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Supreme Court No. 100190-8
(Court of Appeals No. 81326-9-I)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DREYER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Christopher Dreyer asks this Court to review the opinion of the Court of Appeals in *State v. Dreyer*, No. 81326-9-I (filed August 2, 2021). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Accomplice liability requires at least two individuals participate in the commission of an offense and that an accomplice knowingly aid the principal in committing the crime. Here, the trial court instructed the jury on accomplice liability in the absence of evidence that a second individual was involved in the burglary or was complicit with Mr. Dreyer. Is review warranted where the trial court's erroneous instruction allowed the jury to convict Mr. Dreyer based upon an unsupported theory of criminal liability? RAP 13.4(b)(3).

2. Due process requires the State to prove each element of an offense beyond a reasonable doubt. Accomplice liability attaches only where an individual acts "with knowledge that it

will promote or facilitate the commission of the crime.” Is review warranted where the trial court instructions allowed the jury to convict Mr. Dreyer as an accomplice if he was merely a “participant” in the crime, thereby relieving the State of its burden to prove the requisite *mens rea*? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. The State charged Mr. Dreyer with residential burglary because he used electricity and water while staying in an unoccupied home.

In 2019, John Block and Jess Kenoyer formed Perkins Estates, a Limited Liability Corporation (LLC). RP 222-24. The company initially purchased a large piece of property in Bellingham, including a primary residence, which it planned to flip – remodel quickly and sell at a higher price. RP 223-24. The home was empty during the process but for new appliances, including a fridge, stove, and a washer/dryer. RP 225. After a three-week absence, Mr. Block went to meet with an electrician at the home and noticed the doorjamb was damaged. RP 230-31, 269. When he went inside, he discovered

the house was warm, the washer/dryer was running, and there was a cast iron pan on the stove. RP 230, 234.

Christopher Dreyer approached Mr. Block inside the home. RP 231-32. He seemed surprised to see Mr. Block and repeatedly asked who Mr. Block was. RP 231-32. After informing Mr. Block that he was hired to fix up the house by John Sorenson, Mr. Dreyer began to put his personal belongings in his backpack, including new door handles and locks. RP 232-36. Mr. Dreyer then left the home, stating he would be calling law enforcement. RP 237. Mr. Block called the police and followed Mr. Dreyer to the entrance of a wooded trail system. RP 239-40.

Meanwhile, Mr. Kenoyer arrived at the home and observed someone who appeared to be intoxicated speaking with the electrician in the driveway. RP 270. The individual also entered the trail system before the police arrived. RP 258. Mr. Kenoyer “assumed it was possible” the second individual was involved in the incident. RP 299.

When Mr. Block and law enforcement returned to the home, they discovered food and cleaning supplies in the kitchen, and a shower curtain, bathmat, toothbrush, and additional cleaning supplies in the bathroom. RP 243-44, 290. The home was clean, and a scented candle was on the mantle of the living room, although the doorknob packages were in the fireplace. RP 243-44, 451-52, 454. A sleeping bag was laid out in the bedroom, and a second set of bedding was on the ground in the detached garage. RP 272.

Mr. Kenoyer returned the following day and found the house was warm and smelled of cooking, and the washing machine was running. RP 274-75. No one was home, so Mr. Kenoyer placed all of the personal items in the driveway and boarded up the house. RP 276-77, 460-61.

A neighbor contacted Mr. Kenoyer the next day with a photo of an individual filling up an electric teakettle from an exterior water spigot. RP 286. Mr. Kenoyer called law enforcement, and the police arrested Mr. Dreyer as he was

coming out of the gate. RP 297-98. They found several of the personal belongings previously in the home in a detached shed in the yard. RP 297-98. Testing revealed Mr. Dreyer's fingerprints on a PomWonderful bottle inside the kitchen in the main house. RP 408.

