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Division II
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NO. 52231-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LYONS,

Appellant.

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

The Honorable James W. Lawler, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict appellant Derrick Lyons as a principal or accomplice of second degree burglary, attempted first degree theft or attempted taking of a motor vehicle from B & M Logging as alleged by the State in Counts I, II and III.

2. The prosecutor committed repeated, flagrant and ill-intentioned misconduct during closing by arguing facts not in evidence.

3. The trial court erred by overruling Mr. Lyons' objection and allowing the state to introduce evidence of bolt cutters, admitted in conjunction with attempted second degree burglary alleged in Count IV without a sufficient nexus between the bolt cutters and the offenses.

4. The trial court should have excluded the evidence of the bolt cutters, which were not relevant to the charges against Mr. Lyons under ER 401 and 402.

5. Mr. Lyons was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence to convict Mr. Lyons of being a principal actor in the burglary, attempted theft and attempted taking of a motor vehicle from B & M Logging? Assignment of Error 1.

2. Did the State present sufficient evidence to convict Mr. Lyons of being an accomplice to Don Emery's crimes at B & M Logging where the

State failed to establish that Mr. Lyons solicited, commanded, encouraged, or requested Mr. Emery to commit the crimes or that Mr. Lyons aided or agreed to aid Mr. Emery in planning or committing the crimes? Assignment of Error 1.

3. A prosecutor must not encourage verdicts based on facts not in evidence. Here, Did the prosecutor's repeated statement that Mr. Lyons was the driver of the truck and therefore was an accomplice to Mr. Emery's offense constitute flagrant and ill-intentioned misconduct that was prejudicial to Mr. Lyons' due process right to a fair trial, requiring reversal and remand for a new trial? Assignment of Error 2.

4. Evidence is not admissible if it is irrelevant or if its probative value is outweighed by the risk of unfair prejudice. Did the court err by admitting evidence of a bolt cutters admitted in connection with attempted second degree burglary charged in Count IV without a sufficient nexus between the bolt cutters and an attempted burglary? Assignments of Error 3 and 4.

5. Did trial counsel's failure to move for a mistrial constitute ineffective assistance of counsel which denied Mr. Lyons a fair trial where evidence of bolt cutters admitted in connection with second degree burglary in Count IV became evidence admitted without evaluation under ER 404(b) and ER 403 after the trial court dismissed Count IV Assignment of Error 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

Derrick Lyons was charged by information filed in Lewis County Superior Court with second degree burglary (RCW 9A.52.030(1)), attempted first degree theft (RCW 9A.56.020(1)), and attempted theft of a motor vehicle (RCW 9A.52.065). The State also alleged one count of attempted second degree burglary in Count IV of the information. Clerk's Papers (CP) 1-4. The State alleged that Mr. Lyons committed the offenses as either principal or accomplice with co-defendant Don Emery, and that the offenses took place on December 25, 2017 at two businesses in Lewis County, Washington, including B & M Logging. CP 1-4.

The matter came on for jury trial on March 5, 6, 7, and 8, 2018, the Honorable James W. Lawler presiding. 1Report of Proceedings¹ (RP) at 3-162, 2RP at 168-313, 3RP at 317-408, and RP (3/7/18) and RP (3/8/18).

Mr. Lyons' case was severed from Mr. Emery's case prior to trial. RP (2/22/18) at 3-5.

a. Closing arguments:

During closing, the prosecutor argued that Mr. Lyons acted either as

¹The record of proceedings consists of seven volumes, which are designated as follows: January 4, 2018 (arraignment); January 25, 2018; February 22, 2018 (severance of co-defendants); 1RP – March 5, 2018 (motions in limine, voir dire, jury trial, day 1); 2RP -

principal or accomplice in the offenses. In support of the State's theory that Mr. Lyons was an accomplice, the State repeatedly argued that Mr. Lyons assisted Mr. Emery by driving the pickup truck. The prosecutor argued:

How did Mr. Lyons aid Mr. Emery? One, drove him there[.]

3RP at 360.

So we've got him both ways. The first State submits that the evidence is very strong and compelling that he is inside because it's impossible for Emery to do this by himself on the inside. But even if you can't reach that, he's right outside and he drove Mr. Emery there.

