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Court of Appeals
Division II
State of Washington
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NO. 50580-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHERAYA JEANELLE TAYLOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft

No. 16-1-03295-0

Brief of Respondent

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

1. When viewed in the light most favorable to the State, was sufficient evidence adduced for a rational jury to find defendant conspired to commit burglary when defendant aided her co-conspirators as they worked together to gain entry into the house?
2. Did the trial court properly deny defendant's request for a lesser included criminal trespass instruction when a jury would have had to disbelieve evidence in order to acquit defendant of burglary but convict her of criminal trespass?

B. STATEMENT OF THE CASE.

1. PROCEDURE

The State charged Sheraya Jeanelle Taylor, hereinafter "defendant," with six counts relating to a series of crimes that occurred on August 14, 2016. CP 38-41. The charges included one count of first degree robbery, first degree attempted robbery, first degree burglary, conspiracy to commit burglary, and two counts of second degree assault.

Id.

The case proceeded to jury trial on May 3, 2017. RP 127.¹ The State called 15 witnesses, including five of the victims. CP 195. The defense rested without presenting any witnesses. RP 805.

The jury returned guilty verdicts on three of the six counts, including one count of second degree assault, first degree burglary, and conspiracy to commit burglary. CP 137-39. The jury also found that defendant or an accomplice was armed with a deadly weapon during the commission of each of those crimes. CP 143-45. The trial court sentenced defendant to a total of 90 months confinement. CP 179-80. Defendant filed a timely appeal. CP 150.

2. FACTS

“[T]hree peas in a pod.” RP 618. That is how one witness described defendant and her accomplices on the night of August 14, 2016, as they undertook to commit a series of crimes at a Tacoma home. *Id.* In the time leading up to that night, defendant lent her friend \$200 to purchase some heroin from Brandden McDonough. RP 444-45. After determining that the heroin was “bunk,” or fake, defendant decided to go after McDonough to recoup the money or obtain drugs. RP 444-45, 536. Defendant brought two of her associates, Pierre Cortez and Jalen Lilly, to

¹ The Verbatim Report of Proceedings are contained in 12 volumes and have consecutive pagination. They are referred to by page number.

“assist” her in obtaining drugs or money from McDonough. RP 448-49, 466. The three of them drove a gold Chrysler 300 to McDonough’s Tacoma residence. RP 185, 212, 337, 340-42, 532-33.

When they arrived, McDonough’s neighbor, Leroy, went up to McDonough’s house and tapped on his bedroom window. RP 526, 531. Leroy told McDonough that there were people outside who wanted to talk to him. RP 532. McDonough looked outside and saw the gold Chrysler parked across the street. RP 532-34. He went outside, approached the Chrysler, and spoke with defendant. RP 535, 540. When McDonough learned that defendant wanted drugs, he asked all of the Chrysler occupants to leave. RP 536.

The Chrysler pulled away, and two individuals, Steve Napolitano and Katie Koedinger, appeared in a Subaru. RP 537. Napolitano and Koedinger are fellow drug users and friends of McDonough. RP 299, 304, 527. Napolitano got out of the Subaru and went over to the house to smoke with McDonough. RP 544-45. About 15-20 minutes later, the Chrysler returned. RP 537. McDonough heard another tap on his window. RP 539-40. This time it was defendant. *Id.* Defendant was “[v]ery very aggressive.” RP 541. She demanded McDonough come out with drugs or money. *Id.* McDonough told her to go away and that he was not coming outside. RP 543. McDonough closed his blinds and walked away. RP 544.

He asked Napolitano to go outside and “give them whatever they want to make them leave[.]” *Id.* Napolitano agreed and went outside. RP 545.

Defendant remained on McDonough’s porch. *Id.* McDonough heard her “threatening” him. *Id.* “Come outside, come outside ... so we don’t have any problems. You owe me, you owe me ... you don’t want to deal with the problems that you’re about to have.” *Id.* McDonough looked out the window and saw men outside with firearms. RP 545-46.

