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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MARK ANTHONY LEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 09-1-05281-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed the crimes of residential burglary and making a false or misleading statement to a public servant.

2. Did the trial court properly instruct the jury that defendant's intent to commit the crime of residential burglary could be inferred from his unlawful entry into the victim's home?

B. STATEMENT OF THE CASE.

1. Procedure

On November 24, 2009, the Pierce County Prosecuting Attorney's Office charged MARK ANTHONY LEE, hereinafter "defendant" with one count of residential burglary and one count of making a false or misleading statement to a public servant in Pierce County Superior Court Cause No. 09-1-05281-8. CP 1-2.

Trial commenced on March 10, 2010 before the Honorable Stephanie Arend. After opening statements, defense made a motion to dismiss for failure to make a prima facie case, specifically stating that he was unsure if the State had alleged facts supporting that defendant entered Mr. Hamilton's house with the intent to commit a crime therein. RP 28.

The Court denied defendant's motion ruling that the State's opening was sufficient to survive the motion to dismiss. RP 30.

After hearing all the evidence, the jury found defendant guilty as charged. CP 106, 108; RP 354. The court sentenced defendant to 63 months in prison, the low end of the standard range sentence for the residential burglary. CP 112-125. The court also sentenced defendant to one year in jail for making a false or misleading statement to a public servant, to run concurrently with the felony sentence for residential burglary. *Id.*

2. Facts

On the morning of November 23, 2009, Richard Hamilton left his residence, located at 868 South 34th Street, Tacoma, Washington, to visit his son in Florida. RP 86. He asked his friends, Richard Olson, and Richard Haehn, to look after his home while he was away. RP 96, 99.

Around 8:30 a.m., Mr. Haehn went to Mr. Hamilton's house to do some work. RP 143. Mr. Haehn stayed for approximately 30 minutes and checked to make sure all the doors and windows were locked before he left. RP 143. Mr. Haehn testified that when he left the house, everything was in order. RP 146.

Later that day, around 3 p.m., Mr. Olson drove by Mr. Hamilton's house and noticed that his television was on. RP 121. When Mr. Olson

called Mr. Hamilton to let him know, Mr. Hamilton said he may have left his television on and that his worker would turn it off. RP 121.

Around 6 p.m., Mr. Olson drove by Mr. Hamilton's house again. RP 121. Mr. Olson noticed that all the lights in the house were on and a black SUV was parked in the driveway. *Id.*

After calling Mr. Hamilton to inform him about what he observed, Mr. Olson knocked on the front door of Mr. Hamilton's house. RP 122. Defendant answered the door. *Id.* Mr. Olson saw Elaine Turley, a woman he knew, in the background and asked defendant if Ms. Turley was there. RP 122-123. Defendant told Mr. Olson that it was defendant's house and that Ms. Turley was not there. RP 122. At that point, Mr. Olson said "thank you, I'm sorry: have a nice day," and then left. *Id.*

Mr. Olson went to his car and called the police, then drove around the block. RP 124. As he drove past Mr. Hamilton's house again, defendant ran towards Mr. Olson and asked Mr. Olson where he was going. *Id.* Mr. Olson did not respond and then drove around until the police arrived. *Id.*

Around 9:30 p.m., Officer Zachary Spangler from the Tacoma Police Department responded to Mr. Olson's call. RP 39-41, 61. When Officer Spangler arrived, he observed a Ford Excursion parked in Mr. Hamilton's driveway, a woman was sitting inside the vehicle, and three

other people were coming out of the residence. RP 42-43. One person had something in his hand and put the item in the back of the truck. *Id.*

Officer Spangler identified himself as a police officer and told the four individuals, which included defendant, to put their hands up. RP 47-48. Defendant and Ms. Turley ignored Officer Spangler's request and returned to the residence, closing the door behind them. RP 48-49. The man who had complied with Officer Spangler and remained outside, yelled to defendant and Ms. Turley to come back outside because the police were there. RP 49. Defendant and Ms. Turley then came outside. *Id.*

Meanwhile, Tacoma Police Officers Eric Barry, Dean Waubanasum, Dave Johnson, and Nick Jensen arrived at the scene to assist. RP 51. Officers Spangler and Jensen spoke with Ms. Turley who stated that she lived at the residence and could prove it by showing the officers a piece of mail with her name on it. RP 52. Ms. Turley and Officer Jensen went inside to find documentation that proved that Ms. Turley lived there. RP 206. Despite looking for ten to fifteen minutes, Ms. Turley was unable to provide any documentation that linked her to the house. RP 207.

Ms. Turley also claimed that she had keys to the house. RP 207. Officer Jensen had Ms. Turley try each key on her key ring in the front door lock but none of them worked. *Id.* Officer Johnson repeated this exercise with Ms. Turley with the same result. *Id.*

When Officer Spangler went inside the residence, he noticed that a flat screen television had been taken off of its console and placed on the floor. RP 53. In the master bedroom, he observed tools lying on the floor and the wall safe had been broken and scratched. RP 55.

