

FILED  
Court of Appeals  
Division II  
State of Washington  
3/12/2019 11:22 AM  
NO. 51809-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROSS WARNER KIDD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Shelly Speir

No. 17-1-03650-3

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**Brief of Respondent**

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

1. Did the trial court properly exercise its discretion in finding that defendant did not lay sufficient foundation to present other suspects evidence where defendant wanted merely to draw out from State's witnesses that, in the past, others have unlawfully accessed the shed defendant burgled and that the lock on the shed was repeatedly broken? (Appellant's Assignment of Error #1).
2. Should this Court remand to the trial court for the criminal filling fee and the DNA collection fee to be stricken? (Appellant's Assignment of Error #2).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 25, 2017, the Pierce County Prosecuting Attorney charged Ross Warner Kidd (the "defendant") in Count I with Burglary in the First Degree in violation of RCW 9A.52.020(1)(b); in Count II with Unlawful Possession of a Controlled Substance for possessing Heroin in violation of RCW 69.50.4013(1); and in Count III with Obstructing a Law Enforcement Officer in violation of RCW 9A.76.020(1). CP 3-4. On April

18, 2018, the State amended the information to also charge defendant in Count IV with Assault in the Fourth Degree against Carl Anderson in violation of RCW 9A.36.041(1)(2) and Count V with Theft in the Third Degree in violation of RCW 9A.56.020(1)(a) and RCW 9A.56.050. CP 9-11. Defendant pled not-guilty to all charges. 04-18-18 RP 4-5.<sup>1</sup>

Pre-trial proceedings commenced on April 19, 2018, in Pierce County Superior Court before the Honorable Judge Shelly K. Speir.<sup>2</sup> 1RP 2. On April 23, 2018, the State moved to preclude the introduction of any “other suspect” evidence by defense and provided supporting memorandum. 2RP 26-28; CP 28-33. Defendant countered that he merely wanted to present evidence that others had access to the shed, not that others committed the crime of burglary. 2RP 30. The trial court granted the State’s request, finding that evidence that others were sleeping by the shed, had access to the shed, or that there was a history of the shed’s lock being broken were not relevant. 2RP 32. Trial commenced that same day. 2RP 123.

After trial, a jury found defendant not guilty in Count I for Burglary in the First Degree but guilty of the lesser included offense of Burglary in the Second Degree; guilty in Count II for Unlawful Possession of a

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<sup>1</sup> Most, but not all, Records of Proceedings in this case are assigned volume numbers. The State cites to the volume number when possible and to the date of the record otherwise.

<sup>2</sup> In the interest of both clarity and brevity, the State has not included any discussion of procedure or facts not relevant to Appellant’s Assignment of Error 1 or Count I.

Controlled Substance; guilty in Count III for Obstructing a Law Enforcement Officer; not guilty in Count IV for Assault in the Fourth Degree; and guilty in Count V for Theft in the Third Degree. 04-27-18 RP 5-6; CP 79-84. On March 4, 2018, defendant was sentenced to 60 months for Count I and 24 months for Count II, to be served concurrently, and to 12 months of community custody during which defendant must undergo an alcohol and drug evaluation. 7RP 565-66; CP 82-102. The court also sentenced defendant to 364 days for Counts III and V, suspending all 364 days. 7RP 566; CP 103-7. Defendant timely appeals. CP 143.

## 2. FACTS

The events described below happened in Fife, Washington on large section of land bordered to the north by 12th Street East, to the west by Alexander Avenue East, and to the east and south by Wapato Creek. 2RP 135-38. The land is held by a tribal trust, but the specific parcels are occupied by various relatives of the victims in this case. 2RP 137-38.

On September 23, 2017, Carl Anderson awoke to his dog barking. 3RP 226. Anderson followed his dog over to his neighbor Robert Johnson's<sup>3</sup> house. 3RP 226-27. Then, he saw defendant running across Lauren Butler-Thomas's property towards him holding two weed eaters. 3RP 226-

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<sup>3</sup> Robert Johnson did not testify at trial.

28. Anderson yelled at defendant "Stop. Stop. What are you doing?" 3RP 228. Defendant made a U-turn and started running West, in the opposite direction. 3RP 227-28. Defendant reached the fence of Carl "Bill" Sterud and tossed the weed eaters over before jumping it himself. 3RP 228. Anderson yelled "Stop. Stop." but defendant kept running. 3RP 228. Anderson called for help because he did not believe he could jump the fence himself. 3RP 228. Johnson, who apparently exited his house upon hearing the commotion, called Butler-Thomas and 911. 3RP 229. Anderson got in his car to begin searching for defendant. 3RP 229.

