Supreme Court No. 92827-4
Court of Appeals No. 46382-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN HIGHSMITH,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

Other Cases

Statutes

Other Statutes

Rules

A. IDENTITY OF PETITIONER

Kristen Highsmith, the appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

For purportedly burglarizing a vacant house, Ms. Highsmith was convicted of residential burglary. This required proof that the house was a "dwelling," meaning that, at the time of the offense, the house is "used or ordinarily used for lodging." Using an amorphous "relevant factors" test rather than the plain language of the statute, the Court of Appeals held the evidence was sufficient to prove that the house was a dwelling at the time of the offense despite it being vacated for about five months. The unpublished opinion was issued on January 19, 2016 and is attached in the appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Residential burglary requires that the State prove that the defendant entered or remained in a "dwelling." Dwelling means any building or structure that is used or ordinarily used by a person for lodging. The building that the defendant entered had been vacant for about half a year and was for sale. There was no evidence anyone used or ordinarily used the building for lodging at the time of the purported

offense. Did the State fail to prove beyond a reasonable doubt that Ms. Highsmith entered or remained in a dwelling?

2. Before imposing legal financial obligations, the sentencing court must make an inquiry as to the defendant's ability to pay. Appellate courts may exercise their discretion and address a trial court's failure to conduct this inquiry for the first time on appeal. The failure to exercise discretion is an abuse of discretion. Relying on a 2013 decision holding that these kinds of errors may not be raised for the first time on appeal, the Court of Appeals refused to review the issue. Did the Court of Appeals abuse its discretion by arbitrarily refusing to review whether legal financial obligations were properly imposed upon Ms. Highsmith?

D. STATEMENT OF THE CASE

The real estate at issue, a "fixer-upper" located in Port Orchard, was purchased in December 2012. RP 154-56. In 2013, the owners moved to Spokane and, after moving, put the property up for sale in July 2013. The owners returned once or twice a month to work on the property. RP 156-57. The owners did not testify that they stayed at the house when they returned.

The house was staged with furnishings to help sell it. RP 121. In December 2013, the owners' agents were trying to get the furnace in the house to work. RP 109.

On December 16, 2013, the real estate agent visited the property around 4:30 p.m. RP 97-98. After noticing another car parked out front, the agent called 911. RP 99-101. Police stopped the car shortly thereafter as it was driving away from the property. RP 132-33. Kristen Highsmith and Floyd Sibley were in the car. RP 133. Ms. Highsmith, who was in the process of moving, had many items, including boxes and clothing, in the backseat of the car. RP 136, 141, 248. Some of the items were identified as belonging to the homeowners. RP 150, 160-61. Ms. Highsmith was charged and convicted of residential burglary. CP 11, 61; RP 417-18.

E. ARGUMENT

1. The Court of Appeals incorrectly held that the evidence was sufficient to prove residential burglary.

a. Residential burglary requires proof that the building is a "dwelling."

To be guilty of residential burglary, the person must enter or remain in a "dwelling":

> A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025. "'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily

used by a person for lodging." RCW 9A.04.110(7) (emphasis added).[1] Per the "to convict" instruction, the jury had to find that "on or about the 16th day of December, 2013 the defendant, or an accomplice, entered or remained unlawfully in a dwelling." CP 54. Thus, the jury had to find that, at the time of the offense, the building Ms. Highsmith was accused of burglarizing was a "dwelling."

b. The "relevant factors" test, used by the Court of Appeals to decide whether a building is a "dwelling," fails to adhere to the statutory definition and is based on dissimilar burglary statutes.

To determine whether a building or structure is a "dwelling," the Court of Appeals has adopted a non-exclusive "relevant factors" test. State v. McDonald, 123 Wn. App. 85, 91 & n.18, 96 P.3d 468 (2004). These factors include whether the building is usually used by a person for lodging at night, whether it was maintained as a dwelling, and how long it was vacant. Id. at 91 n.18. Applying this amorphous test, the Court of Appeals held the evidence was sufficient to prove that the house, vacated for about half a year, was a dwelling. Op. at 4-6. The court cited the evidence that the owners had lived in it for several months after buying it,

[1] The jury was instructed consistently with this definition. CP 50 ("Dwelling means any building or structure that is used or ordinarily used by a person for lodging.").

the owners returned to work on the house, and the owners left furnishings and other items behind. Op. at 5-6.