Upon arrest, Mr. Dreyer stated he was renting the garage and shed from his grandmother. RP 471, 477. Although he denied being in the house, Mr. Dreyer later told police that, at best, there was probable cause to arrest him for trespass because a burglary would require the intent to damage or steal something in the home. RP 480-81. The State nevertheless charged Mr. Dreyer with Residential Burglary, alleging theft of services because he used the electricity and water.¹ CP 4-5; *e.g.* RP 634-35.

¹ 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.”

2. The trial court instructed the jury on accomplice liability over defense counsel's objection.

At trial, the State did not suggest anyone else was involved in the offense, either as an accomplice or a principal. Defense counsel moved to dismiss, arguing the State failed to establish Mr. Dreyer knew his presence was unlawful in light of his statement to Mr. Block that he was hired to fix up the house by John Sorenson. RP 505, 510-11. At no point did counsel suggest that Mr. Sorenson – or any other individual – committed the burglary or acted in concert with Mr. Dreyer to commit the crime. *See* RP 510-11. In response, the State took issue with defense counsel's "blatant assertion that there might have been a second person," arguing Mr. Dreyer's contradictory explanations about why he was on the property indicated he was lying. RP 515. The court denied the motion. RP 519.

Despite its previous argument there was not a second person involved, the State requested the court instruct the jury on accomplice liability. RP 546. The State claimed it was

entitled to the instruction because defense counsel's reference to a second person in her motion to dismiss revealed counsel's plan to argue a second person was responsible for turning on the heat and appliances. *See* RP 546-47. The State also pointed to evidence at trial suggesting the existence of a second person as warranting the instruction. RP 546-47.

Defense counsel strenuously objected to any instruction on accomplice liability. She pointed out that, even assuming there was evidence of a second person, it was still insufficient to show Mr. Dreyer acted in complicity with that individual. RP 545, 547. Moreover, the existence of the second person in this case – Mr. Sorenson – actually suggested that Mr. Dreyer believed he was authorized to be in the home, and his mere presence could not amount to accomplice liability under RCW 9A.08.020. RP 549-50.

The court agreed the State was entitled to the instruction. RP 548-49; CP 101 (Instruction No. 7). The court did not explicitly address defense counsel's argument regarding Mr.

Dreyer's *mens rea*, finding only that there was a "tenuous suggestion" the two individuals were connected, and Mr. Dreyer's belongings and behavior established he was not merely present at the scene. *See* RP 549-51, 587. The court additionally adopted the State's proposed instruction that jurors need not be unanimous as to whether Mr. Dreyer acted as a principal or an accomplice if they were convinced he "participated" in the crime. CP 102 (Instruction No. 8).

The jury found Mr. Dreyer guilty of residential burglary. CP 118. The trial court sentenced Mr. Dreyer to 43-months confinement. CP 227; RP 703-05. The Court of Appeals affirmed the conviction.²

² The Court of Appeals also remanded the case for resentencing pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Mr. Dreyer does not seek review of that portion of the decision.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court's accomplice liability instruction was unsupported by the evidence.

a. A court prejudices a defendant when it instructs the jury on an unsupported theory of law.

A court errs when it gives a jury instruction that is not supported by the evidence. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). If the evidence supporting a party's theory of the case is "speculative and conjectural ... it amounts only to a scintilla, and the issue should not be presented to the jury." *State v. Mriglot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977). Instructing the jury on a legal principal that is factually "outside of the issues in the case," risks confusing jurors by "introduc[ing] a rule of law inapplicable to the facts." *Bowen v. Odland*, 200 Wn. 257, 263, 93 P.2d 366 (1939). It also invites the jury to convict based upon an unsupported theory of criminal liability. *State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). A court's decision to instruct the jury on

accomplice liability is reviewed for an abuse of discretion. *See State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

b. The evidence of accomplice liability was speculative and conjectural.