McDonough proceeded to lock the doors to the house. RP 546. He ran to the back room and told the homeowner, Martha, that there were intruders on the property who wouldn’t leave and that they had weapons. *Id.* Martha called 911. *Id.*

Ron Goudge, McDonough’s stepfather and Napolitano and Koedinger’s friend, was also on the property that day. RP 589, 603-04. Goudge went over to talk to Napolitano who, after going outside at McDonough’s request, was standing by the Subaru. RP 312-13, 604. When he got there, he noticed the gold Chrysler parked behind the Subaru. RP 312-13, 604. Cortez and Lilly exited the Chrysler. RP 313-15, 329-30, 606-13. Lilly, armed with a shotgun, went up to Goudge and pointed the gun at him. RP 607-08. Goudge grabbed the barrel of Lilly’s gun and jerked it away. RP 608. Lilly asked Goudge if he “wanted to die.” *Id.* Goudge replied, “No, not today.” *Id.*

Meanwhile, Cortez approached Napolitano and shoved his weapon into Napolitano's side. RP 610, 613. Cortez demanded Napolitano to "give him everything he's got" and to empty his pockets. RP 613, 766. Napolitano complied and handed Cortez the money that was in his pocket. RP 766-67. Cortez told Napolitano, "You're gonna get me in that house." RP 767.

Joining forces with Cortez, Lilly prodded Napolitano with his shotgun and grabbed Napolitano's arm. *Id.* At that point, defendant walked over to Napolitano, joining Cortez and Lilly. RP 612. Cortez stood with his pistol in Napolitano's side. RP 768. Defendant stood behind him. RP 768, 776. All three of them led Napolitano up to the side door of the house. RP 770, 775-76. Goudge, watching this take place, called 911. RP 615. He reported that both Cortez and Lilly were armed; defendant was "there with them, but she didn't have a weapon." RP 618. When asked about defendant's relation to Cortez and Lilly at that time, Goudge testified that they were "three peas in a pod. They're all together." *Id.*

After defendant, Cortez, Lilly, and Napolitano got up to the door, Napolitano "bolted." RP 771. He did not want to help them open the door. RP 782. Napolitano testified he would be better off getting shot than "getting charged with home invasion." *Id.* Napolitano testified that all

three of them were focused on getting something from McDonough, who had locked himself inside the house. RP 546, 773.

Defendant, Lilly, and Cortez remained on the front porch after Napolitano left. RP 614. Goudge saw defendant and Lilly “messaging with the window,” and Cortez “beating on the front door[.]” *Id.* Lilly joined Cortez in beating on the front door while defendant wrestled with the window “air conditioner[.]” *Id.* Once defendant finally pushed the air conditioner through McDonough’s window, she joined Cortez and Lilly on the side of the house. *Id.*

Inside, McDonough heard the group yelling and kicking at his door. RP 547, 554. “Let us in, let us in.” RP 547. McDonough was “freaking out” and “scared” talking to the 911 operator. RP 548-49. He ran back and forth from the front door to the back bedroom. RP 549. While on the phone with 911, McDonough heard defendant push his air conditioning unit in through his bedroom window. RP 340, 549-50. According to McDonough, it was “the easiest way in.” RP 549.

As McDonough ran back to Martha’s bedroom, he heard his roommate, Bryan McLeish, exit his room. RP 556. McLeish looked at the video surveillance monitor outside his room and saw Lilly outside with a shotgun. RP 682-83, 687. There is a 15 second delay on the monitor, and the next thing McLeish heard were people kicking at the door. RP 683.

Cortez and Lilly forced their way into the house. *Id.* Cortez grabbed the monitor and threw it out the side door. RP 690-91, 694. Cortez and Lilly tried to go back to Martha's room, but, knowing they were there for McDonough, McLeish directed them to McDonough's room. RP 691, 694-95.

Cortez began rifling through McDonough's belongings, and Lilly held McLeish at gunpoint. RP 695-96. McLeish told Lilly to "get the gun out of [his] face," then he saw defendant come "around the corner." RP 696. Although defendant was not inside the house, she stood right outside while McLeish and Lilly argued in the doorway. RP 697, 699. Defendant and Lilly were close enough to see each other. RP 699. Lilly continued aiming his gun at McLeish; McLeish told defendant, "Tell your friend to get the gun off me." *Id.* In response, defendant only repeated that she was there to settle a debt with McDonough. RP 700. Cortez eventually left McDonough's room, and Lilly took his gun off of McLeish. *Id.* Cortez took a "purse and little plastic bin" from McDonough's room. *Id.*

Finally, Cortez and Lilly went out the front door. RP 700. Police arrived, yelling, "Get on the ground[.]" RP 702. At that point, defendant, Cortez, and Lilly all came back together through the front door, into the house, and out the back door. RP 703.

