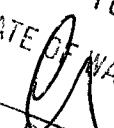


NO. 46865-4-II

FILED  
COURT OF APPEALS  
DIVISION II  
2015 JUL 16 PM 1:20  
STATE OF WASHINGTON  
BY   
DEPUTY

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
RESPONDENT,

VS.

THOMAS ASBACH,  
APPELLANT,

---

STATEMENT OF ADDITIONAL GROUNDS

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THOMAS ASBACH # 998435 I-13-21  
COYOTE RIDGE CORRECTION CENTER  
P.O. BOX 769  
CONNELL, WA. 99326

I, THOMAS ASBACH, HAVE RECEIVED AND REVIEWED THE OPENING BRIEF PREPARED BY MY ATTORNEY. SUMMARIZED BELOW ARE THE ADDITIONAL GROUNDS FOR REVIEW THAT ARE NOT ADDRESSED IN THAT BRIEF. I UNDERSTAND THE COURT WILL REVIEW THIS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW WHEN MY APPEAL IS CONSIDERED ON THE MERITS.

## ADDITIONAL GROUND 1

THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS WHEN IT FAILED TO CONSIDER MR. ASBACH'S PRESENT OR FUTURE ABILITY TO PAY IN VIOLATION OF RCW 10.01.160 (3).

TO ENTER A FINDING REGARDING THE DEFENDANT'S ABILITY TO PAY LFU'S AND RESTITUTION, A SENTENCING COURT MUST CONSIDER THE INDIVIDUAL DEFENDANT'S FINANCIAL RESOURCES AND THE BURDEN OF IMPOSING SUCH OBLIGATIONS ON HIM. RCW 10.01.160; STATE V. BERTRAND, 105 W.N.APP. 393, 403-04 (2011) (CITING STATE V. BALDWIN, 63 W.N.APP. 303, 312 (1991)).

THE GENERAL RULE IS THAT ISSUES NOT RAISED IN THE TRIAL COURT MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL. RAP 2.5 (a) STATE V. FORD, 137 W.N.2D 472, 477 (1999); STATE V. MOEN, 129 W.N.2D 535, 543 (1996). BY ITS OWN TERMS, HOWEVER, THE RULE IS DISCRETIONARY RATHER THAN ABSOLUTE. RAP 2.5 (a) (AN "APPELLATE COURT MAY REFUSE TO REVIEW ANY CLAIM OF ERROR WHICH WAS NOT RAISED IN THE TRIAL COURT"). THUS, THE RULE NEVER OPERATES AS AN ABSOLUTE BAR TO REVIEW.

IN THE CONTEXT OF SENTENCING, ESTABLISHED CASELAW HOLDS THAT ILLEGAL OR ERRONEOUS SENTENCES MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL. EG. MOEN, IMPOSITION OF A CRIMINAL PENALTY NOT IN COMPLIANCE WITH SENTENCING STATUTES MAY BE ADDRESSED FOR THE FIRST TIME ON APPEAL. IN RE PERS. RESTRAINT OF FLEMMING, 129 W.N.2D 529, 532 (1996) ("SENTENCING ERROR CAN BE ADDRESSED FOR THE FIRST TIME ON APPEAL UNDER RAP 2.5 EVEN IF THE ERROR IS NOT JURISDICTIONAL OR CONSTITUTIONAL.")

APPELLATE COURT'S REVIEW THE TRIAL COURT'S DECISION ON ABILITY TO PAY UNDER THE CLEARLY ERRONEOUS STANDARD. BERTRAND, 105 W.N.APP. AT 403-04. TO SURVIVE APPELLATE SCRUTINY THE RECORD MUST ESTABLISH THE SENTENCING JUDGE AT LEAST CONSIDERED THE DEFENDANT'S FINANCIAL RESOURCES AND THE NATURE OF THE BURDEN IMPOSED BY REQUIRING PAYMENT. *id.* SEE STATE V. GRAYSON, 154 W.N.2D 333, 342 (2005) (COURT'S FAILURE TO EXERCISE DISCRETION IN SENTENCING IS REVERSIBLE ERROR.)

