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Court of Appeals
Division III
State of Washington
No. 33959-9-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD LUDVIK

Appellant.

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

The Honorable Judge Harold D. Clarke, III

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Richard Ludvik was convicted of residential burglary after law enforcement found him in a vacant house with antique brass doorknobs in his pockets. Under these circumstances, the jury should have been instructed on the lesser included offense of second-degree burglary, because a jury could very likely have found the vacant house was not a “dwelling” at the time of the offense, had it been given the option of convicting Mr. Ludvik of a lesser burglary offense. Mr. Ludvik was denied his constitutional right to effective assistance of counsel when his attorney failed to request a lesser included second-degree burglary instruction.

Alternatively, Mr. Ludvik was denied his constitutional right to have the jury determine his guilt, and he was denied his constitutional right to effective assistance of counsel, when a deputy testified without objection that the investigation in this case was for “residential burglary.” The deputy’s opinion testimony invaded the province of the jury on its ultimate guilt determination, particularly since the facts were in dispute as to whether this matter involved “residential burglary” as opposed to burglary of a non-dwelling.

Finally, in the event Mr. Ludvik does not prevail in this appeal, he preemptively requests this Court deny any imposition of costs on appeal,

pursuant to the recommended practice in *State v. Sinclair*, No. 72102–0–I, 2016 WL 393719, at *2-7 (Wash. App. Jan. 27, 2016).

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to instruct the jury on the lesser included offense of second degree burglary. Defense counsel was ineffective for failing to request this instruction.
2. Defense counsel was ineffective for failing to object to impermissible opinion testimony by a deputy in this case. The court erred by convicting Mr. Ludvik of residential burglary where the province of the jury was invaded on the ultimate guilt determination.
3. The court erred by entering an unsupported finding on Mr. Ludvik’s ability to pay legal financial obligations, which this Court should consider in refusing to impose costs on appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Ludvik was denied his constitutional right to effective assistance of counsel when his attorney failed to request a lesser included instruction on second-degree burglary, where the evidence showed Mr. Ludvik removed items from a long-vacant house, which the jury could have determined was not a dwelling.

Issue 2: Whether a deputy’s testimony impermissibly invaded the fact-finding province of the jury on its ultimate guilt decision when the deputy testified that officers were investigating a “residential burglary” of a “residence.”

Issue 3: Whether this Court should deny imposition of any appellate costs against this indigent Appellant on appeal.

D. STATEMENT OF THE CASE

Richard Ludvik was convicted of residential burglary after law enforcement found him in a vacant house in Spokane with two other individuals. (RP 34, 44, 50, 52-53; 177-89)

On August 21, 2015, a neighbor called authorities after seeing a suspicious vehicle near the property in question. (RP 27) Responding Deputy Brad Humphrey called for backup when he believed someone may be in the house. (RP 29-31) Deputy Humphrey testified, without objection, as follows:

[W]e were starting to investigate an active residential burglary.

In that instance that particular call is a very high-risk call. There is – never been to a residence before... potentially violent felony...

RP 31 (emphases added).

Mr. Ludvik was found hiding in the house by a K-9 dog and officer. (RP 51-56; Exhibit 2, 3) When Mr. Ludvik was arrested, deputies found antique brass doorknobs in his pants pockets. (RP 39, 44; Exhibit 1) Also, several bags were packed with items that appeared to be collected from around the house and set near the window where boards had been removed to gain access to the house. (RP 32-36; Exhibit 1)

The house in question was owned by Jack Bryan, whose grandparents built it in 1933. (RP 61) It was filled with furniture, antiques and other personal items to such an extent that it was difficult to move about the house without falling; Mr. Bryan's family used the house for storage. (RP 40, 63, 66, 77-78, 83-84, 86; Exhibits D101-110) The house had boards over all of the windows and doors, the electricity circuit breaker was off, and the oil tank was in the backyard. (RP 28, 77, 79, 83)

Many break-ins had occurred over the years while the house sat vacant. (RP 46, 66, 68) No one had lived in the house for at least four years, though Mr. Bryan said he intended to move back there some day. (RP 61-62, 65-66)