The evidence in this case is speculative at best. To act as an accomplice, an individual must, with knowledge that the act will promote or facilitate the offense, “aid or agree[] to aid another person in planning or committing [the crime.]” RCW 9A.08.020(3)(a)(ii).³ “Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting.” *State v. Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (citations omitted); *accord State v. McDaniel*, 155 Wn. App. 829, 863, 230 P.3d 245 (2010) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 472-73, 39 P.3d 294 (2002)). By its plain language, accomplice liability can

³ Under RCW 9A.08.020(3)(i), an individual can also be held liable as an accomplice for soliciting, commanding, encouraging, or requesting another to commit the crime.

attach only where two individuals are involved in the offense: a principal and an accomplice.

Here, there was scant evidence that a second person even existed. Mr. Dreyer offered the name “John Sorenson” as the person he hired to fix up the home. RP 256. Yet, all of the items in the home appeared to belong to Mr. Dreyer inasmuch as they were later discovered in the shed he stated he was renting from his grandmother. RP 297-98. Indeed, the prosecution argued that Mr. Sorenson was fabricated by Mr. Dreyer to avoid arrest and initially scoffed at the defense’s “blatant assertion that there might have been a second person.” RP 515, 641.

More importantly, the evidence did not support a finding that Mr. Sorenson – or anyone else – acted in complicity with Mr. Dreyer. To warrant an accomplice liability instruction, the evidence must create a “reasonable and nonspeculative inference” that one of the individuals involved knowingly aided

in the other's commission of the crime. *State v. Fair*, No. 77180-9-I, 2018 WL 4865051 at *4 (Wash. Ct. App. 2018).⁴

For example, in *State v. Fair*, the Court of Appeals upheld the trial court's denial of an accomplice liability instruction based upon insufficient evidence that the two suspects worked together to commit the charged murder. *Id.* at *4-5. Although there was evidence that the two men were introduced at a party hosted by the victim earlier that evening, and DNA from each man was found on a bag with items linked to the murder, the evidence did not show complicity. *Id.* Even assuming it was reasonable to infer that both men were present in the victim's apartment sometime after the party, this Court found the inference they were in the apartment together and that one man aided the other in committing the murder was too speculative to warrant the instruction. *Id.*

⁴ Cited as persuasive authority pursuant to GR 14.1.

In this case, Mr. Kenoyer observed an unidentified individual in the driveway and, later, going down the same trail as Mr. Dreyer, but there was no evidence this person ever entered the home or directed Mr. Dreyer to enter or remain in the home with an intent to commit a crime therein. Mr. Block was emphatic that no one else approached him or entered the home that day. RP 256-57. The prosecution presented no evidence that these two men were even aware of each other.

The second set of bedding – arguably the only evidence suggesting another person was present on the property – was found in the detached garage, not the main house. RP 272. However, evidence of two individuals at a crime scene is not, in itself, evidence of complicity. *See State v. Asaeli*, 150 Wn. App. 543, 569-70, 208 P.3d 1136 (2009). To base accomplice liability on the bedding, the jurors would have to assume a second person used the bedding, assume the individual overlapped with Mr. Dreyer during the three weeks since Mr. Block was last at the house, assume Mr. Dreyer and the

unknown individual were aware of each other's presence, and, most importantly, assume that one knowingly aided the other's commission of the crime. The trial court rightly characterized the evidence as a "tenuous suggestion" of complicity. RP 549.

Contrary to the Court of Appeals' conclusion, Mr. Dreyer's statement regarding Mr. Sorenson does not support accomplice liability. Opinion at 7-8. In fact, Mr. Sorenson's existence shows only that Mr. Dreyer believed he was allowed to be in the home, even if the authorized work included changing the locks. *See State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (accomplice must have actual knowledge they were promoting charged crime).

Accomplice liability cannot be premised on the specter of a second person who may or may not have played a role in the incident. Ultimately, the State believed and argued that Mr. Dreyer was the only individual involved. The State was nevertheless concerned how the jury may interpret Mr. Dreyer's statement that he was allowed to be in the home, and sought to

hedge its bets by putting forth an unsupported legal theory to ensure a conviction.

c. Reversal is required.

The erroneous instruction was not harmless.

“Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless.” *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001) (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). Here, the State was emphatic the evidence supported the instruction and encouraged the jury to convict Mr. Dreyer based upon accomplice liability, including reading aloud the instructions on accomplice liability during closing arguments. RP 664-66. The State cannot now argue that no juror could have convicted Mr. Dreyer as an accomplice. The trial court’s erroneous instruction warrants review under RAP 13.4(b)(3).

2. The instructions relieved the State of its burden to prove beyond a reasonable doubt Mr. Dreyer knew his actions would promote or facilitate the commission of the offense.

a. Jury instructions that relieve the State of proving each element of the offense beyond a reasonable doubt violate due process.

Jury instructions “must make the relevant legal standard manifestly apparent to the average juror.” *State v. Smith*, 174 Wn. App. 359, 369, 298 P.3d 785 (2013) (quoting *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009)). Indeed, this Court has set forth “a high threshold for clarity of jury instructions.” *State v. Irons*, 101 Wn. App. 544, 550, 4 P.3d 174 (2000).

The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous wording of [a statute] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.

State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Instructions are manifestly clear when

they are “unmistakable, evident or indisputable.” *State v. Ackerman*, 11 Wn. App. 2d 304, 312-13, 453 P.3d 749 (2019).

Instructions that do not correctly inform the jury of the applicable law, mislead the jury, or do not permit the defendant to present his theory of the case fail to satisfy the constitutional demands of a fair trial. *O’Hara*, 167 Wn.2d at 105 (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). An instruction that can be construed as relieving the State of its burden to prove each element beyond a reasonable doubt violates due process. U.S. Const. amend. XIV; Const. art. I, § 3.

b. The jury instructions relieved the State of its burden to prove actual knowledge beyond a reasonable doubt.

Accomplice liability requires that an individual aid the principal “with knowledge that it will promote a crime or facilitate the commission of the crime.” RCW 9A.08.020(3)(a)(ii).

[O]ne’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in the commission of the

crime, will not subject an accused to accomplice liability. To prove that one present is an aider, it must be established that one is “ ‘ready to assist’ ” in the commission of the crime.

State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981)

(citing *Wilson*, 91 Wn.2d at 491). The State must prove accomplice liability beyond a reasonable doubt in order for a jury to convict a defendant as an accomplice. *State v. Teal*, 117 Wn. App. 831, 839, 73 P.3d 402 (2003), *aff'd* 152 Wn.2d 333, 96 P.3d 974 (2004) (citing *State v. Cronin*, 142 Wn.2d 568, 579–580, 14 P.3d 752 (2000)).

In this case, Instruction No. 7 mirrored WPIC 10.51 defining accomplice liability.⁵ CP 101. Instruction No. 8,

⁵ Instruction No. 7 provided,

A person is guilty of the crime of Residential Burglary if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime of Residential Burglary.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of

however, informed the jury that it was not required to be unanimous as to whether Mr. Dreyer acted as the principal or an accomplice as long as it was satisfied Mr. Dreyer “participated” in the crime.⁶ CP 102.

This was clear error. Accomplice liability cannot be premised on mere participation. The State must prove beyond a

the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; Or (2) aids or agrees to aid another person in planning or committing the crime. The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of the crime of Residential Burglary is guilty of that crime whether present at the scene or not.

⁶ Instruction No. 8 provided,

If you are convinced beyond a reasonable doubt that the Defendant participated in the crime of Residential Burglary and that crime has been proven beyond a reasonable doubt, you need not determine whether the defendant was an accomplice or a principal.

reasonable doubt that the accomplice “*actually* knew that they were promoting or facilitating” the charged crime. *Allen*, 182 Wn.2d at 374 (emphasis in original) (prosecutor engaged in reversible misconduct by arguing defendant was an accomplice because he “should have known” he was promoting or facilitating the crime). To be an accomplice, “one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one’s actions.” *State v. Robinson*, 73 Wn. App. 851, 855, 872 P.2d 43 (1994) (citing *Wilson*, 91 Wn.2d at 491).