RCW 10.01.160 REQUIRE THE TRIAL COURT TO CONSIDER THE DEFENDANT'S PRESENT, PAST, AND FUTURE ABILITY TO PAY THE AMOUNT ORDERED BEFORE IMPOSING LFO'S AND RESTITUTION. STATE V. BLAZINA, \_\_\_\_\_ WN.2d \_\_\_\_\_, 344 p.3c/680 (2015)

IN THIS CASE, THE TRIAL COURT ORDERED APPELLANT TO PAY \$800.00 FOR LEGAL FEES AND COSTS. (WRP. OCT. 4, 2014 AT 21) IN SO ORDERING, THE TRIAL COURT INCLUDED GENERIC, PRE-FORMATTED LANGUAGE IN THE JUDGMENT AND SENTENCE THAT CONCLUDED APPELLANT HAD THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THIS AMOUNT. THERE IS NOTHING IN THE RECORD, HOWEVER, INDICATING THAT THE TRIAL COURT EVER TOOK INTO ACCOUNT APPELLANT'S FINANCIAL RESOURCES OR LIKELY FUTURE RESOURCES.

MR. ASBACH CHALLENGES THIS PRE-FORMATTED CONCLUSION ON THE GROUNDS THAT THE RECORD REVEALS NO SUCH CONSIDERATION TOOK PLACE. STATE V. GRAYSON, 154 WN.2d 333, 342 (2005) (COURT'S FAILURE TO EXERCISE DISCRETION IN SENTENCING IS REVERSIBLE ERROR.)

AS IN BERTRAND, THIS RECORD REVEALS NO FACTUAL FINDINGS OR ANALYSIS SUPPORTING THE COURT'S CONCLUSION THAT MR. ASBACH HAD THE PRESENT OR FUTURE ABILITY TO PAY THE LFO'S ORDERED. BERTRAND, 165 WN. APP. AT 403-04.

ACCORDINGLY, THE PORTION OF THE FINDING QUOTED IN THE JUDGMENT AND SENTENCE WAS CLEARLY ERRONEOUS AND SHOULD BE STRICKEN.

REMAND WITH AN ORDER THAT THE TRIAL COURT STRIKE THE UNSUPPORTED FINDING FROM THE JUDGMENT AND SENTENCE AND ORDER THAT THE COURT MAKE THE MANDATED INQUIRY ANNOUNCED IN BLAZINA.

THIS COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW THE APPELLANTS' ASSIGNMENT OF ERROR BECAUSE A JUDICIAL DETERMINATION IN THIS COURT IS NECESSARY BECAUSE IT INVOLVES A MATTER OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST ON WHAT IS REQUIRED OF COURTS WHEN IMPOSING LFO'S ON INDIGENT INDIVIDUALS. IT INVOLVES A CONTINUING CONTROVERSY THAT IS LIKELY TO REQUIR THAT DESIRE'S AN AUTHORITATIVE DETERMINATION TO PROVIDE FUTURE GUIDANCE TO PUBLIC OFFICERS AND IT IMPLICATES DUE PROCESS RIGHTS THAT ARE SUFFICIENTLY INFUSED WITH PUBLIC INTEREST TO WARRANT APPELLATE REVIEW IN THIS COURT. WHEN A STATE ENACTS A CRIMINAL STATUTE, WHICH SETS OUT A PROCEDURE FOR THE IMPOSITION OF A PARTICULAR PENALTY, A DEFENDANT HAS A "SUBSTANTIAL AND LEGITIMATE" EXPECTATION THAT HE WILL BE DEPRIVED OF HIS LIBERTY ONLY IF THE STATE COMPLIES WITH THE PROCEDURAL REQUIREMENTS OF THAT STATUTE. HIRKS V. OKLAHOMA, 447 U.S. 343, 346, 100 S.Ct 2227, 2229 (1980); STATE V. BERRY, 120 WN.2d 431, 698 (1993).

## ADDITIONAL GROUND 2

MR. ASBACH'S TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE U.S. CONSTITUTION AMEND. VI AND WASH. CONSTITUTION. ART. I SECTION 22.

TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST SHOW THAT HIS COUNSEL'S REPRESENTATION WAS DEFICIENT AND THAT HE WAS PREJUDICED AS A RESULT. *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)

TO SHOW DEFICIENT PERFORMANCE, A DEFENDANT MUST SHOW THAT DEFENSE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS. *STATE V. REICHENBACH*, 153 Wn.2d 126, 130 (2004). TO SHOW PREJUDICE, A DEFENDANT MUST SHOW A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S PURPORTEDLY DEFICIENT CONDUCT, THE OUTCOME OF THE PROCEEDING WOULD HAVE DIFFERED. *id.* BECAUSE BOTH PRONGS MUST BE MET, A FAILURE TO SHOW EITHER PRONG WILL END THE INQUIRY. *STATE V. FREDRICK*, 45 Wn.App. 916, 923 (1986)

TO PREVAIL ON A INEFFECTIVE ASSISTANCE CLAIM, A DEFENDANT MUST OVERCOME A STRONG PRESUMPTION THAT COUNSEL'S PERFORMANCE WAS REASONABLE. *STATE V. GRIER*, 171 Wn.2d 17, 33 (2011); *STATE V. KYLLO*, 166 Wn.2d 856, 862 (2009) A DEFENDANT CAN REBUT THE PRESUMPTION OF REASONABLE PERFORMANCE BY SHOWING THAT "THERE IS NO CONCEIVABLE LEGITIMATE TACTIC EXPLAINING COUNSEL'S PERFORMANCE." *id.*

MR. ASBACH CONTENDS THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S RECOMMENDATION CONSIDERATIONS WHEN BEING SENTENCED. HE ARGUES THAT THE STATE RELIED ON FACTORS NOT RELEVANT TO HIS VERDICT AND ESSENTIALLY REQUESTED THE TRIAL COURT TO IMPOSE A SENTENCE BASED ON EXCEPTIONAL SENTENCE STANDARDS. AN OFFENDER MAY ALWAYS CHALLENGE THE PROCEDURE BY WHICH A SENTENCE WAS IMPOSED. *STATE V. HERZOG*, 112 Wn.2d 419, 423 (1989) (QUOTING *STATE V. AMMONS*, 105 Wn.2d 175, 182-83 (1986) (SEE V.R.P. OCT. 4, 2014 SENTENCING AT 12-13)

FIRST, THE STATE RECOMMENDED THE HIGH END OF 68 MONTHS STATING THAT IT WAS "BASED ON TWO CONSIDERATIONS" (V.R.P. OCT. 4, 2014 AT 12) HE WENT ON TO STATE "ONE IS

THAT THE OFFENDER SCORE, ... IS ELEVEN... THE STATE BELIEVES THAT EVERY ONE OF THESE POINTS SHOULD HAVE SOME IMPACT WITH REGARD TO HIS SENTENCE... ELEVEN IS NOT NINE; AND THEREFORE, THE STATE BELIEVES THAT THE KIND OF IMPACT IT SHOULD HAVE WOULD BE DETERMINATION OF THE APPROPRIATE SENTENCE WITHIN THE RANGE. (id at 12-13)

SECOND, THE STATE WENT ON TO STATE "THE SECOND FACTOR IS THAT THIS DEFENDANT DID NOT APPEAR AT THE TIME OF HIS ORIGINAL SENTENCING... THE STATE FEELS THAT THE COURT SHOULD TAKE THAT INTO ACCOUNT AS A FACTOR TO CONSIDER WITH REGARD TO WHAT THE APPROPRIATE PUNISHMENT IS IN THIS CASE." (id at 13)

MR. ASBACH ASSERTS THAT HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATES CONSIDERATION RECOMMENDATIONS, IT RESULTED IN HIS LENGTH OF PUNISHMENT BEING INCREASED TO THE HIGH END. HAD COUNSEL OBJECTED TO THE STATE'S REQUEST TO IMPOSE THE HIGH END BECAUSE ASBACH'S OFFENDER POINTS WERE AT ELEVEN OR MADE AN ARGUMENT TO REBUT IT BASED ON THE STATE'S RELIANCE ON EXCEPTIONAL SENTENCE STANDARDS OF THE DEFENDANT'S HIGH OFFENDER SCORE RESULTS IN SOME OF THE CURRENT OFFENSES GOING UNPUNISHED, ASBACH WOULD'VE BEEN GIVEN A LOWER SENTENCE. COUNSEL SHOULD HAVE KNOWN THAT THE STATES CONSIDERATIONS WERE BASED ON 9.94A.535(B)(c) WHICH ONLY ALLOW A SENTENCE TO BE IMPOSED ABOVE OR OUTSIDE THE STANDARD RANGE NOT WITHIN THEM.

