of respondent should . . . answer the brief of appellant or petitioner." RAP 10.3(b). Rather than answer Ms. Highsmith's argument, the State creates a straw man to knock over.[5] Br. of Resp't at 12. The State incorrectly represents that Ms. Highsmith "claims that counsel was ineffective for failing to propose a lesser instruction on second-degree burglary." Br. of Resp't at 10. This is not Ms. Highsmith's argument. Accordingly, State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) is not controlling and is plainly materially distinguishable. By failing to respond to Ms. Highsmith's argument, the State has impliedly conceded the issue. For the reasons stated in the opening brief, this Court should accept the State's implied concession and reverse for ineffective assistance of counsel.

[5] See http://en.wikipedia.org/wiki/Straw_man.

3. The trial court failed to inquire as to Ms. Highsmith's ability to pay legal financial obligations. This Court should remand for a new sentencing hearing.

a. Before imposing legal financial obligations, a sentencing court must inquire as to the defendant's current and future ability to pay. Appellate courts may address this issue for the first time on appeal.

Recently, our Supreme Court held that before a trial court imposes legal financial obligations (LFOs), RCW 10.01.160(3) requires that the sentencing judge must make an individualized inquiry into the defendant's current and future ability to pay. State v. Blazina, __ Wn.2d __, 344 P.3d 680, 681 (2015). The Court further held that Washington appellate courts have discretion to review LFOs challenged for the first time on appeal and reviewed the claims before it due to the importance of the issue:

> RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *State v. Russell*, 171 Wn.2d 118, 122, 249, P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

Blazina, 344 P.3d at 683. The Court rejected the State's argument that the ripeness doctrine precluded review of LFOs. Blazina, 344 P.3d at 682 n.1. Following Blazina, this Court may properly review the issue.

b. The trial court failed to inquire as to Ms. Highsmith's ability to pay legal financial obligations. This court should exercise its discretion and remand for a new sentencing hearing.

The trial court imposed $1135 in discretionary legal financial obligations (court-appointed attorney fees). CP 68. The court also found that Ms. Highsmith had the ability or likely future ability to pay legal financial obligations and that an award of costs for an appeal may be added to the total legal financial obligations. CP 68. At sentencing, however, the trial court did not inquire as to Ms. Highsmith's current or future ability to pay. 5/23/14RP 1-21. The State did not offer any evidence as to Ms. Highsmith's ability to pay. 5/23/14RP 1-21.

Still, the trial court orally ruled that Ms. Highsmith was capable of paying legal financial obligations because she was capable of working and had worked before:

> Ms. Highsmith, I do note for the record that you are capable of working, and that but for your incarceration, you would be able to work, as you have been working, and so therefore, you would be capable of paying on a legal financial obligation.

5/23/14RP 21.

Under RCW 10.01.160(3) and Blazina, the trial court erred. The statute requires more than the court's assumption that Ms. Highsmith would be able to pay legal financial obligations because she had worked

before. The statute requires an account of the defendant's resources and the burden the costs will impose:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Further, as interpreted by our Supreme Court in Blazina, RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. Blazina, 344 P.3d at 685. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Blazina, 344 P.3d at 685. The sentencing court should examine whether the defendant is indigent under GR 34. Blazina, 344 P.3d at 685. Accordingly, because the records did not show that the sentencing courts inquired into either defendant's ability to pay, the Court remanded for new sentencing hearings. Blazina, 344 P.3d at 685.

Likewise, the trial court did not engage in this inquiry before imposing legal financial obligations. Consistent with Blazina, this Court should also remand for a new sentencing hearing.

D. CONCLUSION

The conviction should be reversed for insufficient evidence. If not reversed for insufficient evidence, the conviction should be reversed for ineffective assistance of counsel. If not reversed, this Court should still remand for resentencing because the trial court did not conduct a proper inquiry before imposing legal financial obligations.

DATED this 21st day of May, 2015.

Respectfully submitted,

_____ S/
s/Richard W. Lechich – WSBA
#43296 Washington Appellate
Project Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 46382-2-II
v.	)	
	)	
KRISTEN HIGHSMITH,	)	
	)	
Appellant.	)	

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