3RP at 364.

Mr. Lyons drove him there. The two of them drove there together.

3RP at 366.

Well, the evidence is very clear they were there. And really the only thing you don't have is a camera inside showing Mr. Lyons is there. Okay. But does that mean it's over? No. You take a look at all the other evidence and ask yourself, okay, what's the circumstantial evidence putting him there inside the building. We know Emery was there and we know he drove him there.

3RP at 367.

The court gave the jury an instruction for the lesser included offense of second degree criminal trespass in Count I. Jury Instruction 13; CP 110.

During closing, defense counsel argued that the State failed to prove

March 6, 2018 (jury trial, day 2); 3RP - March 7, 2018 (jury trial, day 3); March 7, 2018; March 8, 2018 (verdict); and RP (4/16/18) (sentencing) and RP (4/19/18) (sentencing).

that Mr. Lyons committed the charged offenses but conceded that Mr. Lyons was guilty of second degree criminal trespass. 3RP at 401-02.

b. Verdicts and sentencing:

The jury returned guilty verdicts for burglary in the second degree (Count I), attempted theft in the first degree (Count II), and attempted theft of a motor vehicle (Count III). RP (3/8/18) at 7; CP 125, 126, 127, 128.

At sentencing the State presented evidence of Mr. Lyons' prior convictions in Oregon for third degree robbery in 2012, second degree robbery in 2012, first degree burglary in 2012, first degree theft in 2012, identity theft in 2012, and possession of oxycodone in 2011. RP (4/16/18) at 10-15; CP 136-174 (State's Sentencing Memorandum); Exhibits 1-7, 11-13. Defense counsel stipulated that the Oregon convictions are comparable to Washington felonies. RP (4/16/18) at 14. The State asserted that Mr. Lyons had an offender score of "9". The trial court ruled that Counts II and III are the same criminal conduct. CP 176.

After hearing argument from counsel but without permitting allocution, the court announced a sentence at the top of the range. The calculation of Mr. Lyons' offender score included an additional point for being on community custody at the time of the offenses. RP (4/16/18) at 33. The court noted that if it was determined that his supervision in Oregon was not comparable to Washington's community custody, the offender score

would drop accordingly. RP (4/16/18) at 33. The court then, realizing that Mr. Lyons had not addressed the court, was permitted allocation, RP (4/16/18) at 33-35.

The matter came on for entry of the Judgment and Sentence on April 19, 2018. The State agreed that an additional offender score point could not be imposed because his supervision in Oregon was not comparable to Washington's "community custody," reducing the offender score for each charge. RP (4/19/18) at 43-44. The court sentenced Mr. Lyons with an offender score of "8" and a standard range of 43 to 57 months for Count I, and an offender score of "7" for Counts II and III, with standard range of 16.5 to 21.75 months. RP (4/19/18) at 44. The court imposed a standard range sentence of 57 months for Count I, and 21.75 months in Counts II and III, to be served concurrently. RP (4/19/18) at 44; CP 179.

The court ordered legal financial obligations of \$500.00 crime victim assessment, \$200.00 court costs, and a \$100.00 DNA fee. CP 180.

Timely notice of appeal was filed on April 19, 2018. CP 187-97. This appeal follows.

2. Trial testimony:

Lewis County Sheriff Chief Dustin Breen testified that he was traveling northbound on Hamilton Road in Lewis County, Washington on December 25, 2017 at roughly 6:00 a.m. when he observed a truck parked in a turnout along

the roadway. 1RP at 101. Upon approaching the parked vehicle, Chief Breen saw a substantial amount of equipment, tools, tarps, buckets, and other items in the bed of the truck. 1RP at 130. The truck, which had Oregon license plates, was occupied by one person. 1RP at 102. After approaching the vehicle and speaking to the passenger, Chief Breen traveled north from the turnout further up Hamilton Road to check the surrounding area in search of a man on foot. 1RP at 104-05.

Several businesses are located within the area including Chehalis Livestock, B & M Logging, Dietrich Trucking, and Bulldog Trailer. The area had experienced significant snowfall and snow remained on the ground. 1RP at 101.