ALSO, COUNSEL'S FAILURE TO OBJECT TO THE STATES FACTOR THAT MR. ASBACH DID NOT APPEAR AT THE TIME OF HIS ORIGINAL SENTENCING ALLOWED HIS LENGTH OF PUNISHMENT TO BE INCREASED. ALTHOUGH HIS COUNSEL INFORMED THE COURT THAT HE RECEIVED AN EMAIL FROM "DAWN WARD AT THE OFFICE OF ASSIGNED COUNSEL... HE IS WALKING TO COURT FROM MAYTOWN. HE WILL BE THERE AS SOON AS HE CAN." (id at 14) AND INDICATED HE "ALSO RECEIVED FOUR VOICE MAILS FROM [ASBACH] THAT MORNING... STATING "HE'S WALKING, AND HE WILL BE THERE AS SOON AS HE CAN." (id) COUNSEL SHOULD'VE KNOWN THAT THESE WERE FACTORS NOT RELEVANT TO ASBACH'S CONVICTION AND SHOULD'VE ACKNOWLEDGED IT TO THE COURT. THERE IS NO CONCEIVABLE LEGITIMATE TACTIC EXPLAINING COUNSEL'S FAILURE TO OBJECT. THIS WAS DEFICIENT PERFORMANCE THAT PREJUDGED MR. ASBACH BY INCREASING HIS PUNISHMENT RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL. REMAND FOR RESENTENCING

### ADDITIONAL GROUND 3

INSUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE CONVICTION OF BURGLARY IN THE SECOND DEGREE.

DUE PROCESS REQUIRES THE STATE TO PROVE EVERY ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT. IN RE WINSHIP, 397 U.S. 358, 364, 90 S.Ct. 1065 (1970)

THE TEST ON REVIEW OF A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE IS WHETHER THE APPELLATE COURT CAN SAY, AFTER REVIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THAT ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME TO HAVE BEEN ESTABLISHED BEYOND A REASONABLE DOUBT. STATE V. GREEN, 94 Wn.2d 216, 221 (1980); JACKSON V. VIRGINIA, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1984)

WHEN THE SUFFICIENCY OF THE EVIDENCE IS CHALLENGED IN A CRIMINAL CASE, ALL REASONABLE INFERENCES FROM THE EVIDENCE MUST BE DRAWN IN FAVOR OF THE STATE AND INTERPRETED MOST STRONGLY AGAINST THE DEFENDANT. STATE V. SALINAS, 119 Wn.2d 192, 201 (1992)

A CLAIM OF INSUFFICIENT EVIDENCE ADMITS THE TRUTH OF THE STATE'S EVIDENCE AND ALL INFERENCES THAT REASONABLY CAN BE DRAWN FROM THAT EVIDENCE. STATE V. CATON, 174 Wn.2d 239, 241 (2012)

THE STATE MUST PROVE BOTH INTENT TO COMMIT A CRIME AND UNLAWFUL ENTRY IN ORDER TO PROVE SECOND DEGREE BURGLARY. STATE V. HOWE, 116 Wn.2d 446 (1991) (CITING STATE V. STEINBACH, 101 Wn.2d 460, 462 (1984))

APPELLANT (MR. ASBACH), CONTENDS THAT INSUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT HIS CONVICTION OF SECOND DEGREE BURGLARY. HE ASSERTS THE STATE FAILED TO ESTABLISH THAT HE ENTERED OR REMAINED UNLAWFULLY, OR THAT HE HAD INTENT TO COMMIT A CRIME.

