No. 93685-4

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Court of Appeals
Division III
State of Washington

COA No. 33073-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RALPH E. WHITLOCK,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR…….1

1. The court did not determine Mr. Whitlock committed the essential elements of the crimes of first degree burglary and first degree robbery…….1

2. The court did not comply with the *Blazina* factors in imposing legal financial obligations, thus requiring remand……..1

Issues Pertaining to Assignments of Error

A. Can the convictions stand when the court did not determine Mr. Whitlock committed the essential elements of the crimes for which he was convicted? (Assignment of Error 1)……..1

B. Did the court comply with the *Blazina* factors in imposing legal financial obligations? (Assignment of Error 2)……1

II. STATEMENT OF THE CASE……...1

III. ARGUMENT……...7

A. The court did not determine Mr. Whitlock committed the essential elements of the crimes of first degree burglary and first degree robbery, so the convictions must be reversed…….8

B. The court failed to comply with the *Blazina* factors in imposing legal financial obligations……11

IV. CONCLUSION……..12

TABLE OF AUTHORITIES

Table of Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed.2d 368 (1970)…….8, 11

State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003)……..8, 9, 10

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)……11, 12

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998)……11

Statutes

RCW 9A.52.020(1)……...9

RCW 9A.56.190…….....9, 10

RCW 9A.56.200(1)(a)(i)…….10

RCW 10.01.160(3)…….11

Rules

CrR 6.1(d)……..8, 9

I. ASSIGNMENTS OF ERROR

1. The court did not determine Mr. Whitlock committed the essential elements of the crimes of first degree burglary and first degree robbery.

2. The court did not comply with the *Blazina* factors in imposing legal financial obligations, thus requiring remand.

Issues Pertaining to Assignments of Error

A. Can the convictions stand when the court did not determine Mr. Whitlock committed the essential elements of the crimes for which he was convicted? (Assignment of Error 1).

B. Did the court comply with the *Blazina* factors in imposing legal financial obligations? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Ralph E. Whitlock was charged by amended information with count 1: first degree burglary, count 2: first degree robbery, count 3: bribing a witness, and count 4: bribing a witness. (CP 51). After bench trial, the court entered these amended findings of fact:

> 1. That on June 2014, defendant David Johnson and his partner Ralph Whitlock went to the home of Tanya Routt, at 708 7th Street, Clarkston, Washington, during the early morning hours.
>
> 2. That they were taken to that location by Jacob Gustafson, where they were dropped off in front of

the residence. Thereafter, they circled around behind the residence and approached the house through the backyard. Jacob Gustafson went to a nearby convenience store and later returned with the vehicle to the back of Tanya Routt's home where he waited for David Johnson and Ralph Whitlock.

3. Upon approaching the rear of the house Mr. Johnson and Mr. Whitlock were met on the back porch by Lisa Jones and Damian Hester. They engaged in conversation and smoked cigarettes. Lisa Jones was familiar with Ralph Whitlock but did not know David R. Johnson.

4. Mr. Whitlock asked to come inside and retrieve some personal property. Ms. Jones told him that he would have to wait until Tanya Routt had returned home as Ms. Jones had no authority to allow Mr. Whitlock to take any property. Ms. Jones went back in the house and lay down with her daughter. A short time later, Damian Hester reentered the residence and was followed in by Ralph Whitlock. Damian Hester offered Mr. Whitlock a glass of water. Mr. Whitlock and [*sic*] living room and asked to use the restroom. He then tried to open the door to Tanya Routt's room which was locked. It was at this time that Mr. Whitlock advised Lisa Jones to take her daughter and leave the house. Ms. Jones complied. Ms. Jones was not able to positively identify David R. Johnson as the individual who accompanied Mr. Whitlock that night testified [*sic*] that she had never seen before.

