Supreme Court No. _____
COA No. 74526-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD JANEL LEGRONE,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

Statutes

Other Jurisdictions

A. IDENTITY OF PETITIONER/DECISION BELOW

Donald Janel Legrone requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Legrone, No. 74526-3-I, filed June 12, 2017. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Is review warranted where the State did not prove both alternative means of first degree burglary, and the jury did not specify it unanimously agreed on the other alternative? RAP 13.4(b)(1).

2. Did the prosecutor commit misconduct?

3. Were Legrone's constitutional rights to a fair trial and confrontation violated where the State's expert witness relied upon a report prepared by a non-testifying witness?

4. Did the trial court abuse its discretion and violate Legrone's constitutional rights by refusing to declare a mistrial after a State witness testified about Legrone's custodial statement that had been suppressed?

C. STATEMENT OF THE CASE

Daniel Legrone was convicted of first degree burglary arising from an incident that occurred at the Garden Suites Hotel in Des

Moines. Briana Lensegrav, a prostitute, was inside the hotel room entertaining a trick named Pete Smith. She said her boyfriend Charles Rodriguez, accompanied by his friend Legrone, unexpectedly entered the room through the window. Rodriguez was angry at Lensegrav and either pushed her on the bed or grabbed her hair. Meanwhile, Legrone walked toward Smith and Smith went into the bathroom. When Legrone walked away, Smith ran towards the door. He threw his arm out the door but Legrone kicked the door and it hit Smith's arm and head. Smith was able to push the door open and run away. 10/05/15RP 256-94; 10/22/15RP 2124-31.

Rodriguez and Lensegrav had exchanged text messages in the days and hours leading up to the incident. 10/21/15RP 1955-64. Lensegrav told Rodriguez she did not want to see him anymore because he was seeing another woman. 10/21/15RP 1957-58. Rodriguez told Lensegrav he was bothered that she was seeing another man. 10/21/15RP 1958-59. He texted her, "I'm about to come break that window out, if you don't answer that phone, and come in there and beat your ass." 10/21/15RP 1964.

None of the text messages mentioned Legrone. The State presented no text messages—or any other communications—between

Legrone and Rodriguez, or Legrone and Lensegrav, in the days leading up to the incident. 10/21/15RP 1973. The State presented no evidence to show Legrone was aware of the text messages sent between Rodriguez and Lensegrav.

The State charged Legrone with, among other things, one count of first degree burglary. CP 388. The jury was instructed on two alternative means of committing the crime. CP 443. The jury was instructed it could find Legrone guilty if it found he either entered the building unlawfully, or remained in the building unlawfully, with the intent to commit a crime against a person or property therein. CP 443. The jury was not instructed it must unanimously agree as to the means it was relying upon.

The jury found Legrone guilty as charged of first degree burglary. CP 494; 10/30/15RP 795-96. The jury did not specify whether it unanimously agreed on either alternative means.

Legrone appealed, arguing the conviction must be reversed because the State did not present sufficient evidence to prove one of the alternative means of first degree burglary—that he entered the building unlawfully with the intent to commit a crime therein—and the jury did not specify it had relied on the other alternative. The Court of Appeals

affirmed, reasoning the evidence was sufficient to prove *Rodriguez* had an intent to commit a crime inside the room when he entered, because he had sent threatening text messages to Lensegrav beforehand. The court concluded this evidence was also sufficient to convict Legrone as an accomplice under the unlawful entry alternative means. Slip op. at 4-5. The court did not acknowledge that the State had presented no evidence to show that Legrone was aware of the threatening text messages sent by Rodriguez to Lensegrav.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted because the State did not prove one of the alternative means of first degree burglary and the jury did not specify it unanimously agreed on the other alternative. RAP 13.4(b)(1).

When the State alleges a defendant committed a crime by multiple alternative means, but the jury is not instructed it must be unanimous as to the means, the State must present sufficient evidence to prove each charged means beyond a reasonable doubt in order to preserve the right to jury unanimity. State v. Owens, 180 Wn.2d 90, 95, 323 P.2d 1030 (2014).

If the evidence is insufficient to support one of the charged alternative means, and the jury does not specify it unanimously agreed

on the other alternative, the conviction must be reversed. State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017).

Entering or remaining unlawfully in a building with an intent to commit a crime are two alternative means of committing the crime of burglary. State v. Cordero, 170 Wn. App. 351, 365, 284 P.3d 773 (2012); State v. Klimes, 117 Wn. App. 758, 768, 73 P.3d 416 (2003).