Chief Breen parked his vehicle and walked to a building occupied by Dietrich Trucking, and saw a set of footprints along the outside of the fence, but no footprints on the inside of the fence. 1RP at 128. Chief Breen also searched the back side of both Dietrich Trucking and Bulldog Trailer and saw footprints in the snow leading up to the fence. 1RP at 108. Chief Breen testified that based on what he had observed at the different fences and in the general area, it appeared that there were two different types of foot impressions. 1RP at 111.

Chief Breen returned to his patrol car, drove down Hamilton Road North, and as he passed B & M Logging, and saw a white male walking on the

east shoulder of Hamilton Road North northbound. 1RP at 113. The man, who was subsequently identified as Don Emery, was not wearing shoes. 1RP at 113. Chief Breen tracked Mr. Emery's bare footprints in the snow to figure out where he came from. 1RP at 114-115. Chief Breen traced these foot impressions exiting out of UPS that he testified were consistent with the foot impressions of Mr. Emery's bare feet. 1RP at 116. Chief Breen testified that he continued to follow these same foot impressions back onto Hamilton Road North and across the UPS property area to the southern fence line of UPS, and then to a UPS truck that was parked along the back line of the southern fence. 1RP at 118.

Chief Breen then began to check the area and notice that there was one set of "dimpled" foot impressions going into one of the UPS trucks, and a non-defined tread pattern going out. 1RP at 119. In that same area, behind a Conex container, Chief Breen found a pair of coveralls and a pair of shoes that had the tread pattern that he noticed to be consistent with the "dimpled" tread pattern he had observed, along with a key from a vehicle. 1RP at 120.

At about 6:40 a.m., Deputy Emmet Woods arrived on the scene and began to search for persons and footprints around the parked vehicle in the turnout on North Hamilton. 1RP at 137. Deputy Woods testified that he then traveled southbound and began tracing footprints on the outside of the property of B & M, across onto the B & M property, and then down through the vehicles

parked on the property. 1RP at 138-39. Deputy Woods testified that there were two gates in the front area of B & M Logging, and he did not see any footprints inside the gate, only one pair of footprints along the outside of the fence. 1RP at 144-45.

Once Deputy Woods got in and out of the vehicles, he testified that he began to follow the footprints north, not towards the building, but rather towards the back of the property. 1RP at 148. Once at the back of the end of the B & M Logging property, Deputy Woods he heard what he believed was a person behind some brush. 1RP at 139. Deputy Woods testified that he did not follow the footprints towards Deputy Woods followed the footprints west through the brush when he saw a male running. 1RP at 140. Deputy Woods chased the male over a barbed wire fence, through a river, and tackled him once they were across the river. 1RP at 140-41. This male was identified as Mr. Lyons. He was wearing one disposable black rubber glove. 1RP at 141, 143.

Deputy Curtis Spahn testified that he arrived at the scene on Hamilton Road North in the area of the Chehalis Livestock Market. 1RP at 152. He began to follow two sets of shoe prints and taking a number of photographs, all of which were admitted into evidence by the State. 1RP at 152, 154, 155, 156, 157. Some of these photographs were taken by Deputy Spahn, and contained photos of the truck that was located in the turnout on Hamilton Road. 1RP at

154. Exhibit 28 was a photograph of the passenger compartment of the vehicle, and on the seat was what looked like a glove and a set of keys. 1RP at 155. Exhibit 33 was a photograph of the bed of the vehicle showing a large set of bolt cutters. 1RP at 156.

Deputy Spahn investigated the north end of B & M Logging, staying outside the fence, and then back towards the south end of the building, noticing that both gates were closed and secure. 2RP at 171-72. Deputy Ezra Andersen arrived at the scene on Hamilton Road around 7:30 a.m. and saw an ambulance, which police had called in order to treat Mr. Lyons. 2RP at 183.

Deputy Andersen follow the ambulance and remained with Mr. Lyons at the hospital, and once there, she collected Mr. Lyons' clothes and boots and secured the items in her patrol car. 2RP at 184. Deputy Andersen testified that she sent Deputy Mauermann a text message with a photo of Mr. Lyons' boots and a photo of the bottom of the boot. 2RP at 187.