The problem with this test is that it is not based on the language of the Washington statute. Rather, the McDonald Court cited to cases from Arizona, Illinois, Louisiana, New York, Ohio, Texas, and Virginia. McDonald, 123 Wn. App. at 91 n.18 & 19. An examination of these cases do not support some ad-hoc "relevant factors" inquiry. Rather, in each of these cases, the courts focused on the unique statutory language of their burglary statutes. Thus, the Louisiana case turned on applying the statutory language "inhabited dwelling" and "abode." State v. Black, 627 So. 2d 741, 744-45 (La. Ct. App. 1993). The Texas case on the statutory meaning of "habitation." Hargett v. State, 534 S.W.2d 909, 910-11 (Tex. Crim. App. 1976). The Arizona case on the statutory meaning of "residential structure." State v. Engram, 171 Ariz. 363, 367, 831 P.2d 362 (Ct. App. 1991). The Illinois and New York cases on their statutory meanings of "dwelling." People v. Willard, 303 Ill. App. 3d 231, 233, 707 N.E.2d 1249 (1999); People v. Moore, 206 Ill. App. 3d 769, 773-74, 565 N.E.2d 154 (1990); People v. Sheirod, 124 A.D.2d 14, 16-17, 510 N.Y.S.2d 945 (App. Div. 1987). And the Ohio case on the statutory meaning of "occupied structure." State v. Green, 18 Ohio App. 3d 69, 70-71, 480 N.E.2d 1128 (1984).

c. Consistent with the statutory language, whether a building is a dwelling turns on the use or ordinary use of the building.

The meaning of the term "dwelling" under Washington law is an issue of statutory interpretation. The meaning of a statute is a question of law reviewed de novo. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In interpreting a statute, the Court ascertains and carries out the Legislature's intent. Id. If the statute's meaning is plain, the court applies the plain meaning. Id. at 9-10. Plain meaning "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Id. at 11. 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)). This is the framework that should be used to draw lines on what is and what is not a "dwelling." Cf., State v. Larson, No. 91457-5, 2015 WL 9460073, at * 1, 4 (Wash. Dec. 24, 2015) (using framework and holding that ordinary wire cutters did not fall under the statutory language of a "device designed to overcome security systems").

"The law of burglary was designed to protect the dweller . . . ." State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983). The

legislature has divided burglary into three felonies: first degree burglary,[2] residential burglary,[3] and second degree burglary.[4] State v. Olson, 182 Wn. App. 362, 374, 329 P.3d 121 (2014). The offense of residential burglary was enacted to punish people who burglarize dwellings more harshly due to the inherent risk of personal injury to people in their homes. Id. at 378. Hence, residential burglary is a more serious offense than second degree burglary, which protects buildings that are not "dwellings." RCW 9A.52.025(2); 9A.52.030(1) ("A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.")

As argued below, the proper test of whether a building or structure is a "dwelling" should focus on the statutory language, which requires that the building or structure be "used or ordinarily used by a person for lodging." RCW 9A.04.110(7).[5] The focus of this language is on the *use* of the building or structure, not its *type*. That the legislature excluded

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[2] RCW 9A.52.020.

[3] RCW 9A.52.025.

[4] RCW 9A.52.030.

[5] The Court of Appeals cursorily rejected Ms. Highsmith's argument that the Court should adopt a new test premised on the language of the statute. Op. at 6, n.2.

"vehicles" from residential burglary even though they could qualify as a "dwelling" 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."). Thus, in deciding whether a building or structure is a "dwelling," the proper inquiry is whether the evidence proved that (1) a person used the building or structure for lodging at the time of the offense or (2) a person, while not using the building or structure for lodging at the time of the offense, still ordinarily used the building or structure for lodging. This effectuates legislative intent and provides a workable test to distinguish residential burglary from second degree burglary.

d. The "relevant factors" test contravenes this Court's framework for interpreting statutes and is in conflict with precedent.