Here, the prosecutor personally drafted Instruction No. 8, arguing it was approved of in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). CP 88-89; RP 564. Although the *Hoffman* Court appeared to use “participation” and accomplice liability interchangeably, the issue before the court was whether jurors must be unanimous as to whether a defendant acted as the principal or the accomplice. 116 Wn.2d at 103-05. “Where the literal words of a court opinion appear to control an issue, but

where the court did not in fact address or consider the issue, the ruling is not dispositive[.]” *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted). Here, the prosecutor attempted to convey the law in *Hoffman*, but ultimately relieved the State of its burden to prove the necessary *mens rea*.

The Court of Appeals erroneously concluded that, when read as a whole, Instruction No. 7 essentially cures the legal error in Instruction No. 8. Opinion at 9-10. Although both instructions addressed accomplice liability, Instruction No. 8 “diluted the State’s burden” to prove knowledge beyond a reasonable doubt. *Ackerman*, 11 Wn. App. 2d at 313-14 (when read in conjunction, instructions on self-defense requiring “violent felony” and instruction stating “[r]obbery is a felony” diluted the State’s burden of proving absence of self-defense beyond a reasonable doubt). This was a fatal flaw – jury

instructions must be painstakingly precise to ensure the State meets its burden of proof and comport with due process.⁷

c. Reversal is required.

An instructional error that relieves the prosecution of its burden of proof is subject to the constitutional harmless error test. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). To affirm a conviction in the face of this type of error, the court must conclude beyond a reasonable doubt that the error did not contribute to the verdict. *Neder*, 527 U.S. at 15; *Brown*, 147 Wn.2d at 341. This high standard may be satisfied only where the missing element is supported by

⁷ Defense counsel properly preserved this issue at trial because she maintained her objection to accomplice liability instructions as a whole. RP 587. In the event this Court finds the objection insufficient, instructing the jury in a manner that relieves the State of its burden to prove each element of the offense beyond a reasonable doubt is a manifest error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Israel*, 113 Wn. App. 243, 265 n. 2, 54 P.3d 1218 (2002) (citing *Stein*, 144 Wn.2d at 241).

uncontroverted evidence. *Neder*, 527 U.S. at 18; *Brown*, 147 Wn.2d at 341.

The State cannot possibly meet its burden this case. The prosecution argued the evidence was sufficient to warrant an accomplice liability instruction. The prosecutor read Instructions No. 7 and No. 8 in their entirety to the jury during closing argument. RP 664-66. The State then provided a roadmap for the jury to convict Mr. Dreyer as an accomplice based upon the language in the flawed instruction. Specifically, while arguing the evidence supported a finding that Mr. Dreyer acted alone, the prosecutor additionally urged the jury to convict Mr. Dreyer as an accomplice because he was a “participant,” who was partaking in the benefits of a warm house and working appliances. RP 668, 674.

The error was compounded by the absence of an instruction defining “knowledge,” as recommended by the

Washington Pattern Jury Instructions on accomplice liability.⁸

WPIC 10.51 – Accomplice Definition, Note on Use; *see also*

State v. Scott, 110 Wn.2d 682, 692, 757 P.2d 492 (1988)

(recommending “knowledge” be defined in cases involving accomplice liability). Accomplice liability hinges on knowledge

– it attaches only when the defendant knows their acts would

promote or facilitate a specific crime. *See* RCW

9A.08.020(3)(a)(ii). Given the unique facts of this case, Mr.

Dreyer’s presence in the home could have rendered him a

⁸ WPIC 10.02 Knowledge – Knowingly – Definition provides, “[a] person knows or acts knowingly or with knowledge with respect to a [fact] [circumstance] [or] [result]. [It is not necessary that the person know that the [fact] [circumstance] [or] [result] is defined by law as being unlawful or an element of a crime.]

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02 (4th Ed. 2016).

“participant” under the court’s instruction; it did not, however, render him an accomplice.

The erroneous instruction violated Mr. Dreyer’s constitutional right to due process and, given the likelihood of continued use of the instructions in other burglary cases, involves an issue of substantial public interest. This Court should accept review pursuant to RAP 13.4(b)(3) and (4).