A PERSON IS GUILTY OF SECOND DEGREE BURGLARY IF, "WITH INTENT TO COMMIT A CRIME AGAINST A PERSON OR PROPERTY THEREIN, HE OR SHE ENTERS OR REMAINS UNLAWFULLY IN A BUILDING... RCW 9A.52.030.

A PERSON ENTERS OR REMAINS UNLAWFULLY IN OR UPON PREMISES WHEN HE OR SHE IS NOT THEN LICENSED, INVITED, OR OTHERWISE PRIVILEGED TO SO ENTER OR REMAIN.

ASBACH ASSERTS THAT THE TESTIMONY PROVIDED AT TRIAL FAILED TO ESTABLISH SUFFICIENT EVIDENCE TO CONVICT HIM OF SECOND DEGREE BURGLARY.

FIRST, HE POINTS TO THE TESTIMONY OF OFFICER FINCH. FINCH TESTIFIED THAT "[HE] COULD NOT SEE THE ENTIRE DOOR, SO [HE] COULDN'T SEE IF IT WAS OPENED OR CLOSED." (V.P. VOL. 1. AT 124). HE TESTIFIED THAT HE "OBSERVED A HISPANIC FEMALE EXIT THE MAIN DOOR OF THE GARAGE." (id. AT 125) THAT SHE "WAS CARRYING A PLASTIC SACK IN HER HANDS." (id.) THAT HE OBSERVED DAMAGE TO THE GARAGE DOOR BUT IT WAS NOT FRESH DAMAGE. (id. AT 131) THAT "A MALE WALKED OUT OF THE MAIN DOOR." (id. AT 133) THAT "HE DID NOT" HAVE ANYTHING IN HIS HANDS. (id. AT 134) THAT THE GROUND WAS "WET WITH DEW OUTSIDE." (id. AT 138) THAT HE CONFIRMED THAT HE COULDN'T SEE THE DOOR ITSELF. (id. AT 159) THAT HE DID NOT GO INTO THE GARAGE TO DO ANY INVENTORY. (id. AT 161-162) THAT ASBACH STATED HE DIDN'T TAKE ANYTHING. (id. AT 163-64) THAT HE DID NOT SEE ANY 'NO TRESPASSING' SIGNS ON THE PROPERTY. (id. AT 167) THAT HE DID NOT GO CHECK TO SEE IF THERE WAS A GLUCOSE METER. (id. AT 168) THAT IT WAS WET ENOUGH TO WHERE... YOUR PANT LEGS AND SHOES WOULD GET WET. (id. AT 172-73) THAT HE NEVER LOOKED FOR FOOT PRINTS IN GARAGE. (id. 172) THAT MR. ASBACH... HAD NOTHING "TO BE STOLEN ON HIM OR IN HIS POSSESSION." (id.)

SECOND, HE POINTS TO THE TESTIMONY OF LIEUTENANT BARCLIFT. BARCLIFT TESTIFIED THAT HE WENT TO THE GARAGE WHERE THEY HAD BEEN SEEN EXITING... ATTEMPTED TO FIND THIS ITEM, BECAUSE I DIDN'T SEE IT IN HIS HANDS OR AT THAT POINT. (V.P. VOL. 1 AT 222) THAT HE WENT INSIDE THE GARAGE TO LOOK FOR THE GLUCOSE METER AND DID NOT FIND IT. (id. AT 223) THAT HE WENT INTO THE GARAGE AND HOUSE. (id. AT 227) TRIED TO FIND SOMETHING THAT MIGHT STAND OUT... LOOKED AROUND TO SEE WHAT WAS GOING ON IN THERE. (id.) THAT HE WENT INSIDE THE GARAGE TWICE WHILE INVESTIGATING THE INCIDENT. (id. AT 231) THAT THERE WAS DEW ON THE VEGETATION. (id. AT 232) NO. HE DID NOT THINK OF LOOKING THERE FOR FOOTPRINTS. I DID NOT SEE ANY FOOTPRINTS. (id. AT 234) DID NOT WRITE A REPORT. (id.) BECAUSE IT WAS HIS UNDERSTANDING THAT THE OFFICER OBSERVED HIM WALKING OUT OF THE BUILDING (id.) THERE WAS A GALLON MILK CONTAINER IN FRONT OF THE VEHICLE. (id.)