To prove the "unlawful entry" alternative, the State must prove the defendant entered a building without invitation, license or privilege, and, at the time of entry, had an intent to commit a crime therein. State v. Thomson, 71 Wn. App. 634, 637-38, 861 P.2d 492 (1993). To prove the "unlawful remaining" alternative, the State must prove: (1) the defendant's continued presence in the building was unlawful, either because the initial entry was unlawful, or because the defendant exceeded the scope of any license or privilege to be there; and (2) the defendant had an intent to commit a crime in the building which coincided with his conduct that rendered his presence unlawful. Id. at 640-41; State v. Allen, 127 Wn. App. 125, 133, 110 P.3d 849 (2005).

Here, the State did not prove the "unlawful entry" alternative means. The State did not prove Legrone had an intent to commit a crime in the hotel room at the time he entered. Legrone told the police

he entered the room to pick up Lensegrav and take her to another hotel. Exhibit 107 at 4. He had no intent to commit any crime.

The only evidence presented to show Legrone had an intent to commit a crime in the room was Smith's testimony that Legrone kicked the door on Smith's arm and head as he was trying to leave. 10/22/15RP 2130. This evidence does not prove Legrone had an intent to commit a crime *at the time he entered the room*. There is no evidence that Legrone knew before he entered the room that Smith was inside. There is no evidence that Legrone intended to commit any other crime inside the room *at the time he entered.*

Contrary to the Court of Appeals' conclusion, the evidence was also insufficient to prove Legrone was guilty of the "unlawful entry" alternative means under a theory of accomplice liability. To prove Legrone was guilty as an accomplice to Rodriguez, the State was required to prove that, with knowledge that his conduct would "promote or facilitate the commission of *the crime*," Legrone (1) solicited, commanded, encouraged, or requested Rodriguez to commit the crime; or (2) aided or agreed to aid Rodriguez in planning or committing the crime. CP 481 (emphasis added); RCW 9A.08.020(3).

"The crime" for purposes of the accomplice liability statute means "the charged offense." State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000); see also State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Thus, the accomplice must "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and "*will not be liable for conduct that does not fall within this purpose*." Id. (internal quotation marks and citation omitted).

Accomplice liability is not strict liability. Roberts, 142 Wn.2d at 511. "[T]he culpability of an accomplice [does] not extend beyond the crimes of which the accomplice actually has 'knowledge.'" Id. Thus, an accomplice is not liable for any and all offenses ultimately committed by the principal. Cronin, 142 Wn.2d at 579.

The State must prove the accomplice had actual and not merely constructive knowledge of the crime. State v. Allen, 182 Wn.2d 364, 371-74, 341 P.3d 268 (2015). The State must show the defendant *actually knew* the principal would commit the crime. Id.

Thus, to prove Legrone was guilty as an accomplice, the State was required to prove he *actually knew* he was promoting or facilitating Rodriguez in the commission of a burglary. Id. at 374. To prove him guilty as an accomplice to the "unlawful entry" alternative, the State

was required to prove he had actual knowledge Rodriguez had an intent to commit a crime inside the hotel room at the time he entered. Id.

The State did not prove Legrone was guilty as an accomplice of the "unlawful entry" alternative means. There was no evidence Legrone *actually knew* Rodriguez intended to commit a crime inside the hotel room. The State presented no evidence of any communications between Legrone and Rodriguez in the days leading up to the incident. The State presented no evidence of any agreement between them, or any evidence to show they had jointly planned to commit a crime inside the hotel room. There was no evidence to show Legrone was aware of the content of the text messages exchanged between Rodriguez and Lensegrav before the incident.

The only evidence of any crime committed by Rodriguez inside the hotel room was Smith's testimony that Rodriguez grabbed Lensegrav by the hair and threw her on the bed. 10/22/15RP 2126-27. The jury also heard that Lensegrav told the police Rodriguez hit her twice in the face inside the room. 10/06/15RP 387-89.

But the State presented no evidence to show Legrone knew, at the time he and Rodriguez entered the hotel room, that Rodriguez intended to assault Lensegrav inside. Thus, the State did not prove

Legrone promoted or facilitated Rodriguez in unlawfully entering the room with an intent to commit a crime therein. The State did not prove Legrone was guilty as an accomplice to burglary under the "unlawful entry" alternative means.

Because the jury did not specify it unanimously agreed on the other alternative, for which there was sufficient evidence, the conviction must be reversed. Woodlyn, 188 Wn.2d 157.

2. Review is also warranted due to the Court of Appeals' decision to reject the additional issues raised in Legrone's *pro se* statement of additional grounds for review.

a. The prosecutor committed misconduct by altering the PowerPoint work product prepared by a non-testifying witness which the State's testifying expert witness relied upon.

The deputy prosecutor improperly acted as a testifying witness when questioning the State's expert witness, Melissa Rogers. Rogers is a digital forensics examiner who performs cell tower mapping. RP 2004, 2012. She testified about cell phone records for the purpose of determining the location of the participants' cell phones at relevant times. RP 2030-36. The records were admitted over objection. RP 2036. Rogers testified about a PowerPoint document created by an individual who did not testify . RP 882-86, 902. Rogers admitted the

prosecutor had made some changes to the document before giving it to her. RP 2077-79.