Officer Jensen observed several uncapped needles that looked freshly used and a sweater draped over a heater that was placed directly below the window. RP 209. The sweater was damp and had grass clippings and dirt on it. RP 210. There were handprints on the outside of the window and streaks from the fingers went up which indicated that someone was pushing up on the window. RP 211.

Shea Wiley, a Crime Scene Technician for the Tacoma Police Department, lifted eight fingerprints. RP 219, 227. The analyst identified three prints belonging to Ms. Turley, including one found on the television set and one in the closet where the wall safe was located. RP 229, 230.

Officer Spangler spoke with Mr. Hamilton on the phone. RP 59. Mr. Hamilton informed Officer Spangler that Ms. Turley had lived with him for approximately two months but had moved out of his home six months prior. RP 62. Mr. Hamilton had never given Ms. Turley a key to the house. RP 88.

Officer Barry contacted defendant, handcuffed him, and advised defendant of his *Miranda*¹ rights. RP 190. Officer Barry then escorted

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

defendant to his patrol car. *Id.* Defendant waived his *Miranda* rights and agreed to speak with the officer. RP 191-192.

Officer Barry asked defendant what was going on. RP 192. Defendant replied “[m]an, there ain’t nothing funny going on here.” *Id.* Officer Barry asked defendant if he was ever inside the house. *Id.* Defendant denied being inside the house and stated “I don’t know what you’re talking about.” *Id.*

Officer Barry then confronted defendant about the fact that defendant was on the front porch and the front door was open. RP 193. Defendant stated that he was there visiting a female (Turley) who lived there and finally stated “[a]ll right, dude, I was inside.” *Id.*

When Officer Barry asked defendant if that was all he knew, defendant stated “[m]an, that’s all I know.” RP 194. Officer Barry asked defendant if he was sure about that response and defendant finally admitted that he had been inside the house having sex with Ms. Turley on the couch. RP 193-194. Defendant also stated that while he and Ms. Turley were having sex, she looked up at the television and asked defendant if he knew anyone that would want to buy it. RP 195. Officer Barry asked defendant how he got into the house and defendant stated that he didn’t know. *Id.* Defendant was then transported to the police station.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIMES OF RESIDENTIAL BURGLARY AND MAKING A FALSE STATEMENT TO A PUBLIC SERVANT.

Due process requires the State to bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Additionally, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences therefrom. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in a light most favorable to the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. Sufficient evidence was adduced for the jury to find all the elements of residential burglary beyond a reasonable doubt including that defendant knew he was aiding in a burglary.

A person commits the crime of residential burglary when he or an accomplice enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. CP 71-102 (Jury Instruction 8); *see also* RCW 9A.52.025. The jury was instructed that in order to find defendant guilty of the crime of residential burglary, each of the following elements must be proven beyond a reasonable doubt:

- (1) That on or about the 23rd day of November, 2009, the defendant, or an accomplice, entered or remained unlawfully in a dwelling;
- (2) That the act of entering or remaining was with the intent to commit a crime against a person or property therein; and
- (3) That the act occurred in the State of Washington.

CP 71-102 (Jury Instruction 16). The jury was further instructed that:

A person is guilty of a crime 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.

A person is an accomplice in the commission of the 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.

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.

CP 71-102 (Jury Instruction 15); *see also* RCW 9A.08.020.

Appellant argues that there was insufficient evidence to prove that defendant knew he was aiding in a burglary. Appellant’s brief, p. 11. However, at trial, Mr. Olson testified that when he knocked on Mr. Hamilton’s door, defendant answered the door and Mr. Olson saw Ms. Turley in the background. RP 122. Mr. Olson asked defendant if Ms. Turley was there. *Id.* Defendant told Mr. Olson that the house belonged to defendant and that Ms. Turley was not there. *Id.* Defendant later told Officer Barry that defendant had not been inside the house and then changed his story, stating that he had been inside the house visiting Ms. Turley. RP 193. Defendant’s denial of having been inside the house suggests that defendant knew he was not supposed to be there. This doesn’t conform to his later story that Ms. Turley owned the house, because if she did, defendant would have been allowed to be there.

Defendant also told Officer Barry that he did not know how either Ms. Turley or defendant got inside the house. RP 195. Additionally, Officer Barry testified that defendant admitted that when he was inside having sex with Ms. Turley, Ms. Turley asked defendant if he knew

anyone who would want to buy the television. RP 195. It was reasonable for the jury to infer that since defendant knew that Ms. Turley did not live in the house, defendant also knew that Ms. Turley did not have permission to sell the television.

Defendant's changing story supports a reasonable inference that defendant knew the house did not belong to Ms. Turley, that he knew that the objects inside the house were not Ms. Turley's to dispose of, and that defendant was inside the house to commit the crime of theft.

Taken in the light most favorable to the State, the evidence presented at trial, coupled with the reasonable inferences from that evidence was sufficient for the jury to find beyond a reasonable doubt that defendant knew that he was assisting in the commission of a burglary and therefore supports the jury's finding that defendant is guilty of the crime of residential burglary.