The McDonald "relevant factors" test is also in conflict with other Washington decisions interpreting Washington's burglary statute. RAP 13.4(b)(1), (2). For example, in Moran, Division One of the Court of Appeals examined the present "use of the house," not "all relevant factors." State v. Moran, 181 Wn. App. 316, 322, 324 P.3d 808 (2014) ("We next inquire as to the use of the house. The record establishes that the house was being used for lodging. Kevin does not contest this.") (emphasis added). This analysis was premised on the "plain reading of the

statute," not some amorphous relevant factors test. Id. at 323. Other Washington decisions interpreting the burglary statute similarly emphasis the statutory language. See, e.g., State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (noting rule that legislative intent is derived from the language of the statute alone when the language is clear); State v. Murbach, 68 Wn. App. 509, 513-14, 843 P.2d 551 (1993) (interpreting statutory language in burglary statute in light of New Mexico case which interpreted similarly worded statute).

The decision here is also inconsistent with a recent Court of Appeals decision from Division Two, which shows that it is the *use* of a building that controls, not its *type*. State v. McPherson, 186 Wn. App. 114, 344 P.3d 1283 (2015). In McPherson, the defendant was convicted of residential burglary after burglarizing a jewelry store. Id. at 116-17. 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. Id. at 116. Accordingly, the evidence was sufficient to prove that the building was a "dwelling." Id. at 119. If it was simply the *type* of building which controlled, the defendant's insufficiency argument might have prevailed.

e. States with similar burglary statutes focus on the *use* of the building, not its *type*.

Other jurisdictions make this distinction. For example, in Utah burglary is elevated from third degree to second degree if the offense was committed in a "dwelling." State v. Francis, 284 P.3d 720, 2012 UT App 215 (Utah Ct. App. 2012); Utah Code § 76-6-202. "Dwelling" is defined as 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); Francis, 284 P.3d at 721. Under this language, "the key inquiry is 'the actual use of the particular structure that is burglarized, not the usual use of similar types of structures.'" Francis, 284 P.3d at 721 (quoting State v. McNearney, 246 P.3d 532, 534, 2011 UT App 4 (Utah Ct. App. 2011)). Under this test, evidence that a house was never occupied was insufficient to prove that it was a "dwelling." McNearney, 246 P.3d at 535. In contrast, evidence that a caretaker lived at a church at the time of the offense was sufficient to prove that the building was a "dwelling." Francis, 246 P.3d at 720-21.

Another jurisdiction is California. Under California law, a person is guilty of 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. Thus, "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 rather than the design of the building, its customary use, or its current occupancy that is important." People v. Burkett, 220 Cal. App. 4th 572, 579, 163 Cal. Rptr. 3d 259 (2013).

f. Because the vacated house was not used or ordinarily used for lodging at the time of the charged offense, it was not a dwelling.

Applying the proper test, it is undisputed that on December 16, 2013, the date of the charged offense, the property was not being used by a person for lodging. It was unoccupied. RP 96. The owners had not resided there for about half a year. RP 155-56. While the owners returned once or twice a month to work on the property, there was no evidence they resided or slept there. RP 156-57. That the furnace was not working in December indicates they had not. RP 109. Thus, the owners also no longer ordinarily used the building for lodging. It follows that a jury could not rationally find that the building was a dwelling, i.e., used or ordinarily used for lodging. The Court of Appeals should have reversed for insufficient evidence because the house was not a "dwelling." State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (State must prove all the elements of an offense beyond a reasonable doubt through sufficient evidence).

g. This Court should grant review to resolve the conflict in precedent and because the issue is one of substantial public importance.

In sum, review is warranted because the Court of Appeals' decision is in conflict with precedent. RAP 13.4(b)(1), (2). Interpretation of Washington's burglary law is also a matter of substantial public interest. RAP 13.4(b)(4). To resolve the conflict and to lay out a proper test on what constitutes a "dwelling," this Court should grant review.

2. The Court of Appeals improperly refused to review whether the trial court erred in imposing legal financial obligations without inquiring into the defendant's ability to pay.