5. Crista Ansel relates that Damian Hester came downstairs, woke her up, and advised her Ralph Whitlock was in the house and that he had a crowbar (Hester denies having seen crowbar). This information was upsetting Crista Ansel. She went upstairs to find out why Ralph was at the house. Ralph and Crista were well acquainted with one another and referred

to one another as brother and sister although this was a fictive [*sic*] rather than blood relationship. Prior to entering the kitchen, Lisa Jones advised Crista Ansel be careful because the man with Ralph had a gun. The conversation took place between Ralph and Crista. Ralph told Crista that if he had known she were there, he would not have come to the house. Crista Ansel was angry with Ralph and there was a loud verbal exchange.

6. Ms. Ansel also saw that David R. Johnson was in the kitchen by this time. She noticed that Mr. Johnson was holding what appeared to be a pistol which was silver in color. Mr. Johnson told Crista Ansel not to do anything stupid.

7. At that point, Mr. Whitlock had decided to force entry into Tanya Routt [*sic*] room. Ms. Ansel testified that Mr. Whitlock had a crowbar which he intended to use to open the bedroom door. Ms. Ansel grabbed Mr. Whitlock's arm in an attempt to stop them from damaging the door and was elbowed in the face. She characterized this contact as accidental rather than intentional. Crista Ansel had a key to the room which she used open [*sic*] the bedroom door in order to avoid having the door broken open. Mr. Whitlock looked into the room and then resumed looking through the rest of the house.

8. Ms. Ansel accompanied Mr. Whitlock downstairs and showed him the TVs in the house. He remarked that was not why he was there. Ms. Ansel implored Mr. Whitlock to abandon his efforts but was told it was too late and he shut her in her bedroom. Ms. Ansel was unable to open the bedroom door and believed that someone was holding it shut from the outside. At this point, she believes Ralph Whitlock went back upstairs and stole the video monitor, DVR, and safe from Tonya Routt's bedroom. She sent texts to Tanya Routt advising her that her house was being robbed and that she needed to return home.

9. During the time Mr. Whitlock was looking at Tanya

Routt's room, Mr. Johnson had gone downstairs where he flipped on the lights, briefly looked around, and went back upstairs. This was witnessed by Damian Hester who was hiding in the darkened hallway and holding a baseball bat for defense. Mr. Hester remained downstairs and did not see anyone remove anything from the home although he testified that he heard tools being used upstairs which he now associates with the items being removed from Tanya Routt's bedroom.

10. When Mr. Hester was advised that Mr. Whitlock and Mr. Johnson were no longer present he went back upstairs where he saw that Ms. Routt's bedroom door was open and that her large black video monitor was missing.

11. After leaving Ms. Routt's residence, Mr. Whitlock and Mr. Johnson took the stolen items out through the backyard where they met up with Mr. Gustafson who had returned with the car. Mr. Gustafson observed Mr. Whitlock to be [*sic*] a safe and Mr. Johnson to be carrying a TV and a gun. He described the gun as a pistol and was able to see its silhouette in Mr. Johnson' hand.

12. The two men placed the stolen items in the trunk of the car. The two men got in the car with Mr. Gustafson and Mr. Whitlock instructed Mr. Gustafson to keep his mouth shut. Mr. Gustafson drove them to Kelly McDonough's house where they unloaded the stolen items and took them inside.

13. Meanwhile, Tanya Routt returned home. Upon returning home, she called the police and advised all occupants in the house that the police were coming and anyone not wishing to have contact with law enforcement should leave. Crista Ansel left with Damian Hester and Bridget Yarborough at that time. They went to Kelly McDonough's house where Crista Ansel was informed that Ralph Whitlock and David Johnson had already been to Mr. McDonough's home that morning. The testimony of Mr. McDonough

confirmed this fact as well as the fact that Mr. Johnson and Mr. Whitlock had brought a black TV and a safe into Mr. McDonough's home that morning. They had left prior to Ms. Ansel's arrival and had taken the stolen items with them when they left.

14. 2 days later, Ms. Ansel was at Tanya Routt's house when Mr. Whitlock and Mr. Johnson returned. Ms. Routt would not allow them into the home and called the police. Ms. Ansel hid when the police came because she knew she had warrants for her arrest. Following this incident, Ms. Ansel testified that she had threats made against her by various persons which resulted in her secreting herself from law enforcement.