Officers commanded defendant to exit the house with her hands up. RP 204. She came out holding a home alarm monitor but dropped it at police command. *Id.* While detaining defendant, defendant resisted and “became violent.” RP 202, 206-06. She started “screaming and yelling.” *Id.* She used her body weight to try to push away from the officer. *Id.* When defendant finally calmed down, she agreed to speak with officers. RP 211. She admitted that she went to the house with Cortez and Lilly to get money from McDonough. RP 212-13.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR A RATIONAL JUROR TO FIND DEFENDANT CONSPIRED TO COMMIT BURGLARY BEYOND A REASONABLE DOUBT.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In considering the 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). Conflicting evidence is judged solely by the jury. *Welliever v. MacNulty*, 50 Wn.2d 224, 310 P.2d 531

(1957). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the jury should be upheld. *Camarillo*, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

To convict defendant of conspiracy to commit burglary, the jury had to find, among other things, that defendant agreed with one or more persons to enter or remain unlawfully in a building with intent to commit a crime against a person or property therein, and that any one of the persons involved in the agreement took a substantial step in pursuance of the agreement. RCW 9A.28.040; RCW 9A.52.020. Defendant admits that the evidence shows that she and her accomplices had a "general plan to confront McDonough and obtain drugs or money." Brief of Appellant at

10. She claims, however, that that plan was limited to a confrontation only outside of the home. *Id.* Defendant contends that even when Cortez and Lilly forced their way into the home, there was no evidence to suggest that defendant planned or agreed to this escalation of events. *Id.*

A formal agreement is not necessary to prove conspiracy. *State v. Smith*, 65 Wn. App. 468, 471, 828 P.2d 654 (1992). “Conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action.” *State v. Embry*, 171 Wn. App. 714, 743, 287 P.3d 648 (2012). “The State can demonstrate concert of action by showing the parties working understandingly, with a single design for the accomplishment of a common purpose.” *Id.*

“[A] conspiracy does not require that all of the criminal elements of the plan be proposed and agreed to at the same instant in time.” *State v. Oeung*, 196 Wn. App. 1011 (2016)² (citing *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98 (2006)). A planned criminal enterprise that evolves over time should be treated no differently than one that is fully formed at the outset. *See Williams*, 131 Wn. App. at 496. [A]ll a prosecutor needs to prove is that the conspirators agreed to undertake a

² GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

criminal scheme and that they took a substantial step in furtherance of the conspiracy.” *State v. Bobic*, 140 Wn.2d 250, 265, 996 P.2d 610 (2000).

When viewed in the light most favorable to the State, sufficient evidence existed for a rational jury to conclude beyond a reasonable doubt that defendant made an agreement with Cortez and Lilly to unlawfully enter McDonough’s home and commit a crime there. Defendant correctly states that when she “first attempted to settle the debt with McDonough, she waited in the [Chrysler] for McDonough to come outside[.]” Brief of Appellant at 10. But her plan changed over the course of the night.

Trial testimony revealed that after McDonough refused to come outside following defendant’s persistent commands, defendant joined up with Cortez and Lilly, who were holding Napolitano at gun point. RP 612. Defendant, Cortez, and Lilly collectively led Napolitano up to the side door in an attempt to gain entry. RP 770, 775-76. Cortez told Napolitano, “You’re gonna get me in that house.” RP 767. Goudge saw them; they were “all together.” RP 618. Even though defendant was not armed while leading Napolitano to the door, Goudge testified she was “there with them.” *Id.* She was just as much a part of the effort as Cortez and Lilly were. Both Cortez and Lilly had guns on Napolitano, and, according to Goudge, they were like “three peas in a pod.” RP 610, 613, 618, 767. While defendant did not enter the house with Cortez and Lilly, Cortez and

Lilly went into the house to fulfill the group's common purpose: to get something from McDonough. RP 683, 691, 694-95. It was so obvious what their plan was that McLeish directed Cortez to McDonough's bedroom. RP 691, 694-95.