For the first time on appeal, Ms. Highsmith argued that the trial court improperly imposed legal financial obligations because the court did not conduct an adequate inquiry into her present and future ability to pay. The Court of Appeals refused to review the issue, reasoning that its "decision in *State v. Blazina*, 174 Wn.App. 906, 911, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827, 344 P.3d 680 (2015), issued before Highsmith's May 23, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing may waive a related claim of error on appeal." Op. at 8.

As this Court subsequently held, however, RAP 2.5(a) grants appellate courts discretion to accept review of certain errors not appealed as a matter of right. State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680

(2015). While "[e]ach appellate court must make its own decision to accept discretionary review," the broken LFO system "demand[ed]" that this Court reach the merits of the underlying appeals. Id.

The Court of Appeals impliedly recognized that it had authority to reach the issue but "decline[d] to exercise such discretionary review here." Op. at 8. The sole basis for this refusal to exercise discretion was its 2013 decision in Blazina, reasoning that it provided "notice" to Ms. Highsmith that she must raise the issue at the trial court level. Op. at 8. But as Judge Bjorgen recognized, "this holding cannot serve as a license to continue to decline review of the same issue, when the Supreme Court has also made clear that these same circumstances demand the exercise of discretion *to* review." State v. Lyle, 188 Wn. App. 848, 855, 355 P.3d 327 (2015) (Bjorgen, J. dissenting).

Moreover, the Court of Appeals decision is a failure to exercise judicial discretion. "Judicial discretion" means "'a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.'" T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)). The blanket refusal to exercise discretion in this case is arbitrary and thus constitutes

an abuse of discretion. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999) ("Failure to exercise discretion is an abuse of discretion.").

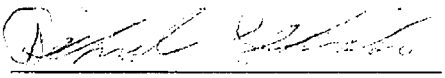
Accordingly, the decision is in conflict with precedent, meriting review. RAP 13.4(b)(1), (2). Legal financial obligations are also matter of great public importance, justifying review. See Blazina, 182 Wn.2d at 835; RAP 13.4(b)(4). This Court should grant review and correct the Court of Appeals. Alternatively, if review is not granted on the primary issue, the Court should exercise its own discretion and remand for a new sentencing hearing on legal financial obligations. Blazina, 182 Wn.2d at 839 (remanding cases for new sentencing hearings).

F. CONCLUSION

In evaluating what constitutes a "dwelling," the Court of Appeals has relied not on the statutory meaning of the term, but on a non-exclusive "relevant factors" test. This amorphous standard is not in accord with the statutory meaning of the term "dwelling" and contravenes this Court's framework for statutory interpretation. This Court should grant review and hold that it is the use or ordinary use of a building that is controlling, i.e., a person uses or ordinarily uses the building for lodging.

DATED this 18th day of February, 2016.

Respectfully submitted,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Petitioner

Appendix

Filed
Washington State
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Division Two

January 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KRISTEN A. MARIA HIGHSMITH, Appellant.	No. 46382-2-II UNPUBLISHED OPINION

JOHANSON, C.J. — A jury found Kristen Highsmith guilty of residential burglary after she took items from a home that was unoccupied at the time of the burglary. Highsmith appeals her conviction and sentence. We hold that (1) the evidence was sufficient to support Highsmith's conviction because a rational fact finder could conclude, based on the evidence, that the house was ordinarily used for lodging, (2) Highsmith did not receive ineffective assistance of counsel because counsel's chosen defense was a legitimate trial tactic, and (3) Highsmith has waived any challenge to the trial court's imposition of legal financial obligations (LFOs). Accordingly, we affirm Highsmith's conviction and sentence.

FACTS

In December 2012, Natalie and Landon Foss purchased a home in Port Orchard. The following year, the Fosses decided to move back to Spokane. They listed the Port Orchard house for sale in July 2013. The Fosses kept some of their furniture and personal effects—including one

of their vehicles—at the Port Orchard house while it was listed for sale. After the move to Spokane, the Fosses regularly returned to the Port Orchard house once or twice a month to continue work on various home improvement projects.