The prosecutor's decision to alter the PowerPoint document and then present it through the testimony of Rogers amounts to misconduct. State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2014).

b. Legrone was denied a fair trial when Rogers testified to the accuracy of the PowerPoint work product created by someone else who did not testify.

The PowerPoint document relating to cell tower evidence which Rogers testified about was created by a non-testifying individual named Melton. The State called Rogers to testify rather than Melton because "Melton had not been fully forthcoming with the Defense." RP 438. The document constituted hearsay because it was an out-of-court statement offered for the truth of the matters asserted. ER 801(c). It was therefore inadmissible. ER 802. Thus, Rogers's testimony was based on inadmissible hearsay.

Expert testimony based on hearsay is inadmissible. Anderson v. Calderon, 232 F.3d 1053, 1097 (9th Cir. 2000), overruled on other grounds by Osband v. Woodford, 290 F.3d 1036 (9th Cir. 2002). Expert testimony must be based on "scientific knowledge derived by the scientific method" and the expert's work product must amount to

"good science." United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996); U.S. Const. amend. XIV.

Legrone's constitutional right to confrontation was also violated. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); U.S. Const. amend. VI.

Due to these violations, the convictions must be reversed.

c. *The trial court abused its discretion and violated Legrone's constitutional rights by admitting his custodial statements that the court had previously suppressed under CrR 3.5.*

Legrone was arrested after being stopped by the police in an Impala in a parking lot. RP 264. Legrone told the officer the Impala was not his but belonged to his family. RP 271. Prior to trial, the court ordered that Legrone's custodial statements must be suppressed because he had not waived his Miranda rights. RP 578. Nonetheless, at trial, Officer Rongen testified that at the time of his arrest, Legrone said both the Impala and another car nearby, a Monte Carlo, belonged to his family. RP 152-53. Counsel objected and moved for a mistrial. RP 1484. The court denied the motion. RP 1485.

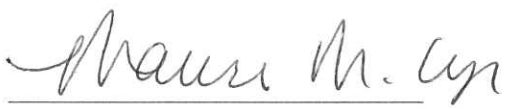
The court abused its discretion and violated Legrone's constitutional rights to a fair trial and to be silent by denying the

motion for a mistrial. State v. Young, 129 Wn. App. 468, 472-73, 119 P.3d 870 (2005); U.S. Const. amends. V, XIV.

E. CONCLUSION

For the reasons stated, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 7th day of July, 2017.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONALD JANEL LEGRONE, Appellant.	No. 74526-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 12, 2017

LEACH, J. — Donald Legrone appeals his conviction for first degree burglary and fourth degree assault. He contends he was denied his constitutional right to a unanimous jury verdict because the State failed to prove one of the charged alternative means of first degree burglary and the trial court did not instruct the jury that it must be unanimous as to the means.

A defendant is entitled to jury unanimity as to guilt on the crime charged. But the jury need not be unanimous about the means when substantial evidence supports each of the means by which the State charged the crime. Here, substantial evidence supported each means.

Legrone contends, and the State concedes, that his conviction for fourth degree assault incorrectly contains a domestic violence designation. This designation does not impact his sentence. Thus, we remand this case to superior court to amend the judgment and sentence by deleting the domestic violence designation for the fourth degree assault conviction. In all other respects we affirm the judgment and sentence.

FACTS

On October 23, 2013, Briana Lensegrav, a heroin addict who supported her habit by working as a prostitute, arranged a date with Peter Smith, a repeat client, at the Garden Suites Motel where she had been staying.

As Lensegrav and Smith concluded their date, Charles Rodriguez and Legrone entered the room through a window without permission. Smith testified that Rodriquez was angry and grabbed Lensegrav's hair, throwing her onto the bed. Legrone indicated that Smith should head to the bathroom. Smith complied. But when Legrone was distracted, Smith ran for the motel door. Legrone kicked the door, smashing Smith's arm and head. Legrone grabbed Smith's jacket, ripping it, but Smith was able to escape.

Legrone said that they should leave because Smith was probably going to call the police. Legrone led Lensegrav out through the front door to his car. As Legrone was pulling out of the motel driveway, he stopped for Rodriguez, who got in the back seat. They drove to a rural area. As they were driving up a gravel road, Rodriguez told Lensegrav that she was going to die.

After the car stopped, Rodriguez started hitting Lensegrav and repeated that she was going to die. When Rodriquez stopped, Legrone began to hit her. While Legrone was hitting her, Legrone told Lensegrav to pull her pants down and masturbate. Both threatened Lensegrav's family and son if she were to run or go to the authorities.