Defendant remained on McDonough's porch while Cortez and Lilly made their way inside. RP 697, 699. She never told them to stop. RP 630. She never tried to intervene. *Id.* She never left the property. Rather, defendant aided Cortez and Lilly's efforts by shoving McDonough's air conditioning unit through his bedroom window. RP 614. She then stood outside the doorway, looking at Lilly who had his gun pointed at McLeish. RP 696-700. McLeish asked her to tell Lilly to move his gun. *Id.* All she said in response was that she was there to get something from McDonough. *Id.*

Multiple witnesses testified that defendant, along with Cortez and Lilly, acted as a group to get inside the house and rob McDonough. RP 370-71, 455, 564-65, 618. Defendant herself admitted that Cortez and Lilly were there to assist her in getting either drugs or money from McDonough. RP 466.

The actions of the group displayed nothing but a concerted effort to get inside the house. When viewed in the light most favorable to the State, evidence was sufficient for any rational juror to find that defendant

agreed with Cortez and Lilly to unlawfully enter McDonough's home and commit a crime there. This Court should affirm defendant's conspiracy to commit burglary conviction.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S REQUEST FOR A LESSER INCLUDED CRIMINAL TRESPASS INSTRUCTION.

A defendant is entitled to an instruction on a lesser included offense only when two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). The first condition, referred to as the "legal prong," requires that each of the elements of the lesser offense be a necessary element of the offense charged. *Workman*, 90 Wn.2d at 447-48; *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). The second condition, referred to as the "factual prong," requires that the evidence in the case support an inference that only the lesser crime was committed. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015); *LaPlant*, 157 Wn. App. at 687. Because the legal prong of the *Workman* test was met, defendant only challenges the trial court's finding as to the factual prong. Brief of Appellant at 12-14. Review is therefore limited to an abuse of discretion. *LaPlant*, 157 Wn. App. at 687.

A trial court commits an abuse of discretion if its decision is "manifestly unreasonable" or based on "untenable grounds or reasons."

State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). “A court’s decision is ‘based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.’” *Id.* “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.* “The ‘untenable grounds’ basis applies ‘if the factual findings are unsupported by the record.’” *Id.*

“The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one.” *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2006) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000)). “[T]he evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina*, 141 Wn.2d at 456.

The crime charged in this case was burglary in the first degree. CP 38-41. The elements of first degree burglary include that (1) on or about August 14, 2016, the defendant entered or remained unlawfully in a building; (2) the entering or remaining was with intent to commit a crime

against a person or property therein; (3) in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person; and (4) any of these acts occurred in the State of Washington. CP 79-113; RCW 9A.52.020; WPIC 60.02.

The court also gave an accomplice liability instruction, stating that

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.

CP 79-113; WPIC 10.51.

Defendant claims she was entitled to a lesser included instruction of first degree criminal trespass. Brief of Appellant at 12. An instruction on first degree criminal trespass would include that (1) on or about August 14, 2016, the defendant knowingly entered or remained in a building; (2) the defendant knew that the entry or remaining was unlawful; and (3) this act occurred in the State of Washington, City of Tacoma, County of Pierce. RCW 9A.52.070; WPIC 60.16.

At trial, defendant requested the court give a lesser included criminal trespass instruction. RP 816. The trial court heard argument from both sides. Defendant argued that *Workman*'s factual prong was satisfied

because (1) a jury could find that Cortez and Lilly were acting on their own when they led Napolitano up to the house and when they ultimately gained entry into the house, and (2) at the point defendant actually entered the house, she did so in reaction to seeing police. RP 816. In sum, defendant argued that a jury may find that defendant was not acting as an accomplice to the burglary, and, therefore, she only committed criminal trespass when she ran through the house to escape police. RP 817. The State responded that the burglary was a “continuous behavior,” lasting for approximately 20 minutes, and that the officers’ arrival did not disrupt the chain of events. RP 821. Additionally, the State argued, witnesses testified to seeing defendant, along with Cortez and Lilly, all walk Napolitano up to the door and work “together to gain entry through assorted different means into the home.” RP 822. The State argued that a jury would have to disbelieve all of that evidence in order to find that defendant was not an accomplice to the burglary but only guilty of criminal trespass. *Id.*

The trial court agreed with the State and denied defendant’s request for the criminal trespass instruction, holding:

I don’t think under the standards articulated in the case law which state that there has to be affirmative evidence or inference from the affirmative evidence that only the lesser included charge was committed, and that simply the jury disbelieving certain evidence is not in and of itself sufficient. I don’t see the basis for it given the evidence that has come

in with -- as summarized by Ms. Lund, and so I will not be giving the lesser included.