On December 16, 2013, the Fosses' real estate broker, Sandra Nelson, visited the property, which had previously been locked with a realtor's lockbox. When she arrived, Nelson observed a vehicle in the driveway that she did not recognize. Concerned, Nelson called 911. Port Orchard Police Sergeant Donna Main and Officer Nathan Lynch responded to the scene. As Officer Lynch drove toward the home, the suspicious vehicle approached from the opposite direction. Officer Lynch stopped the car, which was driven by Highsmith. Officer Lynch saw clothes and boxes in Highsmith's vehicle.

Meanwhile, Nelson accompanied another responding deputy to the Fosses' house. When she passed Highsmith's car, Nelson saw bedding that she recognized as belonging to the Fosses. Once there, it was clear to Nelson that furniture, as well as a number of the Fosses' personal effects, were missing from the home. Based on Nelson's description of the home, Officer Lynch arrested Highsmith.

Officer Lynch took photographs of the items contained in the car. He e-mailed those pictures to the Fosses who confirmed that some of those items were their belongings. Natalie[1] explained that "[a]lmost everything" was gone, they were missing couches, lamps, rugs, tables, pictures, personal items from their bathrooms, and their children's toys that had been left because they were "still going back and forth." 1 Report of Proceedings (RP) at 163.

[1] We refer to the Fosses individually by their first names for clarity, intending no disrespect.

The State charged Highsmith with residential burglary under RCW 9A.52.025(1). At trial, defense counsel argued that Highsmith lacked the intent to commit a crime when she entered the Foss home. A jury found Highsmith guilty as charged. At the sentencing hearing, the trial court found that, but for Highsmith's incarceration, she was capable of working and, therefore, had the ability to pay the LFOs. Highsmith appeals.

ANALYSIS

I. INSUFFICIENT EVIDENCE

Highsmith argues that the evidence was insufficient to support her conviction because under the "relevant factors" test, the State failed to prove that the building was a "dwelling" for purposes of the residential burglary charge. We disagree because sufficient evidence established that the burglarized building was ordinarily used for lodging.

To determine whether evidence is sufficient to sustain a conviction, we review the evidence in the light most favorable to the State. *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003). The relevant question is "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *Wentz*, 149 Wn.2d at 347). In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Drum*, 168 Wn.2d at 35 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We interpret the evidence "'most strongly against the defendant.'" *State v. Hernandez*, 172 Wn. App. 537, 543, 290 P.3d 1052 (2012) (internal quotation marks omitted) (quoting *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993)). We consider both circumstantial and direct evidence as equally reliable and defer to the trier of fact on issues of conflicting testimony, witness

credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Under RCW 9A.52.025(1), "[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." "'Dwelling' means any building or structure . . ., or a portion thereof, which is used or *ordinarily used* by a person for lodging." RCW 9A.04.110(7) (emphasis added). Whether a particular building is a dwelling turns on all relevant factors and is generally decided by the jury. *State v. McDonald*, 123 Wn. App. 85, 91, 96 P.3d 468 (2004).

In support of her contention that the unoccupied home here did not constitute a dwelling on the date of the alleged crime, Highsmith relies primarily on this court's decision in *McDonald*. There, a husband and wife owned a home in Gig Harbor in which they had lived for several years. *McDonald*, 123 Wn. App. at 87. The couple sought to remodel the home, so they moved to Tacoma, spending evenings and weekends performing the improvements. *McDonald*, 123 Wn. App. at 87. While the home was "essentially under construction," it was burglarized. *McDonald*, 123 Wn. App. at 87.

In *McDonald*, we held that the question of whether a building is a residence turns on all relevant factors and there it presented a jury question as to whether the house was a dwelling. 123 Wn. App. at 91. The *McDonald* court cited several cases from other jurisdictions to identify a number of factors to consider in deciding if a house is a dwelling, including whether "'the occupant deemed the house to be her place of abode and whether she treated it as such,'" whether it is furnished and rented out periodically, if it was inhabited, whether it was maintained as a dwelling,

and how long it was vacant. 123 Wn. App. at 91 n.18 (quoting *State v. Black*, 627 So. 2d 741, 745 (La. App. 1993)).

