IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DENNIS WAYNE BROOKS, Appellant.	No. 40763-9-II UNPUBLISHED OPINION

Armstrong, J. – Dennis Wayne Brooks appeals his conviction of residential burglary, arguing that the evidence was insufficient to support his conviction, that his attorney ineffectively represented him by failing to request an inferior degree instruction, and that the trial court erred in imposing court costs and fees that he cannot pay. We affirm.

Facts

On July 5, 2009, Woodland police officers arrested Brooks for driving with a suspended license and for outstanding warrants. After the arrest, the officers observed an open bag of jewelry in the back of his truck. Brooks first denied knowing anything about the jewelry but then said it might belong to a friend who was cleaning out an abandoned house. Passenger Scott Petersen told the officers that the jewelry was from a home that he and Brooks had burglarized on July 1. Petersen said he could show officers the house. Because it was outside the city limits, Deputy Cory Robinson responded, and Petersen took him to a house on Duncan Road. The house was unoccupied, but its back door was open.

Brooks was eventually charged with residential burglary, intimidating a witness, and harassment. Petersen also was charged and pleaded guilty, and he testified for the State at

Brooks's trial. Petersen testified that he and Brooks burglarized the residence on July 1 after Brooks asked him to help clean it up. On cross-examination, he said that the burglary occurred on July 4, just before his arrest.

Deputy Robinson testified that when Petersen took him to the Duncan Road house, there was a van in the driveway. The deputy described the house as follows:

> The house seemed to have been left in the state it was for a while. There were overgrown plants and things. There was maybe bats or something or some feces on the wall and some food that was kind of rotten. But, it seemed like the house there, there hadn't been someone living there for some amount of time.

Report of Proceedings (RP) at 79. The front of the house was overgrown and the locked front door was covered in cobwebs "so it looked like it hadn't been accessed in quite a while." RP at 80. Petersen had told the deputy that Brooks entered the house through the front door. The deputy described the interior of the house as cluttered. During the booking process, Deputy Robinson found jewelry in Petersen's pockets as well as documents later determined to have come from the house. When the deputy booked Brooks, however, he found no property associated with the burglary.

Elaine Shephard testified that she resided at the Duncan Road house for about eight years until 2007 or 2008. She recognized the jewelry found in the bag and said she had never given anyone permission to enter the house and take anything. After she testified, the defense asked the court to dismiss all counts, citing insufficient evidence on the burglary charge. The court dismissed the harassment charge.

Brooks's girlfriend testified for the defense that he was home on July 1. Brooks testified that Petersen had told him the bag of jewelry was from a home a friend had cleaned out. Brooks

denied ever taking Petersen to a house to burglarize it.

At the end of the testimony, the trial court read this stipulation to the jury:

> [T]he parties stipulate that Robert Hubner, the owner of the residence at 225 Duncan Road . . . did not give [Brooks] or [Petersen] permission to be in his residence on or about July 1st, 2009; that he does not know the defendant or Mr. Scott Petersen; that he did not hire any company or private individuals to clean his residence during the time of the incident; that his sister, Elaine Shephard, was the last person to have resided in the residence and that the items taken and found in the truck, driven by the defendant, belonged to Elaine Shephard.

RP at 167-68.[1]

During closing argument, the defense argued that Brooks was innocent of participating in the robbery and that all evidence pointed to Petersen as the guilty party. The jury acquitted Brooks of intimidating a witness but found him guilty of residential burglary. The trial court imposed a low-end standard range sentence as well as agreed restitution of $3,650 and standard fees and costs.

ANALYSIS

I. Sufficiency of the Evidence

Brooks argues that the State's evidence was insufficient to prove that he entered a dwelling, which is an essential element of residential burglary. RCW 9A.52.025(1).

Evidence is sufficient if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201 (citations omitted). Circumstantial and direct evidence

[1] Hubner died shortly before trial.

are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Because it is the jury's responsibility to resolve credibility issues and determine the weight of the evidence, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To prove residential burglary, the State had to prove that Brooks entered or remained in a "dwelling." RCW 9A.52.025(1). A "dwelling" is "any building or structure . . . which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7). Brooks argues that the evidence at trial showed that the house on Duncan Road had not been lived in for several years or maintained in the interim and thus was not a dwelling.

As support, he cites *State v. MacDonald*, 123 Wn. App. 85, 90, 96 P.3d 468 (2004), where we held that the trial court erred in refusing the defendant's request for an instruction on second degree burglary in a residential burglary prosecution. The less serious offense of second degree burglary requires unlawful entry into a building other than a dwelling. *MacDonald*, 123 Wn. App. at 89-90; RCW 9A.52.030(1). We upheld the defendant's claim of instructional error partly because the jury could have found that the house in question had been vacant for several months and thus was not being "'used or ordinarily used by a person for lodging'" on the date of the burglary. *MacDonald*, 123 Wn. App. at 90 (quoting RCW 9A.04.110(7)). We disagreed, however, that the evidence was insufficient to support a finding that the house was a "dwelling." Whether a house is a dwelling "turns on all relevant factors and is generally a matter for the jury to decide." *MacDonald*, 123 Wn. App. at 91.