- b. Sufficient evidence was adduced for the jury to find all the elements of making a false or misleading statement to a public servant beyond a reasonable doubt.

A person commits the crime of making a false or misleading statement to a public servant when he or she knowingly makes a false or misleading material statement to a public servant. CP 71-102 (Jury Instruction 21); *see also* RCW 9A.76.175. The jury was instructed that a material statement is a written or oral statement reasonably likely to be

relied upon by a public servant in the discharge of his or her official powers or duties. CP 71-102 (Jury Instruction 24). The jury was further instructed that in order to find defendant guilty of the crime of making a false or misleading statement to a public servant, each of the following elements must be proven beyond a reasonable doubt:

- (1) That on or about the 23rd day of November, 2009, the defendant made a false or misleading statement to a public servant;
- (2) That the statement was material;
- (3) That the defendant knew both that the statement was material and that it was false or misleading; and
- (4) That any of these acts occurred in the State of Washington.

CP 71-102 (Jury Instruction 25).

Officer Barry testified that defendant initially denied being inside Mr. Hamilton's residence. RP 170. Defendant later admitted to Officer Barry that he and Ms. Turley were inside Mr. Hamilton's house having sex. *Id.* Defendant's initial statement to Officer Barry that he was not inside Mr. Hamilton's home was the false or misleading statement that formed the basis for Count II. *See* RP 238-239.

Defendant's statement was false because Mr. Olson testified that defendant had been inside Mr. Hamilton's house. This sort of statement (who was in the house) was material because the officer was investigating

a residential burglary and knowing if defendant was in the house was material to the investigation.

Furthermore, the issue of whether or not defendant initially told Officer Barry that he was not inside Mr. Hamilton's house is a question of fact for the jury to decide. The jury believed Officer Barry's testimony that defendant initially denied being inside Mr. Hamilton's house and that defendant later admitted that he had been inside the house. Defendant knew that his statement to Officer Barry was reasonably likely to be relied upon by the police in their official capacity because Officer Barry was questioning defendant in his official investigation about the burglary.

Taken in the light most favorable to the State, the evidence presented at trial and the reasonable inferences therefrom support the jury's finding that defendant is guilty of making a false or misleading statement to a public servant.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING THE JURY THE PERMISSIBLE INFERENCE INSTRUCTION.

A trial court's instructions to the jury are reviewed under the abuse of discretion standard. *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22, 914 P.2d 67 (1996). A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3)

when read as a whole, properly inform the trier of fact of the applicable law. *Id.* at 22-23. A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

“In any prosecution for burglary, any person who enters or remain unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.” *State v. Brunson*, 128 Wn.2d 98, 106, 905 P.2d 346 (1995). A rational connection must exist between the initial fact proven and the further fact presumed. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989). The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. *Id.* (*internal citations omitted*). A jury is presumed to have followed all the court’s instructions, not solely the instruction on an inference. *State v. Brunson*, 128 Wn.2d at 109 *quoting State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

The jury was instructed that:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not

binding upon you and it is for you to determine what weight, if any, such inference is to be given.

CP 71-102 (Jury Instruction 12); WPIC 60.05.

In the present case, the permissible inference instruction² was proper because the evidence presented at trial established that defendant was inside Mr. Hamilton's house, lied to the police about being inside the house, and lied to Mr. Olson about the house belonging to defendant. The evidence further established that defendant was planning to assist Ms. Turley in selling Mr. Hamilton's television.

Additionally, defendant claimed that he did not know how he got inside Mr. Hamilton's house and that he did not know how Ms. Turley got inside Mr. Hamilton's house. However, Officer Jensen observed several uncapped needles that looked freshly used and a sweater that was damp and had grass clippings on it draped over a heater that was placed directly below the window. RP 209-210. There were also handprints on the outside of the window and streaks from the fingers went up which indicated that someone was pushing up on the window. RP 211. It can be inferred from this testimony that Ms. Turley and defendant

² Originally, defense did not object to the permissible inference instruction. RP 256. However, prior to the instructions being read to the jury, defense counsel stated "[a]lso making our objection known for the record, No. 12, same reason as before. It's been ruled on before, Your Honor." RP 303. Even though defense counsel stated he was reiterating his objection to instruction 12, in the preceding conversation about jury instructions defense counsel did not object to instruction 12 and did not present the court with a reason as to why instruction 12 would not be proper. RP 256.

entered the home through the window which further supports the inference that defendant knew the house did not belong to Ms. Turley and entered the house with the intent to commit a crime therein.

The permissible inference instruction did not require the jury to infer defendant's intent; it merely permitted the jury to infer defendant's intent from his unlawful entry into Mr. Hamilton's house.

The court did not abuse its discretion in giving the permissible inference instruction.

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D. CONCLUSION.

For the above reasons, the State respectfully requests the court
affirm defendant's judgment and sentence below.

STATE OF WASHINGTON
BY _____
DEPUTY

DATED: JANUARY 25, 2011

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Karen Judy
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/25/11 *[Signature]*
Date Signature