15. Mr. Johnson was subsequently arrested and charged with burglary in the first degree and robbery in the first degree.

16. At trial, Robert Anderson testified regarding a note which had been passed to him in the jail by Mr. Gustafson with instructions to deliver it to Mr. Whitlock. Mr. Gustafson denied authoring the note and the circumstances described by Mr. Anderson necessitated that little weight be given to his testimony.

17. There were also vigorous attacks on the veracity of the most current version of events given by Mr. Gustafson and Ms. Ansel given the inconsistencies with prior statements. However their explanations for the inconsistencies are credible and their testimony at trial is in convergence with that of other witnesses [*sic*] of events.

18. Mr. Johnson's testimony that he had been unsuccessful in regaining the key to Tanya Routt's car and had walked over to her house with Mr. Whitlock at 2 o'clock in the morning in order to advise her of that fact makes no sense. His version of events is not in accord with that of nearly every other percipient witness that testified at trial. Mr. Whitlock elected to remain silent at trial. The court draws no inference from his election to do so.

> 19. The testimony as it relates to a crowbar possessed by Mr. Whitlock is too conflicting for the court to find beyond a reasonable doubt that its existence has been proven. In addition, there was no testimony from any witness that a crowbar, if indeed present, had been used for anything other than its intended purpose. There was also little or no testimony that the firearm possessed by Mr. Johnson had been used to specifically assault or threaten a particular person.
>
> 20. Following the commission of the burglary, Mr. Whitlock was being held in the Asotin County jail pending trial. It is alleged that Mr. Whitlock contacted Frances Rains for the purpose of having her bribe Mr. Gustafson to prove a false statement favorable to Mr. Whitlock. Mr. Gustafson did in fact provide such a statement at one point, but has since admitted to the falsity of that initial statement.
>
> 21. Frances Rains testified that she was contacted by Mr. Gustafson as he was expressing concern that he would be implicated in the robbery. Ms. Raines testified that she had no means to provide Mr. Gustafson with any form of remuneration for his assistance and did not offer any. Mr. Gustafson's testimony was to the contrary. Ms. Raines also testified that she did not wish to speak to Tanya Routt and did nothing to facilitate her leaving town. The social media communications elicited at trial seem to indicate that Ms. Routt was leaving the area of her own accord and without influence by Ms. Raines or Mr. Whitlock. The telephone recordings introduced into evidence were suggestive of a bribe but on balance the evidence on the bribery charges [*sic*] simply too tenuous to support a finding beyond a reasonable doubt. (CP 71-76).
>
> From these findings, the court made the following

conclusions of law:

> 1. That on June 10, 2014, David R. Johnson entered the residence of Tanya Routt, at 708 7th Street, Clarkson, Washington, with intent to commit a crime therein.

> 2. That regardless of whether or not he was invited in or whether his entrance into the home was simply by passive acquiescence of the persons present, his remaining in the residence while committing a crime was unauthorized and unlicensed.
>
> 3. The property of Tanya Routt was stolen in the presence of Crista Ansel and Damian Hester against those persons' will by force, intimidation, and/or fear of injury.
>
> 4. That during the commission of the crime and during immediate flight therefrom, David R. Johnson was armed with a firearm.
>
> 5. The Court does not find based upon the testimony of the witnesses, that Mr. Johnson or Mr. Whitlock were armed with a deadly weapon other than a firearm.
>
> 6. That Mr. Whitlock is guilty of the crimes Burglary in the 1st Degree and Robbery in the 1st Degree, both committed while an accomplice, Mr. David R. Johnson, was armed with a firearm.
>
> 7. The Court acquits Mr. Whitlock of the 2 counts of bribing a witness. (P 76-77).

Mr. Whitlock was sentenced within the standard range to 180 months, inclusive of the 60-month firearm enhancement. (CP 140). This appeal follows. (CP 157).

III. ARGUMENT

A. The court did not determine Mr. Whitlock committed the essential elements of the crimes of first degree burglary and first degree robbery, so the convictions must be reversed.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). The court did not conclude from the evidence that Mr. Whitlock committed the essential elements of the crimes for which he was convicted. (CP 76-77).