Deputy Mauermann testified that he investigated foot prints along the west side of B & M Logging. 2RP at 195. He noticed the "dimpled" foot impressions and a couple other shoe prints, but he was unsure if they were the deputies' or somebody else's. 2RP at 196. Deputy Mauermann continued to the south side of B & M Logging along the outside of the fence line and again picked up the "dimpled" foot impressions leading to the UPS area and in between some semi-trucks. 2RP at 198-99. Deputy Mauermann testified that

the “dimpled” foot impressions led up to the door of a truck, then moved on to another truck, then up and around the building, to the back side of the UPS building. 2RP at 199.

Deputy Mauermann further testified that he followed the “dimpled” foot impressions to the area where Mr. Emery’s overalls, shoes, and the key fob were found. 2RP at 200. After receiving the texted photograph from Deputy Andersen, he went back to look for the particular foot impressions he believed matched the picture. 2RP at 203.

Deputy Mauermann testified that he investigated around the northeast corner of B & M Logging located off North Hamilton Road and followed footprints down along the northwest side of the B & M property, where vegetation and snow made it difficult to determine which footprints were left by which individual. 2RP at 260-61. Deputy Mauermann went to the back door entrance of B & M Logging which was slightly ajar and proceeded to go inside the building with Sergeant Wetzel. 2RP at 282-83. Deputy Mauermann testified that he found a footprint on the stair located right outside an office area inside the building. 2RP at 285. After leaving the B & M Logging building, Deputy Mauermann proceeded to go to Dietrich Trucking where he saw a footprint by a front window that he believed was consistent with Mr. Lyons,’ although he did not outline in his report what type of footprint he saw. 2RP at 285, 287.

Brandon Smith, owner of B & M Logging, testified that the key fob was for a truck located inside the shop, and that the truck had been moved. 2RP at 299.

Mr. Smith testified that the truck had been moved forward within the shop about fifteen to twenty feet, and tools and large tanks were loaded in the back of a truck. 2RP at 300. He stated that a large toolbox that was moved could have been picked up and moved by a forklift in the shop. 2RP at 302. Other power tools, grinders, CB radios as well as the large oxygen tank had been put in the back of another truck located in the shop. 2RP at 302. Mr. Smith stated that the value of the items moved and placed in the trucks was \$7,000 or \$8,000. 2RP at 304-05. Mr. Smith said that the door the shop had been locked and that it had been pried open to gain access. 2RP at 306.

At the conclusion of the State's case in chief the prosecution conceded that the testimony did not show that the logging yard at 159 Labree Road was fully enclosed by a fence and the court granted the defense motion to dismiss attempted second degree burglary charged in Count IV. 2RP at 322-23.

The defense rested without calling witnesses. 2RP at 338.

D. ARGUMENT

- 1. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTIONS AS PRINCIPAL OR ACCOMPLICE FOR SECOND DEGREE BURGLAR, ATTEMPTED THEFT, AND ATTEMPTED TAKING A MOTOR VEHICLE**

Due process rights, guaranteed under the United States Constitution and the Washington Constitution, require the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. Amend. VI; Const. art. 1 § 3,22; *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Baeza*, 100 Wn.2d at 488.

Where a criminal defendant challenges the sufficiency of the evidence, the court of appeals reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Lyons was charged—either as principal or accomplice—with burglary in the second degree, attempted first degree theft, and attempted taking a motor vehicle. CP 1-4. The State did not provide sufficient

evidence that he committed the crimes by entering the B & M Logging building or that he aided or encouraged Mr. Emery to enter the building.

a. The State presented insufficient evidence to convict Mr. Lyons of being a principal in the burglary and attempted theft from the B & M Logging property.

A person commits second degree burglary “if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1). A person who knowingly aids the commission of the crime is as culpable as the person who performs the criminal acts. RCW 9A.08.020.

It was undisputed at trial that Mr. Lyons was in the area where Mr. Emery was caught and that he was arrested following a foot chase by police. Mr. Lyons conceded that he was on the property and had committed second degree criminal trespass. 3RP at 401. However, the State presented no evidence from which the jury could draw the inference that Mr. Lyons entered or remained in the B & M shop building with the intent to commit a crime or that he asserted control over any of the property. Mr. Lyons was not seen entering any building nor did he have any items taken from the building in his possession when he was arrested. No physical evidence placed him inside the shop, with the exception of testimony that a footprint in the building appeared to be left by Mr. Lyons. 2RP at 285. That footprint, however, was not photographed. The State did not produce an expert to identify individual

foot prints and differentiate the hundreds of prints left by the nine law enforcement officers who were walking around the scene.