Defense counsel argued there was insufficient evidence the house was a “dwelling” (RP 118-19, 128), or, alternatively, there was insufficient evidence Mr. Ludvik intended to commit a crime within the house (RP 118, 120, 122-23, 126, 128). Defense counsel also requested and received a lesser included instruction on criminal trespass, arguing Mr. Ludvik only trespassed in the house and never intended to take anything. (RP 91, 117-18, 128) Defense counsel never requested an instruction on second degree burglary of a non-dwelling. (CP 37-59)

The jury found Mr. Ludvik guilty as charged of residential burglary. (RP 134; CP 22, 84) Mr. Ludvik received a low-end standard-range sentence, and the court imposed only mandatory legal financial obligations along with a boilerplate finding on Mr. Ludvik’s ability to pay LFOs. (RP 153; CP 177-89, 180, 183-84)

This appeal timely followed. (CP 193)

E. ARGUMENT

Issue 1: Whether Mr. Ludvik was denied his constitutional right to effective assistance of counsel when his attorney failed to request a lesser included instruction on second-degree burglary, where the evidence showed Mr. Ludvik removed items from a long-vacant house, which the jury could have determined was not a dwelling.

Defense counsel argued Mr. Ludvik did not commit burglary of a “dwelling”, but then neglected to request the lesser included instruction for a burglary that occurs of a non-dwelling. The evidence clearly showed Mr. Ludvik entered the vacant house to commit some crime against the property therein, since he was found with brass doorknobs in his pockets and other bags appeared to be packed and set next to the window to remove items from the house. The salient question was not whether Mr. Ludvik intended to commit theft, but whether the vacant house was a “dwelling” so as to support a residential burglary conviction. Defense counsel seemed to recognize this pertinent issue in closing argument when he argued the vacant house was not a “dwelling.” Yet, defense counsel failed to request an instruction that would have allowed the jury to find Mr. Ludvik guilty of the lesser included offense of second-degree burglary, or burglary of a non-dwelling. This constituted ineffective assistance of defense counsel; the case should be reversed and remanded for a new trial.

When a defendant is charged with an offense consisting of varying degrees, the jury may find that person not guilty of the higher degree that has been charged and guilty of an inferior degree thereto. RCW 10.61.003. To benefit from this statute, the defendant (or counsel) would need to request an instruction on the inferior offense. *See e.g., State v. McDonald*, 123 Wn. App. 85, 96 P.3d 468 (2004); *State v. Crittenden*, 146 Wn. App. 361, 366, 189 P.3d 849 (2008), *review denied*, 165 Wn.2d 1042 (2009) (“To find an accused guilty of a lesser included offense, the jury must be instructed on its elements.”)

A defendant is entitled to a lesser-included offense jury instruction if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382, 385 (1978). First, “[t]o satisfy the legal requirement, the proponent must show that the proposed instruction describes an offense that is an inferior degree of the charged offense, or, alternatively, that the proposed instruction describes an offense each element of which is included within the charged offense.” *McDonald*, 123 Wn. App. at 88-89 (internal citations omitted). Second, “[t]o satisfy the factual requirement, the proponent must show that when the evidence is viewed in the light most favorable to him, the jury could find that even though the defendant is not guilty of the charged offense, he is guilty of the inferior or lesser offense embodied in the proposed instruction.” *Id.* at 89 (citing *State v.*

Tamalini, 134 Wn.2d 725, 732, 953 P.2d 450 (1998), *aff'd*, 249 F.3d 895 (9th Cir.2001) (evidence must support inference that defendant committed the lesser offense “instead of” the charged offense)).

The legal requirement is clearly met in this case: “second degree burglary is an inferior degree of residential burglary.” *McDonald*, 123 Wn. App. at 90 (internal quotation omitted) (the legislature mandated that “residential burglary” is a “more serious offense than second degree burglary.”) Residential burglary occurs when a person, with intent to commit a crime therein, enters or remains unlawfully in a “dwelling” other than a vehicle. RCW 9A.52.025. Whereas, a person commits the inferior degree of burglary (second degree burglary) if, with intent to commit a crime therein, he enters or remains unlawfully in a building other than a vehicle or dwelling. RCW 9A.52.030. The difference between these two offenses involves whether the building burglarized is a dwelling. *C.f.* RCW 9A.52.025 and .030. Dwelling is defined as “any building or structure... which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7).