In *MacDonald*, therefore, the fact that a house was vacant did not preclude it from being considered a "dwelling" under RCW 9A.04.110(7). Here, Brooks emphasizes that the front door of the Duncan Road residence was locked and overgrown. The back door, however, was open. Furthermore, Shephard testified that she left the house as late as 2008, and in the stipulation, the owner of the house referred to it as "his residence." Clerk's Papers at 23. Peterson took documents from a box of mail by the door, and there was a van in the driveway. The fact that the house was cluttered, dirty, and unoccupied at the time of Brooks's entry does not preclude it from being a dwelling under the statutory definition. Viewed in the light most favorable to the State, the evidence was sufficient for the jury to find that Brooks entered a dwelling when he entered the house on Duncan Road.

II. Ineffective Assistance of Counsel

Brooks contends that his attorney ineffectively represented him by failing to request an instruction on second degree burglary. To prevail, Brooks must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial

would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

As stated, we concluded in *MacDonald* that the trial court erred in refusing the defendant's request for an instruction that would have given the jury the option of convicting on second degree burglary rather than residential burglary. We held that the proposed second degree burglary instruction, which requires entry into a building other than a dwelling, described an offense that is an inferior degree of residential burglary, and that the jury could have found that the house was not a dwelling when the defendant entered it unlawfully. *MacDonald*, 123 Wn. App. at 89-90; RCW 9A.52.030(1).

Here, however, the question is not one of trial court error for refusing an inferior degree instruction but a claim that counsel was deficient for failing to request one. The decision not to request an instruction on a lesser offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). In *Hassan*, 151 Wn. App. at 220-21, Division One of this court upheld an "all or nothing" strategy as a legitimate trial tactic because a lesser offense instruction would have weakened the defendant's claim of innocence. And in *Grier*, 171 Wn.2d at 42, the Supreme Court rejected an ineffective assistance claim because "an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal."

Brooks's attorney clearly adopted an "all or nothing" strategy based largely on Petersen's admissions and contradictory testimony. Petersen claimed at trial that the burglary occurred on July 1, but he told the officers it occurred on July 4. He told the officers that Brooks entered the

house through the front door, but that door had not been opened for some time, and the back door was open. Evidence from the burglary was found on Petersen's person, whereas none was found on Brooks. Brooks testified that Petersen and a friend were responsible and that he had never entered the Duncan Road house, and his attorney argued in closing that all of the evidence pointed to Petersen as the only guilty party. Requesting an instruction on second degree burglary would have compromised this effort to seek an acquittal. The failure to make such a request was a reasonable trial strategy and does not support a claim of deficient performance. Consequently, we reject Brooks's claim of ineffective assistance.

III. Inability to Pay Legal Financial Obligations

Brooks argues here that the trial court exceeded its statutory authority and violated his right to equal protection in imposing court costs and attorney fees in light of his inability to pay.[2]

The trial court imposed standard costs and fees as well as an agreed amount of restitution for which Brooks is jointly and severally liable with Petersen. Brooks acknowledges that the victim penalty assessment and DNA (deoxyribonucleic acid) collection fees were mandatory, but he argues that the imposition of the remaining fees was an abuse of discretion because of his indigency. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (victim penalty assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA collection fee mandatory); RCW 9.94A.760(1) (when person is convicted in superior

[2] Brooks's argument in this regard is somewhat perplexing, as he cites a finding regarding his inability to pay as well as specific cost figures that are not reflected in the judgment and sentence contained in our appellate record. Consequently, we do not address his claim of error regarding the alleged finding, but we do address the larger claim of error concerning the imposition of court costs and fees because the trial court did impose such financial obligations in the judgment and sentence provided.

court, court may order payment of legal financial obligation as part of the sentence).

Brooks's claims of error concerning his legal financial obligations are premature. As the Supreme Court recently explained, challenges to sentencing conditions imposing financial obligations are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement. *State v. Sanchez Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010). With respect to financial obligations, the relevant question is whether the defendant is indigent at the time the State attempts to sanction the defendant for failure to pay. *Sanchez Valencia*, 169 Wn.2d at 789. Thus, the factual development of the claim is essential to assessing its validity, and a pre-enforcement challenge is not ripe for review. *Sanchez Valencia*, 169 Wn.2d at 789; *see also State v. Ziegenfuss*, 118 Wn. App. 110, 112, 74 P.3d 1205 (2003) (at sentencing, defendant argued her due process rights were violated by imposition of legal financial obligations because law governing violation hearing lacked adequate safeguards; argument held not ripe since she was not yet harmed by alleged unconstitutionality); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (constitutional challenge to imposition of costs was not ripe for review; it is at point of enforcement of financial obligations that indigent may assert constitutional objection to payment). Brooks's claims of error concerning his legal financial obligations are premature.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.