The evidence introduced at trial establishes only that Mr. Lyons was present in the area as Mr. Emery committed the crimes of burglary and theft. The State's evidence was insufficient to establish the requisite means to convict Mr. Lyons of burglary or attempted theft or attempt to take a vehicle.

- b. The State presented insufficient evidence to convict Mr. Lyons of being an accomplice to Mr. Emery's crimes at B & M Logging where the State failed to establish that Mr. Lyons solicited, commanded, encouraged, or requested Mr. Emery to commit the crimes or that Mr. Lyons aided or agreed to aid Mr. Emery in planning or committing the crimes.**

An accomplice and a principal share the same criminal liability. *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (quoting *State v. Graham*, 68 Wn.App. 878, 881, 846 P.2d 578 (1993)). A person is an accomplice if, “[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). But mere presence at the scene of a crime, even if coupled with knowledge of another's criminal conduct, is not sufficient to prove complicity. *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Rather, the State must prove that the accomplice acted with knowledge that his or her action promoted or facilitated the commission of the

charged crime. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); RCW 9A.08.020.

In order to be deemed an accomplice, an individual must have acted with knowledge that he was promoting or facilitating the crime for which the individual was eventually charged, rather than any and all offenses that may have been committed by the principal.” *State v. Carter*, 119 Wn.App. 221, 227, 79 P.3d 1168 (2003), affirmed 154 Wn.2d 71, 109 P.3d 823 (2005).

A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed. *Luna*, 71 Wn. App. at 759, 862 P.2d 620 ; see also *State v. Robinson*, 73 Wn. App. 851, 8972 P.2d 43 (1994). Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

Washington case law has consistently held that physical presence and assent alone are insufficient to constitute aiding and abetting. *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. See also *Luna*, 71 Wn.App. at 759, 862 P.2d 620 (“Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.”), citing *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). “One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed.” *State v.*

Amezola, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

Again, it was undisputed that Mr. Lyons was in the area at the time Mr. Emery was arrested and it was further undisputed that Mr. Lyons was on the property. At most, entering the property without permission this establishes only that Mr. Lyons committed the uncharged offense of second-degree trespass. See RCW 9A.52.080(1) (“A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.”)

As stated above, “[i]n order to be deemed an accomplice, an individual must have acted with knowledge that he was promoting or facilitating the crime for which the individual was eventually charged, rather than any and all offenses that may have been committed by the principal.” *State v. Carter*, 119 Wn.App. 221, 227, 79 P.3d 1168 (2003). Because Mr. Lyons took no actions which would make him an accomplice to the crimes of second degree burglary and attempted theft, he cannot have been found to have been an accomplice of Mr. Emery to any of his crimes. At worst, the State's evidence established only that Mr. Lyons was present outside the building while Mr. Emery was committing crimes and that The State introduced no evidence that Mr. Lyons took any actions indicating that he assisted in or otherwise encouraged or fomented Mr. Emery's actions.

2. PROSECUTORIAL MISCONDUCT DENIED MR. LYONS A FAIR TRIAL

a. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If not objected to, prosecutorial misconduct requires reversal if it is flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

b. The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct during closing argument.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct *8 warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence

that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the American Bar Association Standards for Criminal Justice std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

c. The prosecutor committed misconduct by implying that Mr. Lyons was an accomplice with “facts” not in evidence.

A prosecutor commits misconduct by “testifying” during closing argument to “facts” not in evidence. *Glasmann*, 175 Wn.2d at 705. A prosecutor may not make arguments bolstering the credibility of a witness even if the evidence supports such an argument. *Jones*, 144 Wn. App. at 293; U.S. Const. Amends. VI, XIV; art. I, § 22.

Accordingly, a prosecutor commits misconduct by attempting to bolster a witness's credibility with prejudicial “facts” not in evidence. *Jones*, 144 Wn. App. at 292-94.