State v. McDonald is analogous to this matter: the issue in that case was whether the court erred by failing to give a second-degree burglary instruction where a defendant was charged with residential burglary. 123 Wn. App. 85. There, like here, the pertinent issue at trial was whether the

defendant committed burglary of a “dwelling” when he unlawfully entered and took items from a vacant house. *Id.* at 87-88. The parties and court agreed that the legal requirement was clearly met; second-degree burglary is an inferior degree of residential burglary. *Id.* at 89-90.

The *McDonald* court then addressed the factual prong, viewing the evidence in a light most favorable to the defendant, and determined that a jury could have found the vacant house was not a dwelling. 123 Wn. App. at 90. Indeed, no one was living in the burglarized house from October 2002 to March 2003, so a jury could have found the house was not “used or ordinarily used by a person for lodging” on the date of the offense in December 2002. *Id.* The court emphasized the fact that, although the owners of the home had lived there for eight years, they had not been living in the residence for two or three months preceding the burglary. *Id.* at 87. Instead, the house was in the process of being remodeled. *Id.* Under these circumstances, the court concluded, the factual requirement for the lesser included instruction was met; that is, a jury could have found that the burglarized house was not a “dwelling” at the time of the offense. *Id.* at 90-91 (“the evidence in this case presents a jury question on whether the Hintons’ house was a ‘dwelling.’”) The trial court erred by failing to instruct on the inferior degree of second degree burglary, and the matter was reversed and remanded for a new trial. *Id.* at 86, 91.

Unlike in *McDonald, supra*, Mr. Ludvik is raising this error for the first time on appeal because he was denied his constitutional right to effective assistance of counsel when his defense attorney failed to request the lesser included instruction on second-degree burglary at trial. To establish ineffective assistance of counsel, Mr. Ludvik must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

When the failure to instruct the jury on a lesser-included offense is raised as an ineffective assistance of counsel claim, “[t]he salient question . . . is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.” *State v. Grier*, 171 Wn. 2d 17, 42, 246 P.3d 1260 (2011).

The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *Id.* at 43; *see also State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

In *Grier*, our Supreme Court found the withdrawal of lesser-included jury instructions was not ineffective assistance of counsel. 171 Wn.2d at 42-45. The Court reasoned “[the defendant] and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Id.* at 43. But, “where there is overwhelming evidence that the defendant is guilty of some offense, such strategy may be unreasonably risky.” *State v. Breitung*, 155 Wn. App. 606, 620, 230 P.3d 614 (2010), *aff’d*, 173 Wn.2d 393 (2011), (citing *Grier*, 150 Wn. App. at 643). “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.” *Grier*, 150 Wn. App. at 643

Here, defense counsel could not have reasonably believed that an “all or nothing” strategy was the best approach in this burglary case. *See Grier*, 171 Wn.2d at 43. Indeed, he requested a lesser included instruction on criminal trespass just in case the jury found Mr. Ludvik lacked intent to take anything from the vacant home. But the jury should have also been instructed on second-degree burglary, given defense counsel’s alternative argument that the vacant house did not constitute a “dwelling.”

The jury in this case was not likely to accept defense counsel’s argument that Mr. Ludvik did not intend to take anything from the house,

considering Mr. Ludvik was found with antique brass doorknobs in his pockets, and where bags had been packed with belongings from the house and placed by the window where Mr. Ludvik and his two cohorts appeared to have accessed the house. RP 32-36, 39, 44. Given the argument made in closing that the vacant house was not a dwelling (RP 118-19, 128), it would appear defense counsel simply overlooked the lesser included offense of second degree burglary. Counsel's oversight does not equate to legitimate trial strategy.