Afterward, Legrone drove Rodriquez to another motel. Lensegrav slept in the car and awoke when they were transferring cars. After providing Lensegrav with heroin, Legrone took her to her motel and gave her $100.

At her mother's urging, Lensegrav called the police who took her to a hospital where she was diagnosed with a fractured cheekbone.

The State charged Legrone and Rodriquez with first degree burglary, first degree kidnapping, and second degree assault.[1] The jury found Legrone guilty of first degree burglary and a lesser included charge of fourth degree assault. The jury could not reach a unanimous verdict on the kidnapping charge.

Legrone appeals. He contends that the State presented insufficient evidence to prove his conviction for first degree burglary. He also alleges his conviction for the misdemeanor fourth degree assault was improperly designated as a domestic violence crime.

ANALYSIS

Sufficient evidence

Legrone contends his constitutional right to a unanimous jury verdict under article I, section 21 of the Washington Constitution was violated because the State failed to prove one of the charged alternative means of first degree burglary and the trial court did not instruct the jury that it must be unanimous as to the means.

First degree burglary is an alternative means crime. It can be committed by entering a building unlawfully with intent to commit a crime or by remaining unlawfully with this intent.[2] Legrone does not dispute that he entered the motel unlawfully, only that the

---

[1] Legrone was also charged with two counts of possession of heroin on October 25, 2013, with intent to deliver in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. That charge was severed.

[2] RCW 9A.52.020(1); State v. Allen, 127 Wn. App. 125, 131,110 P.3d 849 (2005).

State failed to prove that he did so with the intent to commit a crime. Where sufficient evidence supports both means, the jury need not decide unanimously on one means.[3]

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, a rational trier of fact could have found guilt beyond a reasonable doubt. By making this challenge, Legrone "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[4]

Here, the State charged Legrone as both a principal and an accomplice to Rodriguez. RCW 9A.52.020 provides,

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

While mere presence at the crime is insufficient to prove accomplice liability, the evidence here supports a jury finding that Legrone was "ready to assist in the crime."[5] The State presented evidence of threatening texts that Rodriguez sent to Lensegrav shortly before breaking in. Although Lensegrav told Rodrigues that she would contact him after her date left, Rodriguez replied that he was going to "come break that window out if you don't answer that phone, and come in there and beat your ass." Minutes later, Rodriguez and Legrone both entered through the rear window of the motel room. This startled both Lensegrav and Smith. Legrone intimidated Smith by ordering him to the bathroom, while

---

[3] State v. Ortega-Martinez, 124 Wn.2d 702, 707-09, 881 P.2d 231 (1994); State v Armstrong, No. 93119-4, slip op. at 6 (Wash. May 11, 2017), http://www.courts.wa.gov/opinions/pdf/931194.pdf.

[4] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[5] State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

Rodriguez grabbed Lensegrav by the hair and threw her down. When Smith ran for the door, Legrone chased him, kicking the door to try and prevent him from leaving. The door struck Smith, causing him pain. Legrone then tried to stop Smith by grabbing his jacket. Smith managed to escape.

A rationale trier of fact could conclude from this evidence that Legrone meant to enter the room to help Rodriquez attack Lensegrav. Legrone's actions to contain Smith could reasonably be seen as helping Rodriguez by keeping Smith from aiding Lensegrav or escaping to contact the authorities for help. Sufficient evidence supports the conviction for first degree burglary.

Misdemeanor Judgment and Sentence

Legrone contends, and the State concedes, that the judgment and sentence for fourth degree assault incorrectly contained a domestic violence designation as there was no evidence that Legrone had a relationship with Lensegrav. We accept the State's concession.

Statement of Additional Grounds

In a statement of additional grounds, Legrone alleges violations of the court's witness exclusion ruling, the confrontation clause, prosecutorial misconduct, inadmissible testimony, and ineffective assistance of counsel. None of these claims has any merit.

Appellate Costs

Finally, Legrone asks this court to deny the State appellate costs based on his indigency. We generally award appellate costs to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding continues

throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[6] Here, the trial court found Legrone indigent. If the State has evidence indicating significant improvement in Legrone's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

In conclusion, we remand the matter to superior court to amend the judgment and sentence by deleting the domestic violence designation for the fourth degree assault conviction. In all other respects we affirm the judgment and sentence.

Leach, J.

WE CONCUR:

Schindler, J. Applewick, J.

[6] RAP 14.2.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 74526-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent David Seaver, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 7, 2017

WASHINGTON APPELLATE PROJECT

July 07, 2017 - 3:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74526-3
Appellate Court Case Title:	State of Washington, Respondent v. Donald J. Legrone, Appellant
Superior Court Case Number:	13-1-13558-9

The following documents have been uploaded:

- 745263_Petition_for_Review_20170707153656D1896677_2669.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20170707_145158.pdf

A copy of the uploaded files will be sent to:

- david.seaver@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170707153656D1896677