Here, Highsmith asserts that, unlike *McDonald*, the State's evidence was insufficient to prove that the Fosses' home was a dwelling because the home was unoccupied for longer than the two-to-three-month period in *McDonald*, the Fosses returned only once or twice a month, and there was no testimony that the Fosses slept at the home when they did return. Therefore, in Highsmith's view, the jury could not have found that the house was a dwelling considering the relevant factors.

Notwithstanding these contentions, there was sufficient evidence that the Fosses' house was used or ordinarily used for lodging such that the jury could have rationally found that the home was a dwelling for purposes of Highsmith's residential burglary conviction. The Fosses lived in the Port Orchard home for several months after purchasing it. Natalie testified that several pieces of their furniture and home fixtures had been taken.

The burglars had also taken sheets off of the Fosses' bed, their shower curtains, shampoo, Natalie's curling iron, Landon's shaving kit, and toilet paper from the bathroom. Likewise missing were articles of the Fosses' clothing, photographs, and children's toys. Natalie explained that they purposely declined to pack some of their children's favorite things and clothing at the Port Orchard house because "[they] went back and forth." 1 RP at 167.

There was sufficient evidence from which a rational fact finder could have concluded that the home was ordinarily used for lodging and therefore qualified under the statute as a dwelling. Accordingly, we hold that Highsmith's conviction was supported by sufficient evidence.[2]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Highsmith next argues that she received ineffective assistance of counsel because her trial attorney did not raise the "strong defense" that the Fosses' home was not a dwelling. In Highsmith's view, the jury "likely did not even think there was an issue as to whether the building was a 'dwelling'" because it was not raised. Br. of Appellant at 16. We disagree that Highsmith's trial counsel rendered ineffective assistance.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). An appellate court reviews an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362. We need not address both

[2] In the alternative, Highsmith asks us to adopt a new test as to what constitutes a dwelling premised on the statutory meaning of dwelling. Highsmith asserts that the evidence also would be insufficient to establish that the Fosses' home was a dwelling under this proposed test. To the extent Highsmith argues that the Fosses' home is not a dwelling because it was unoccupied at the time of the burglary, we reject it. Highsmith ignores the statutory language "used or ordinarily used" for lodging. Here, the evidence shows the Fosses' home was ordinarily used for lodging.

prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Given the deference we afford defense counsel's decisions in representation, the threshold for deficient performance is high. *Grier*, 171 Wn.2d at 33. Thus, "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, Highsmith's trial counsel challenged whether the State's evidence established that Highsmith entered the home with the intent to commit a crime. His defense theory was that Highsmith, a former real estate agent herself, simply intended to show a friend a listed home that was similar to one owned by that friend's mother. This theory was as viable a challenge as the argument Highsmith now asserts that counsel should have made and we give exceptional deference when evaluating counsel's strategic decisions. *Strickland*, 466 U.S. at 689.

Defense counsel opted to premise Highsmith's defense on one arguably reasonable theory in lieu of another. Accordingly, we hold that counsel employed a legitimate trial tactic and therefore counsel's performance was not deficient. *Kyllo*, 166 Wn.2d at 863. We hold that Highsmith's argument fails.

III. LEGAL FINANCIAL OBLIGATIONS

Highsmith argues that the trial court erred during her sentencing hearing by failing to conduct an inquiry into her present and future ability to pay before imposing LFOs. We decline to reach the merits of Highsmith's argument.

Under RCW 10.01.160(3), "[t]he 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."

But Highsmith did not challenge the trial court's imposition of LFOs at her sentencing. Our decision in *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827, 344 P.3d 680 (2015), issued before Highsmith's May 23, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing may waive a related claim of error on appeal. Our Supreme Court noted that an appellate court may use its discretion whether to reach unpreserved claims of error. *Blazina*, 182 Wn.2d at 830. We decline to exercise such discretionary review here. *See State v. Lyle*, 188 Wn. App. 848, 851-52, 355 P.3d 327 (2015). Accordingly, we hold that Highsmith has waived any challenge to the trial court's imposition of LFOs.

We affirm Highsmith's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick, J.
WORSWICK, J.

Maxa, J.
MAXA, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 46382-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Randall Sutton
[kcpa@co.kitsap.wa.us]
Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 18, 2016

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