E. CONCLUSION

For the reasons set forth above, Christopher Dreyer respectfully requests that this Court grant review.

DATED this 7th day of September, 2021.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains 4416 words (word count by Microsoft Word).

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APPENDIX

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 81326-9-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
CHRISTOPHER JAMES DREYER,)	
)	
Respondents.)	
_____)	

ANDRUS, A.C.J. — Christopher Dreyer appeals his conviction for residential burglary, challenging the trial court’s accomplice liability instructions. Because there was sufficient evidence to prove Dreyer aided or agreed to aid another in the crime of residential burglary, we affirm his conviction. We remand solely for resentencing under State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).¹

FACTS

John Block and his business partner, Jess Kenoyer, purchased a home in Bellingham in late April of 2019. They intended to renovate the vacant house and resell it at a profit. In late October or early November 2019, Block had a new stove and refrigerator delivered to the house. The utilities remained on inside the house

¹ The State concedes that Dreyer must be resentenced in light of Blake.

but Block left the new appliances unplugged. Block and Kenoyer did not visit the house again for three weeks. During that time, they had the heat turned down.

On November 25, 2019, Block met an electrician at the house to discuss some improvements he and Kenoyer wanted done. When Block entered through the back door, he noticed the door frame had been split in half. It was very hot inside the house and Block could hear the washing machine or dryer running. He found a man, later identified as Christopher Dreyer, inside the house. Dreyer demanded to know who Block was. When Block identified himself as the owner, Dreyer retreated inside the house.

Block followed him and asked Dreyer who he was. Dreyer said he had been “hired to fix up the place” and “John Sorenson hired me.” Block did not know anyone named John Sorenson. Neither he nor Kenoyer had given anyone permission to be inside the home. As Block walked through the kitchen, he saw a cast-iron pan with food bits on the stove, and empty beer bottles and take-out food containers on the counters. The kitchen smelled like someone had recently cooked.

When Block walked into the living room, he saw Dreyer pulling personal items, including what appeared to be new doorknobs with keys and the plastic packaging they came in, out of a cupboard and drawers and stuffing them into a backpack. Block testified that it was then that “it finally clicked that this is someone who’s not supposed to be here, and I don’t know this person, so I kind of put two and two together at that time.”

Block went outside to call Kenoyer and, about 30 seconds later, saw Dreyer leave the house by the front door. Block yelled at Dreyer to “take a hike” and Dreyer yelled back that he was going to call the police. Block took a photograph of Dreyer as he walked away.

Block called 911 and followed Dreyer in his car as Dreyer walked down the street. Block saw Dreyer enter some woods on a trail and then stop to gather something from the bushes. Block waited for the police on the corner near the trailhead.

Meanwhile, Kenoyer arrived at the house where he saw the electrician and his apprentice in the driveway talking with an intoxicated man whom he did not recognize. Kenoyer drove to the trailhead to meet Block. Kenoyer saw the man he had seen talking to the electricians walk down the same trail Dreyer had used minutes earlier. Police arrived 15 or 20 minutes later but were unable to locate Dreyer. The police, Block, and Kenoyer, then returned to the house.

Block found the refrigerator plugged in and full of food. The police found bath mats, toothbrushes, toothpaste, a hairbrush and comb, hairspray, and shower curtains in the bathroom, a scented candle on the living room mantel, and bleach and a mop and other personal items in various locations in the house. In an upstairs bedroom, they found a sheet laid out on the floor, covered with a sleeping bag. In the garage they found more personal items, including a blanket on the ground.

The police took some items for fingerprinting and the owners left everything in the house as they found it, locked the door as best they could, and left. Kenoyer turned the thermostat back down before he left.

The next day, November 26, Kenoyer returned to the house and found the heat turned up again and the washing machine running. It appeared someone had again recently cooked food in the kitchen. Kenoyer quickly left and called the police. But the police searched the house and found no one inside. Kenoyer collected the personal items from the house and put them outside in a bin in the driveway. He then boarded up the damaged back door to the house.