The defendant abandoned the weed eaters in Sterud's yard and fled up a tree. 3RP 232-33. Recently arrived Puyallup Tribal Police Officer Jeffrey Erdt ordered defendant out of the tree and informed him he was under arrest. 3RP 288. Defendant jumped out of the tree on the other side of fence and took off running. 3RP 289. Erdt went back to his car to search for defendant. 3RP 290.

Anderson and Sterud pursued on their own. 3RP 235, 272. Anderson tackled defendant and a physical confrontation between the three ensued. 3RP 236. Anderson and Sterud were able to hold defendant until Erdt arrived to take defendant into custody. 3RP 236, 272-75, 291-92.

At trial, Butler-Thomas's step-son Sealth Thomas testified that he has exclusively maintained Butler-Thomas's parcel of land with various

lawn equipment including the two weed eaters. 4RP 349-50. The two weed eaters in question were stored in the shed with the grey tarp on the roof. 4RP 352. The shed often has a padlock on the door but they lost the key to the padlock years ago, so they put the lock through the hasp on the shed and rotated it, so it appears locked.<sup>4</sup> 4RP 360. Sealth<sup>5</sup> did some lawn maintenance the prior night from 4:00 to 7:00 p.m. 4RP 354. He removed both the weed eaters from the shed that night. 4RP 362. When he was finished, he “put them back in the shed that's pictured on Exhibit 15, the one with the grey tarp on top, shut the doors, put the padlock on but didn't lock it all the way.” 4RP 363.

Defendant also testified at trial.<sup>6</sup> 4RP 438. He stated that after a night of drinking and gambling at the casino, he needed gas. 4RP 438. He apparently did not have any money left and the gas station patrons were not sympathetic, so he went searching other people's yards. 4RP 439-40. Defendant admitted walking into Butler-Thomas's backyard and spotting the weed eaters, though he claims they were leaning against the outside of the shed. 4RP 440-42. As he got close to them, he knocked them over making

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<sup>4</sup> During cross examination, Butler-Thomas stated that the padlocks/lock hasps on the shed had been repeatedly broken by others. 3RP 206.

<sup>5</sup> Multiple trial witnesses share the last name “Thomas.” To avoid confusion the State refers to Sealth by his first name, no disrespect is intended.

<sup>6</sup> Defense admitted on direct examination defendant's prior convictions for Possession of a Stolen Vehicle and Possession of Stolen Property in the Second Degree. 4RP 439.

“quite a raucous.” 4RP 441. Defendant briefly hid to contemplate his next move before grabbing the weed eaters and walking back towards the road “at a fast pace.” 4RP 442. At that point, defendant planned to sell the weed eaters for gas money. 4RP 442-43.

Defendant further admits that he fled when he saw Anderson and that he threw the weed eaters over Sterud’s fence before hopping it himself. 4RP 443. However, defendant then claims that somebody else initiated a separate, earlier physical altercation with him. 4RP 444. After this fight, defendant claims he was exhausted and went to hide in some bushes, possibly even falling asleep for anywhere between “a moment” and 25 minutes. 4RP 444, 464.

When defendant awoke to people still looking for him, he climbed a tree. 4RP 445-46. Defendant admits he saw Officer Erdt, recognized him as a police officer, and understood his commands. 4RP 446. Despite admittedly knowing that Officer Erdt was ordering defendant to come down on the side of the tree Erdt was on, when asked about jumping down on the opposite side defendant testified, “the tree was on the other side [of the fence]. I did exactly what he asked me to: I came down.” 4RP 466-67. On redirect defendant stated, “I was wrong in attempting to steal these weed eaters from these people that work hard for a living.” 4RP 476.

C. ARGUMENT.

1. THE EVIDENCE IN QUESTION IS “OTHER SUSPECTS” EVIDENCE; DEFENDANT DID NOT LAY SUFFICIENT FOUNDATION TO PRESENT SUCH EVIDENCE; AND MOST OF THE EVIDENCE CAME IN ANYWAY, MAKING ANY ERROR HARMLESS.

a. The trial court properly exercised its discretion in finding that not enough foundation had been laid to present this “other suspects” evidence.