This is not a challenge to the sufficiency of the evidence. Rather, it is a challenge to the court's conclusions that clearly do not support the convictions for failure to find the essential elements of the crimes. *In re Winship*, *supra*.

In a bench trial, the court must enter findings of fact and conclusions of law. CrR 6.1(d). Each element of the crime must be addressed separately, setting out the factual basis for each conclusion of law. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Further, the findings must specifically state an element has been met. *Id*. The court here did not specifically address any of the elements of the crimes of which Mr. Whitlock was convicted and did not meet the requirements of CrR 6.1(d).

The court entered no conclusion of law that Mr. Whitlock entered Ms. Routt's residence with the intent to

commit a crime therein, an essential element of first degree burglary. RCW 9A.52.020(1). The court also made no conclusion of law that Mr. Whitlock had entered the house. (CP 76-77). The conclusions of law relate only to Mr. Johnson's actions, not Mr. Whitlock's. Indeed, the court did not make a finding or conclusion establishing accomplice liability. The court failed to find Mr. Whitlock committed the essential elements of the crime of first degree burglary. *Banks*, *supra*.

The court further failed to conclude Mr. Whitlock had committed the essential elements of first degree robbery. RCW 9A.56.190 defines robbery:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use of threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

A person is guilty of first degree robbery if, in the commission of a robbery or of immediate flight therefrom, he is armed with a deadly weapon. RCW 9A.56.200(1)(a)(i).

Again, the court's conclusions of law do not reflect that it determined Mr. Whitlock committed the essential elements of the crime of first degree robbery, either as a principal or as an accomplice. (CP 76-77). The court did not conclude he unlawfully took personal property from the person of another or in his or her presence against his or her will by the threatened use of immediate force, violence, or fear of injury to that person. RCW 9A.56.190. The court failed to conclude Mr. Whitlock had committed the essential elements of first degree robbery. *Banks*, *supra*.

The next question is whether the court's error was harmless. *Banks*, 149 Wn.2d at 43. An error is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id*.

The error here was not harmless because the court's conclusions do not specifically address Mr. Whitlock's involvement in the offenses at all. The conclusions address only Mr. Johnson. These were amended conclusions by the

court so its failure to address the elements with specific reference to Mr. Whitlock cannot be an oversight. (CP 64-70, 71-77).

The complete lack of any conclusions that Mr. Whitlock committed the essential elements of the crimes of first degree burglary and first degree robbery cannot be harmless because the error complained of not only contributed to the error in the verdict obtained, but also permeated it. Without finding the essential elements of the crimes were met, there can be no convictions. *Winship*, *supra*. Therefore, the error was not harmless and the convictions must be reversed. *See State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

B. The court failed to consider the *Blazina* factors in imposing legal financial obligations.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the court held that before imposing discretionary legal financial obligations against a convicted defendant, the trial judge is required by RCW 10.01.160(3) to consider the defendant's individual financial circumstances and to make an individualized inquiry into the defendant's current and future ability to pay. That inquiry must appear on the record, which

must also reflect that the court in its inquiry considered important factors, such as incarceration and the defendant's other debts, including restitution. *Id*. at 834, 837-38, 839).

Here, the State asked the judge to impose legal financial obligations. (12/20/14 RP 690-91). In ordering them, the judge stated:

> Oh, yes. With respect to legal financial obligations, I'm going to follow the, uh, State's request in its entirety. (*Id*. at 702).

The record reflects neither a consideration of Mr. Whitlock's individual financial circumstances nor an individualized inquiry into his current and future ability to pay as required by *Blazina*. No inquiry was made as to other factors such as incarceration and other debts. 182 Wn.2d at 837-38. The issue of legal financial obligations must be remanded for further proceedings. *Id*. at 839.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Whitlock respectfully urges this court to reverse his convictions and/or remand for further proceedings with directions to comply with *Blazina* in addressing legal financial obligations.

DATED this 7th day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that on October 7, 2015, I served a copy of the Brief of Appellant by USPS on Ralph Whitlock, # 877866, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed by counsel, on Curt Liedkie at lwebber@co.asotin.wa.us and Susan Gasch at gaschlaw@msn.com.