THIRD, THAT MR. ASBACH'S TESTIMONY WAS, THAT HE WAS LOOKING FOR WATER (id at 268) HAD A MILK GALLON BEHIND THE DRIVER'S SEAT AND IT GOT INFRONT OF THE CAR BECAUSE HE SET IT THERE. (id. AT 269) DID NOT KNOW THAT MARIA MADRIGAL HAD ANYTHING OR THAT SHE WAS PICKING STUFF UP. (id AT 270) DID NOT GO INTO THE GARAGE. (id. AT 271) THAT HE DIDNOT TAKE OR TELL BARCLIFT HE ONLY TOOK A GLUCOSE METER. (id. 275) THERES NO POSTING OF KEEP OUT SIGNS OR ANYWHERE ON THE PROPERTY. (id. 279)

MR. ASBACH MAINTAINS THAT THE STATE FAILED TO PROVE THAT HE ENTERED THE GARAGE BECAUSE THE TESTIMONY AND EVIDENCE DO NOT SUGGEST THAT HE EVER ENTERED. THE MOST IMPORTANT FACT INTRODUCED WAS BOTH OFFICERS TESTIMONY THAT THE GROUND OUTSIDE WAS WET. THE OFFICERS TESTIFIED THAT THERE WAS NO FOOTPRINTS IN THE GARAGE NOR THAT ANYTHING WAS FOUND IN MR. ASBACH'S POSSESSION. ALSO THE EXHIBIT PROVIDED OF THE PICTURE OF THE DOORWAY OF THE GARAGE DID NOT SHOW ANY FOOTPRINTS MADE OR IN THE VICINITY OF THE DOOR. ALTHOUGH OFFICER FINCH TESTIFIED THAT HE SEEN MR. ASBACH COME OUT OF THE GARAGE NOTHING INDICATES THAT HE ACTUALLY DID SEE HIM BASED ON THE EVIDENCE AND THE LACK OF EVIDENCE SHOWING HE EVER MAINTAINED POSSESSION OF ANYTHING. NOTHING WAS EVER FOUND. THERE WAS NO INTENT PROVEN EITHER BECAUSE THE STATE FAILED TO PROVE THAT MR. ASBACH WAS THERE TO COMMIT A CRIME. HE WAS THERE TO GET WATER FOR HIS CAR. EVIDENCE SUGGEST THAT HE WAS BECAUSE THE OFFICERS TESTIFIED THAT THERE WAS A MILK CARTON BY THE CAR BUT NO EXPLANATION WAS GIVEN BY THE OFFICERS OF HOW IT GOT THERE. MR. ASBACH TESTIFIED THAT THE MILK CARTON GOT THERE BECAUSE HE PUT IT THERE BECAUSE HE NEEDED WATER. ALSO MR. ASBACH TESTIFIED THAT THE PROPERTY GATE WAS OPEN AND THAT THERE WAS NO SIGNS INDICATING NO TRESPASSING. NOTHING INDICATES THAT THERE WAS AN INTENT TO PASS THAT GATE TO COMMIT A CRIME. HE ASSERTS THE COURT FAILED TO RECOGNIZE THE STATES FAILURE TO PROVE THE ELEMENTS OF SECOND DEGREE BURGLARY. HE ~~REQUEST~~ <sup>REQUEST</sup> THIS COURT TO DISMISS THE BURGLARY CHARGE.

A LESSER INCLUDED OFFENSE EXISTS WHEN ALL OF THE ELEMENTS OF THE LESSER CRIME ARE NECESSARY ELEMENTS OF THE GREATER CRIME. STATE V. HOLY, 104 UNCL.2d

315, 318 (1985) STATE V. HOLLGSON, 44 W.N. APP. 592, 599 (1986)

IF IT IS POSSIBLE TO COMMIT THE GREATER OFFENSE WITHOUT HAVING COMMITTED THE LESSER OFFENSE, THE LATTER IS NOT AN INCLUDED CRIME. STATE V. ROYBAL, 82 W.N. 2D 577, 583 (1973).