The police were able to isolate a fingerprint on one of the empty bottles they removed from the house. The print matched Dreyer's right thumb.

The following morning, November 27, when Kenoyer went by the house, he noticed that the items he had left in the driveway were gone. Around noon, a neighbor sent him a text message with a photograph of Dreyer using the house's outdoor water spigot to fill an electric kettle. Kenoyer again called the police and met them at the house. After 10 minutes, Dreyer walked out of the back yard and the police detained him. The arresting officer testified that Dreyer was wearing sneakers that matched the shoes worn by the man Block photographed leaving the house on November 25.

When they searched the house, it was in the same condition as Kenoyer left it the day before, but they found some of the personal items Kenoyer had removed from the house inside a detached shed. They also found the jacket and

backpack Dreyer was wearing on November 25, 2019. They found a pry bar tool inside Dreyer's backpack.

Dreyer told police that he was renting the shed or garage from his grandmother and he was legally allowed to be there. He denied ever being inside the house. Dreyer also said the police lacked probable cause to arrest him for burglary because such a charge would require proof he had the intent to damage or steal property. He insisted that his conduct was nothing more than a trespass.

The State charged Dreyer with residential burglary under RCW 9A.52.025(1).² During his February 2020 trial, Dreyer argued that he believed, in good faith, that he had permission to be inside the house and the State could not prove otherwise. In response, the State asked the court to instruct the jury on accomplice liability. The State contended that if Dreyer intended to argue that another person was responsible for entering the home and turning on the appliances and heat, it should be permitted to argue that Dreyer was acting in concert with another suspect. Dreyer maintained that while there was evidence that a second person was involved, there was no evidence of a connection between Dreyer and this second individual. In light of Dreyer's argument that a second person was involved in burglarizing the house, evidence that more than one person was present on November 25, and that Dreyer possessed lock hardware, suggesting he was a participant in the crime, the court granted the State's request for the accomplice liability instruction.

² Under this statute, "(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."

In closing, the State argued Dreyer entered and remained unlawfully in the Block/Kenoyer house with the intent to commit a crime against property, namely the theft of electricity, heat and water. Dreyer argued he did not enter the house unlawfully because he believed he had permission to be inside. He maintained that when he was arrested, he chose not to point the finger at this other individual because he knew that would lead to him being arrested as well. The State contended that even if the jury accepted the possibility of a second person being involved in the burglary, “the evidence all indicates that . . . Mr. Dreyer is an equal and active participant.”

The jury convicted Dreyer as charged. He appeals his conviction and sentence.

ANALYSIS

Dreyer challenges the trial court’s instructions on accomplice liability, arguing the evidence at trial did not support the giving of an accomplice liability instruction.

A party may have instructions embodying its theory of the case if there is evidence to support that theory; it is error to give an instruction not supported by the evidence. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). To determine if sufficient evidence exists to warrant an accomplice liability instruction, we review the evidence to determine if it was sufficient to permit conviction by a rational trier of fact. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). We view the supporting evidence in the light most favorable to the party that

requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

To prove that Dreyer was an accomplice to residential burglary, the State had to present evidence that Dreyer solicited, commanded, encouraged, or requested another to commit residential burglary, or aided or agreed to aid another in the commission of that crime. RCW 9A.08.020(3)(a). There must be evidence that Dreyer had actual knowledge that the principal was engaged in the charged crime and had actual knowledge that he was furthering that crime. RCW 9A.08.020(3)(a); State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

Dreyer argues that while there may have been evidence of two individuals being inside the house, there was no evidence to show that he acted in complicity with this other individual with the intent to commit a crime. We disagree.

There is overwhelming evidence Dreyer entered the house with the intent to commit a crime against property. Block found his back door jamb split open and Dreyer inside the house, using appliances, water, electricity, and heat. Dreyer had a pry bar in his backpack. A reasonable juror could conclude from this evidence that Dreyer broke into the house and did so to use utilities—heat, water, and electricity—and kitchen appliances that belonged to Block and Kenoyer. Significantly, the nature and number of personal items found at the house provided compelling evidence that Dreyer was not just passing through but had been living in the house for some time and using utilities throughout this time.