RP 823.

The trial court did not abuse its discretion when it denied defendant's request for a lesser included criminal trespass instruction. All of the evidence adduced at trial pointed to defendant working alongside Cortez and Lilly, aiding them in the burglary: (1) defendant joined Cortez and Lilly as they walked Napolitano up to the house at gunpoint in an effort to get him to open the door [RP 612, 770, 775-76]; (2) defendant shoved McDonough's air conditioner through his bedroom window while Cortez and Lilly worked to gain entry into the house through the door [RP 614]; (3) defendant yelled at McDonough and threatened him, prompting McDonough to lock his doors [RP 546-47]; and (4) defendant stood outside the doorway as Lilly pointed his gun at McLeish, and when McLeish asked defendant to tell Lilly to move the gun, defendant responded by explaining to McLeish why all of this was happening [RP 696-700]. Taken together, the evidence shows that defendant acted as an accomplice to the burglary by aiding Cortez and Lilly.

The jury would have had to disbelieve and disregard all of that evidence in order to acquit defendant of first degree burglary. Much less could a jury find *substantial evidence* supporting the inference that

defendant only committed criminal trespass. See *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2006) (emphasis added). To be entitled to a lesser included instruction, there must be evidence affirmatively establishing defendant's theory of the case – that Cortez and Lilly acted on their own. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). It is “not enough that the jury might disbelieve the evidence pointing to guilt.” *Id.*

Defendant provided no affirmative evidence supplying a basis for her claim that she was not acting as an accomplice when Cortez and Lilly first entered the home. Brief of Appellant at 13. Defendant did not testify at trial. RP 805. Defendant did not call any witnesses. *Id.* Defendant's theory relied entirely on the jury disbelieving evidence presented by the State showing that defendant aided Cortez and Lilly while they worked to gain entry into the house.

It is true, as defendant points out, that there was testimony that defendant “repeatedly urged McDonough to come outside;” that Cortez and Lilly were “more aggressive and attempted to kick in the door;” and that defendant remained outside the house when Cortez and Lilly went inside. Brief of Appellant at 13; RP 337, 344, 362-63, 365, 531-32, 543, 545, 697, 699. That evidence does nothing to undermine defendant's accomplice liability for the burglary. Under *Fernandez-Medina*,

defendant had to show *affirmative evidence* establishing that she was not an accomplice in order to be entitled to the lesser included offense instruction. 141 Wn.2d at 456. Defendant failed to show that. Rather, as discussed in the argument above regarding the sufficiency of the evidence for the conspiracy charge, affirmative evidence established the contrary. The evidence showed that defendant aided Cortez and Lilly in their collective attempt to gain entry into the home, and therefore acted as an accomplice.

Because defendant failed to present any affirmative evidence supporting her theory that she was not an accomplice to the burglary, and because the jury would have had to disbelieve evidence in order to acquit defendant of the burglary charge, defendant failed to satisfy *Workman's* factual prong. Accordingly, defendant was not entitled to a lesser included criminal trespass instruction. The trial court's decision was not manifestly unreasonable or based on untenable grounds or reasons. This Court should therefore affirm.

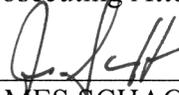
D. CONCLUSION.

When viewed in the light most favorable to the State, evidence was sufficient for a rational jury to conclude that defendant conspired to commit burglary. Further, the trial court did not abuse its discretion when it denied defendant's request for a lesser included criminal trespass

instruction because the evidence affirmatively showed that defendant acted as an accomplice to the burglary. The State respectfully requests this Court affirm defendant's convictions.

DATED: May 21, 2018.

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PIERCE COUNTY PROSECUTING ATTORNEY

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