SECOND DEGREE BURGLARY REQUIRES THE FOLLOWING ELEMENTS: THE ACTOR MUST, WITH THE INTENT TO COMMIT A CRIME AGAINST A PERSON OR PROPERTY THEREIN, ENTER OR REMAIN UNLAWFULLY, IN A BUILDING. STATE V. BERGERSON, 105 W.N. 2D 1, 5 (1985)

FIRST DEGREE CRIMINAL TRESPASS REQUIRES THE ACTOR KNOWINGLY TO ENTER OR REMAIN UNLAWFULLY IN A BUILDING. STATE V. MOUNSEY, 31 W.N. APP. 511, 517, REV. DEN 97 W.N. 2D 1028 (1982)

SECOND DEGREE BURGLARY REQUIRES INTENT WHILE FIRST DEGREE CRIMINAL TRESPASS REQUIRES KNOWLEDGE. STATE V. ALLEN, 101 W.N. 2D 335, 341 (1984)

IN STATE V. SOTO, 45 W.N. APP. 839 (1986) THE COURT INDICATED THAT INTENT AND KNOWLEDGE ARE CULPABLE MENTAL STATES IN A HIERARCHY, ... RANGING FROM INTENT TO CRIMINAL NEGLIGENCE. (CITING STATE V. ACOSTA, 101 W.N. 2D 612, 618 (1984))

THE COURT IMPLIED THAT "WHEN ACTING KNOWINGLY SUFFICES TO ESTABLISH AN ELEMENT, SUCH ELEMENT ALSO IS ESTABLISHED IF A PERSON ACTS INTENTIONALLY. RCW 9A.08.010(e) PROOF OF A HIGHER MENTAL STATE IS NECESSARILY PROOF OF A LOWER." STATE V. ACOSTA, SWARA. THUS, PROOF OF SECOND DEGREE BURGLARY IS NECESSARILY PROOF OF FIRST-DEGREE CRIMINAL TRESPASS.

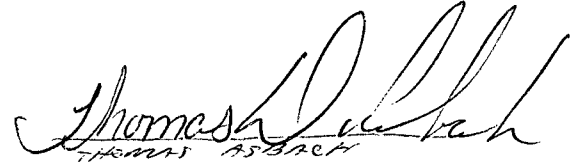
MR. ASBACH MAINTAINS THAT THIS COURT SHOULD, IN THE ALTERNATIVE, AGREE THAT THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR BURGLARY, BUT THAT THERE IS SUFFICIENT EVIDENCE OF INTENT TO SUPPORT A CONVICTION ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE CRIMINAL TRESPASS PURSUANT TO THE RULES ANNOUNCED IN SOTO.

REMAND WITH INSTRUCTIONS TO REDUCE HIS CHARGE OF BURGLARY TO CRIMINAL TRESPASS IN THE FIRST DEGREE.

CONCLUSION

THIS COURT SHOULD ENTER AN ORDER REMANDING FOR IMPOSITION OF LFO'S AND TO DETERMINE APPELLANT'S ABILITY TO PAY PURSUANT TO STATE V. BLAZINA, ENTER AN ORDER DISMISSING THE SECOND DEGREE BURGLARY OR IN THE ALTERNATIVE REDUCE THE CHARGE TO FIRST DEGREE CRIMINAL TRESPASS AND FIND THAT HIS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, AND REMAND FOR RESENTENCING.

DATED: 7-13-15

  
THOMAS ASBACH



Clerk: David C. Ponzoba

Division II Court of Appeals

7-13-15

RECEIVED

JUL 16 2015

RE: SAB

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

Mr. Ponzoba, I am requesting that the Division II Court of Appeals please send me a copy of my SAB pursuant to RAP 10.10.

Due to insufficient funds I am an indigent offender that has no money to pay for copies, let alone postage.

I would like to request a copy of this A.S.P. or as time may allow you to do so.

Thank you for aiding me in this request in which I respect so much.

Respectfully  
TH

Thomas W. Asbach #998435

Thomas W. Asbach