An accused person has a constitutional right to present a defense. U.S. Const. Amend. VI; Wash. Const. VI, § 1. But, this right does not extend to presenting irrelevant or otherwise inadmissible evidence. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015). Decisions on the admissibility of evidence are within the sound discretion of the trial court and its decisions will not be reversed on appeal absent abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). “An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court.” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (citing *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

“Moreover, the constitutional right to present a defense is not unfettered.” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). When “the defendant seeks to introduce evidence connecting another person with

the crime charged, a proper foundation must be laid.” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). By seeking to admit evidence of repeated unwanted intrusions, defendant sought to connect other persons to the crime. This requirement reflects ER 403 which excludes evidence that is unfairly prejudicial, confuses the issues, or has the potential to mislead the jury. *State v. Starbuck*, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015) (citations omitted); *see* ER 403. While the evidence need not establish the guilt of an “other suspect” beyond a reasonable doubt, Washington courts have held that defendant must establish “a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.”<sup>7</sup> *State v. Starbuck*, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015) (quoting *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); also citing *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). The Washington Supreme Court more recently stated, “[t]he *Downs* test in essence has not changed: some combination of facts or circumstances must point to a *non-speculative* link between the other suspect and the charged crime.” *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (emphasis added).<sup>8</sup>

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<sup>7</sup> This standard has been approved by the United States Supreme Court. *State v. Starbuck*, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015) (citing *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

<sup>8</sup> Also noting that “neither *Maupin* nor the earlier cases stand for the proposition that motive, ability, opportunity, and/or character evidence together can *never* establish such a connection.” *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (emphasis added).

Defendant attempts to avoid these foundational requirements by arguing that the evidence is not “other suspects evidence” yet cites primarily “other suspects” cases in his brief. Appellant’s Brief at 11-15. Specifically, defendant relies heavily on *State v. Hawkins*, 157 Wn. App. 739, 238 P.3d 1226 (2010) and *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). Both are easily distinguished from the case at hand.

In *State v. Hawkins*, 157 Wn. App. 739, 751-52, 238 P.3d 1226 (2010), defendant wanted to present evidence that he had been framed. *State v. Hawkins*, 157 Wn. App. 739, 751-52, 238 P.3d 1226 (2010). Hawkins had evidence that someone tried to frame him; including evidence of motive, others switching his property out with the similar property he was accused of stealing, and that someone alerted law enforcement. *State v. Hawkins*, 157 Wn. App. 739, 751-52, 238 P.3d 1226 (2010). The court correctly found that evidence that someone framed defendant is not the same as evidence that someone other than defendant committed the crime. *State v. Hawkins*, 157 Wn. App. 739, 751, 238 P.3d 1226 (2010).

In *Maupin*, defendant was prevented from introducing a witness that placed the victim of a kidnapping and eventual homicide with another person during the same period when the State alleged Maupin was kidnapping the victim. *State v. Maupin*, 128 Wn.2d 918, 927-28, 913 P.2d 808 (1996). The court held that evidence was not merely speculative when it directly

contradicted the State's version of events. *State v. Maupin*, 128 Wn.2d 918, 928, 913 P.2d 808 (1996).

Here, defendant correctly acknowledges that, given his testimony at trial, the only element of burglary that could be challenged by this evidence is whether the defendant entered or remained in the shed unlawfully.<sup>9</sup> App. Br. at 12; *see also*, RCW 9A.52.030; CP 52-53. Jeffrey Thomas, Lauren Butler-Thomas, and Sealth Thomas testified that Sealth was the only one responsible for storing the weed eaters. 2RP 155; 3RP 194-95, 206; 4RP 349. Sealth testified that he put the weed eaters in the shed and closed the doors roughly twelve hours before defendant was seen with the weed eaters. 4RP 363. Given the fact that the evidence defendant now contends should have been admitted was regarding "unwanted intrusions" into the shed,<sup>10</sup> it is hard to see how additional evidence on this issue could be anything but evidence that another – unknown – person entered the shed unlawfully and removed the weed eaters. This is other suspect evidence.

While the foundation standard may be relaxed when the State's case is entirely circumstantial, defendant must still present sufficient circumstantial evidence "tending to identify some other person as the perpetrator of the

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<sup>9</sup> Note that the defendant admitted entering the area with the intent to steal and more specifically, taking the weed eaters with the intent to sell them for gas money. 4RP 440, 442-43.

<sup>10</sup> App. Br. at 11.

crime.” *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (citations and internal quotations omitted). As the proponent of the evidence, defendant bears the burden of establishing it is relevant, material, that there is a clear nexus between the other person and the crime, and that the other person “took a step indicating an intention to act on the motive or opportunity.” *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (citations omitted).