Had defense counsel requested an instruction on second-degree burglary, it most assuredly would have been given and resulted in a guilty verdict on second degree burglary. Like in *McDonald, supra*, the house in this case was vacant. 123 Wn. App. at 87-90; RP 61-62, 65-66. In fact, the house at issue here had been vacant for four years (compared to the two to three months of vacancy in *McDonald, supra*). RP 61-62, 65-66. The doors and windows were all boarded up, the circuit breaker was off, no one lived at the house, the family only used it for storage, and the house was likely unlivable in its current state given all the belongings and debris spread about so that even the owner and K-9 dog had difficulty traversing the rooms. RP 28, 40, 63, 66, 77-79, 83-84, 86; Exhibits D101-110) The owner's wife, who passed away six months before trial, had no interest in living in the home due to the multiple break-ins over the years.

RP 66, 68. Like explained in *McDonald*, a jury could certainly have found that this vacant home was not a “dwelling” and returned a not guilty verdict as to residential burglary, finding Mr. Ludvik guilty only of the lesser offense of second-degree burglary.

Without the lesser included instruction, the jury was more likely to convict Mr. Ludvik of residential burglary. The evidence showed Mr. Ludvik was not merely a trespasser who was looking for a place to sleep, for example. The evidence suggested Mr. Ludvik took items from within the vacant house; the jury was very likely to convict Mr. Ludvik of some degree of burglary rather than criminal trespass, since Mr. Ludvik personally removed antique brass doorknobs. RP 39, 41; Exhibit 1. Since the jury was likely to convict Mr. Ludvik of some degree of burglary, and the question remained as to whether the house was a “dwelling” at the time of the offense, there was no legitimate tactical advantage to only requesting the lesser included trespass instruction rather than an instruction on the lesser included offense of second-degree burglary.

Counsel was ineffective for failing to ask for a lesser included instruction that would have given the jury the opportunity to convict Mr. Ludvik of second-degree burglary rather than residential burglary. Mr. Ludvik requests that this Court reverse his conviction and remand for a new trial. *State v. Henderson*, 180 Wn. App. 138, 143, 321 P.3d 298

(2014), *aff'd*, 182 Wn.2d 734 (2015) (citing *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)) (setting forth this remedy).

Issue 2: Whether a deputy's testimony impermissibly invaded the fact-finding province of the jury on its ultimate guilt decision when the deputy testified that officers were investigating a "residential burglary" of a "residence."

Critical herein was the jury's determination of whether this case involved *residential* burglary, as opposed to perhaps burglary of a non-residence or non-dwelling. When a deputy testified officers were investigating a case of "residential burglary," describing the offense as a "potentially violent felony" within a "residence," the deputy invaded the jury's fact-finding province on its ultimate guilt determination for residential burglary. RP 31. This impermissible testimony, made without objection, deprived Mr. Ludvik of his constitutional rights to a fair trial and effective assistance of counsel.

Ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)). "Improper opinion testimony violates a defendant's right to a jury trial and invades the fact-

finding province of the jury.” *We*, 138 Wn. App. at 730 (J. Schultheis dissenting).

A witness’s opinion regarding the defendant’s guilt “is irrelevant and invades the defendant’s right to a jury trial and invades the jury’s exclusive fact-finding province.” *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). “To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider ‘the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.’” *We*, 138 Wn. App. at 723 (quoting *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

“Opinions on guilt are improper whether made directly or by inference.” *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014) (internal cites omitted). Opinions from law enforcement officers are especially problematic because they are more likely to influence the jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotations omitted) (“A law enforcement officer’s opinion testimony may be especially prejudicial because the officer’s testimony often carries a special aura of reliability.”)

In *State v. Quaale*, where the defendant was charged with driving under the influence, the trooper testified that he had no doubt the defendant was “impaired,” which “parroted the legal standard contained in the jury instruction definition for ‘under the influence.’” *Quaale*, 182 Wn.2d at 200. “[T]he trooper’s opinion went to the core issue and the only disputed element: whether Quaale drove while under the influence of alcohol.” *Id.* In other words, because the “trooper’s inadmissible testimony went to the ultimate factual issue – the core issue of Quaale’s impairment to drive—the testimony amounted to an improper opinion on guilt.” *Id.* “This improper opinion on guilt violated Mr. Quaale’s constitutional right to have a fact critical to his guilt determined by the jury...[,]” which resulted in reversal and retrial. *Id.* at 200-01.