And there was evidence from which a rational jury could conclude that Dreyer did not act alone. Dreyer told Block that Sorenson gave him permission to

be inside the house. But neither Block nor Kenoyer gave anyone named Sorenson permission to be there or to undertake any renovations to the house. If Sorenson had let Dreyer into the house, he did so unlawfully. And Dreyer fled from the house after being confronted by Block—an act at odds with his contention that he believed he had permission to be inside. This evidence would support a jury determination that Dreyer knew neither he nor Sorenson had the legal right to enter or remain in the house.

There was also evidence suggesting more than one person was living in the house with Dreyer. There was one sleeping/bedding area in an upstairs bedroom and another area for someone to sleep on the ground in the garage. The police also found more than one toothbrush in the bathroom, and enough food, empty beer bottles, and personal items in the house to suggest Dreyer was not squatting in the house by himself. And on the same day that Block discovered Dreyer inside the house, Kenoyer saw another man talking to the electrician and his apprentice in the driveway and then saw this same man follow Dreyer into the woods after Dreyer fled the home. Although the two men were not seen together, there is sufficient circumstantial evidence from which a rational jury could conclude there was a nexus between them.

The evidence also supports the conclusion that Dreyer's role was not simply presence inside the house. Before Dreyer fled, he gathered up several new doorknobs and locksets, with their plastic packaging, and stashed them in his backpack. A rational jury could infer from this evidence that if someone named

Sorenson let Dreyer inside, Dreyer was helping him convert the house to their exclusive use by actively planning to change the locks on the house.

This evidence supports a jury determination that Dreyer aided or agreed to aid another in committing residential burglary. The trial court did not err in giving an accomplice liability instruction.

Dreyer next argues that the wording of Instruction No. 8 erroneously relieved the State of its burden to prove beyond a reasonable doubt that Dreyer acted with knowledge that his actions would promote or facilitate the commission of the crime, as required by RCW 9A.08.020(3)(a). Instruction No. 8 provided:

If you are convinced beyond a reasonable doubt that the Defendant participated in the crime of Residential Burglary and that crime has been proven beyond a reasonable doubt, you need not determine whether the defendant was an accomplice or a principal.

Dreyer focuses on the phrase “the Defendant participated in the crime” to argue that the State was relieved of the burden of proving actual knowledge.³

But Instruction No. 7 instructed the jury on the knowledge element that Dreyer contends is missing in Instruction No. 8.⁴ The trial court also instructed the

³ The State contends Dreyer waived his right to assert this error on appeal because he did not object to this wording below. The State is correct that Dreyer explicitly told the court it had no objections to the specific wording of Instruction No. 8. But Dreyer objected generally to Instruction No. 8 below, so we choose to address Dreyer’s argument on appeal.

⁴ Instruction No. 7 stated:

A person is guilty of the crime of Residential Burglary if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime of Residential Burglary.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime;
- or
- (2) aids or agrees to aid another person in planning or committing the crime.

jury that “[d]uring your deliberations, you must consider the instructions as a whole.” When read as a whole, Instruction Nos. 7 and 8 properly informed the jurors of the applicable law regarding accomplice liability. See State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005) (“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.”) The instructions did not relieve the State of its burden to prove beyond a reasonable doubt that Dreyer acted with knowledge that his actions would promote or facilitate the commission of the crime.

We affirm the conviction and remand to the trial court for resentencing in light of Blake.

WE CONCUR:

Andrus, A.C.J.

Cohen, J.

Lippelwick, J.

The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of the crime of Residential Burglary is guilty of that crime whether present at the scene or not.

Instruction No. 7 mirrors 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.51 (5th ed. 2021), which in turn mirrors RCW 9A.08.020(3)(a)(i-ii).

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