Defendant has not established here on appeal, nor below at trial, how evidence that others accessed the shed unlawfully in the past is relevant in this case. Particularly where there is no nexus with crime charged. Courts have found insufficient foundation even where ample motive and opportunity are present when there is no evidence the other suspect was near the crime scene on the day of the crime. *See State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (finding insufficient foundation where there was evidence the other suspect, the victim’s son, frequently quarreled with the victim; would benefit financially from the victim’s death if defendant were convicted; knew where the murder weapon was kept; and was inexplicably absent from work on the morning of the crime); *see also State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015) (citing *State v. Rafay*, 168 Wn. App. 734, 800-1, 285 P.3d 83 (2012) and *State v. Strizheus*, 163 Wn. App. 820, 828, 262 P.3d 100 (2011)). Nor has defendant established that

any other person took a step indicating intention to act on an opportunity to steal the weed eaters. Defendant does not satisfy the foundational requirement by merely showing that it is possible that an “other suspect” committed the crime. *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992). With no evidence beyond the fact that some people had access to the shed without the owner’s permission at some point in the past, it was reasonable for the trial court to find that sufficient foundation for presenting other suspect evidence had not been laid. Evidence that others have improperly accessed the shed in the past could only serve to mislead the jury and spark rampant speculation. The trial court did not abuse its discretion.

- b. The evidence in question came in during witness testimony and was even used by defense counsel during closing argument, thus any error was harmless.

Defendant argues that testimony that the Butler-Thomas experienced “numerous unwanted intrusions” onto her property over the years and evidence that locks used to secure the shed were repeatedly tampered was improperly excluded. App. Br. at 11, 14. Erroneous evidentiary rulings are presumed prejudicial and must be proven harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159, 164 (2014). However, what would normally be a high bar to clear is not so in this case because, despite the Court’s initial ruling excluding some testimony, the

evidence in question was admitted during the course of the trial. 3RP 195, 206.

When asked about the security of the shed on direct examination, Butler-Thomas stated, “We were locking them often and they kept on getting the locks broke, so we stopped.”<sup>11</sup> 3RP 195. Outside the presence of the jury, defense counsel later inquired if he could cross examine Butler-Thomas on the broken locks. 3RP 200. The court allowed inquiry on the broken locks, merely preventing defendant from asking *who* broke them. 3RP 201-2. During cross examination defense counsel and Butler-Thomas had the following exchange:

Q. You said the locks had been broken before on that shed.

A. All of them had. Not in recent -- just that recent. We were - - the locks per se weren't broken; they had just slammed the whole thing off. So the apparatus that holds the lock on, there's like a thing, they would just, whoever, whoever they are, we'd show up and it'd be gone.

3RP 206. In fact, during closing argument defense counsel stated, “They stopped locking these sheds. As Ms. Butler-Thomas testified, *the locks just kept getting broken, cleaned off over the years*. The sheds are on a piece of this unfenced land and unsecured.” 5RP 528 (emphasis added). Not only

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<sup>11</sup> Following Butler-Thomas’s answer, the State said, “Let me strike that, please.” but launched into another question without the Court striking the answer or giving any instruction to the jury. 3RP 195.

did the evidence come in during the trial, it was featured in the defendant's closing argument.

Defendant contends that evidence that others had unlawful access to the shed was material to defendant's claim that he found the weed eaters outside the shed. Maybe so, but defendant was able to – and in some cases did – cross examine the witnesses on whether the weed eaters were put away in the shed the night before. 4RP 368-70. Moreover, when defendant testified he stated that he found that weed eaters outside the shed. 4RP 440-41. Even if this court were to find that some of the evidence was excluded throughout the trial, defendant was still able to present his defense. There is no reason to doubt that any error was harmless when almost all the evidence in the question was admitted in some form.

2. THIS COURT SHOULD ORDER THAT THE IMPOSITION OF THE CRIMINAL FILING FEE AND THE DNA COLLECTION FEE BE STRIKEN.

In this case, the trial court found the defendant to be indigent. CP 147-48. The defendant's direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final.

The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on non-restitution legal financial obligations.

The State acknowledges that this defendant was found indigent by the sentencing court, and therefore the \$200.00 criminal filing fee should be stricken.

The appellant in this case also appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714, (2018).

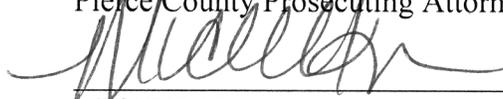
The State believes that this defendant’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab. The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100.00 DNA collection fee.

D. CONCLUSION.

For the reasons expressed above, the State respectfully request this Court affirm the defendant's convictions, holding that defendant did not lay sufficient foundation to present other suspects evidence and that any possible error was harmless. On the issue of fees imposed, this Court should remand for the trial court to strike the imposition of the \$200.00 filing fee, the imposition of the \$100.00 DNA collection fee and the interest accrual provision.

DATED: March 12, 2019

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MICHELLE HYER  
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\_\_\_\_\_  
Evan Boeshans  
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>efile</sup> 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.

3/12/19   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**March 12, 2019 - 11:22 AM**

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**Appellate Court Case Title:** State of Washington, Respondent v Ross Warner Kidd, Appellant  
**Superior Court Case Number:** 17-1-03650-3

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