Since “testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal.” *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005) (internal citations omitted). Whether a defendant seeks review of this error as one of constitutional magnitude, or as one gleaned from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that inadmissible opinion testimony occurred and (2) that the outcome of the trial would have been different if the improper opinions had been excluded. *We*, 138 Wn. App. at 722-23 (citing *State v. Warren*, 134 Wn.

App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel).

Here, Deputy Humphrey testified as follows:

[W]e were starting to investigate an active residential burglary.

In that instance that particular call is a very high-risk call. There is – never been to a residence before... potentially violent felony...

RP 31 (emphases added).

This testimony constituted an impermissible opinion on the ultimate guilt determination, informing the jury that this matter did indeed involve “residential” burglary. The testimony was even more prejudicial than the testimony held to be improper in *Quaale*, 182 Wn.2d at 200 (where the officer’s opinion testimony parroted an element of the crime), because the deputy here testified that the case was one of “residential burglary” (the ultimate guilt determination itself).

It is very likely the jury would have questioned whether this case satisfied the “residential burglary” elements, since the “residence” was actually a vacant house that had not been lived in for four years (and was likely unlivable in its current state). The jury would likely have questioned a guilty verdict of “residential” burglary, given defense counsel’s argument and the facts suggesting the vacant house was not a dwelling. But, having been informed by the deputy that a residence was

indeed involved, and that this was a case of “residential burglary,” the jury’s fact-finding job on this issue was either substituted by the deputy’s opinion or impermissibly swayed by the deputy’s testimony.

The deputy was in a position to persuade the jury, given his special aura of reliability. The facts could very well have led the jury to determine the vacant house was not a dwelling, but its fact-finding determination was invaded by the impermissible testimony. Mr. Ludvik has demonstrated that impermissible opinion testimony was given, and that the outcome would have been different but for this testimony; thus, a new trial should be ordered.

Issue 3: Whether this Court should deny imposition of any appellate costs against this indigent Appellant on appeal.

Pursuant to the recommended practice in *State v. Sinclair*, No. 72102–0–I, 2016 WL 393719, at *2-7 (Wash. App. Jan. 27, 2016), Mr. Ludvik preemptively objects to any appellate costs, should the State be the prevailing party on appeal.

Mr. Ludvik remains indigent and unable to pay costs that may be imposed on appeal. The imposition of costs would be inconsistent with those principles enumerated in *State v. Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).

The Judgment and Sentence contains boilerplate language stating the “court has considered the total amount owing, the defendant’s past,

present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 180. However, this language has no support in the record: the trial court did not actually consider Mr. Ludvik's ability to pay when it imposed legal financial obligations, other than to find he had no ability to pay discretionary costs. CP 183-84. There is no support in the record for Mr. Ludvik having the ability to pay costs on appeal.

For these reasons, Mr. Ludvik respectfully requests no costs on appeal be assigned to him.

F. **CONCLUSION**

Mr. Ludvik's conviction of residential burglary should be reversed, because he was denied his constitutional right to effective assistance of counsel when his attorney failed to request the lesser included jury instruction on second-degree burglary. Alternatively, Mr. Ludvik is entitled to a new trial because he was denied his constitutional right to have a jury find him guilty, and to effective assistance of counsel, when an officer offered opinion testimony pertaining to the ultimate issue of guilt for residential burglary. Finally, in the event Mr. Ludvik is not successful with this appeal, he requests that this Court not impose any costs against him on appeal.

Respectfully submitted this 27th day of April, 2016.

/s/ Kristina M. Nichols
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) COA No. 33959-9-III
Plaintiff/Respondent)
vs.) Spokane County No. 15-1-03210-1
)
RICHARD TODD LUDVIK)
) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 27, 2016, I deposited for mail by U.S. Postal Service, first-class and prepaid, a copy of the opening brief to the following:

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Having obtained prior permission, I also served a copy of the same by email on the Spokane County Prosecutor's Office at scpaappeals@spokanecounty.org.

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