In this case, the prosecutor argued that the truck with Oregon plates found by Hamilton Road by Chief Breen belonged to Mr. Lyons despite no showing that he owned the vehicle. 3RP at 358. Mr. Lyons told police that he had been in the truck, which contained his Oregon driver’s license, but no

evidence of ownership was provided. Moreover, the prosecutor repeatedly stated that Mr. Lyons was the driver of the truck and that he had driven Mr. Emery to the location of the offenses and that he therefore was an accomplice to the offenses. During closing argument the prosecutor told the jury:

How did Mr. Lyons aid Mr. Emery? One, drove him there[.]

3RP at 360.

So we've got him both ways. The first State submits that the evidence is very strong and compelling that he is inside because it's impossible for Emery to do this by himself on the inside. But even if you can't reach that, he's right outside and he drove Mr. Emery there.

3RP at 364.

Mr. Lyons drove him there. the two of them drove there together.

3RP at 366.

Well, the evidence is very clear they were there. And really the only thing you don't have is a camera inside showing Mr. Lyons is there. Okay. But does that mean it's over? No. You take a look at all the other evidence and ask yourself, okay, what's the circumstantial evidence putting him there inside the building. We know Emery was there and we know he drove him there.

3RP at 367.

The prosecutor's argument blatantly encouraged the jury to find accomplice liability by arguing that Mr. Lyons not only owned the truck but that he drove Mr. Emery to the area where the truck was found.

As argued in Section 1, *supra*, the State presented virtually no evidence that Mr. Lyons entered the B & M building. The State's argument was based almost entirely on speculation that one person could not have

moved heavy items in the B & M shop and that Mr. Lyons had to have been inside the building and was helping Mr. Emery in the burglary and attempted thefts. 3RP at 360, 361, 364. No person saw Mr. Lyons in the building. Virtually no physical evidence placed him inside the building. 2RP at 287. The evidence that a print in the building, which was not photographed by police, was equivocal at best. The State did not produce an expert to identify the maker of each print, despite introduction of over one hundred “footprint” photos.

By asserting—without supporting testimony—that Mr. Lyons was the driver of the vehicle, the prosecutor committed misconduct by improperly implying accomplice liability by stating “facts” not in evidence. *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010).

The prosecutor's improper argument prejudiced Mr. Lyons. Mr. Lyons' argument that he did not participate and did not assist or encourage Mr. Emery in any way was critical to the defense. The insertion of prejudicial “facts” not in evidence invited the jury to find that Mr. Lyons acted as an accomplice. given the virtual non -existence of physical evidence that Mr. Lyons entered the building, there is a substantial likelihood that the prosecutor's misconduct affected the jury. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by attempting to bolster the credibility of the State's witnesses with “facts” not in evidence. *Johnson*, 158 Wn. App. at 686. Mr. Lyons'

convictions must be reversed. *Id.*

c. The misconduct requires reversal of Mr. Lyons' convictions

The effect of repeated instances prosecutorial misconduct can be “so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). The prosecutor committed acts of misconduct by arguing that Mr. Lyons was the driver and therefore an accomplice with “facts” not in evidence. The improper argument requires reversal of Mr. Lyons' convictions. *Id.*

3. THE COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE OF BOLT CUTTERS THAT WERE NOT LINKED TO THE BURGLARY AT B & M LOGGING IN ANY WAY.

The court admitted evidence of bolt cutters found by police during a search of the truck over defense objection. 2RP at 226. The trial judge ruled that the bolt cutters are “pretty relevant” and that the tool was found in the pickup truck and that there were “tracks leading to and from the pickup.” 2RP at 227.

No evidence showed that access to B & M Logging property was gained by use of bolt cutters. The court, however, allowed admission of the bolt cutters based on the footprints to and from the truck and on the basis of testimony that a lock at Dietrich Trucking was cut. 2RP at 227. The appellant argues that this was in error because there was no nexus demonstrated by the

State between the bolt cutters and B & M Logging.

The court erred by admitting the evidence, which was irrelevant and highly prejudicial. the trial court erred by admitting evidence of the bolt cutter found in the bed of the pickup truck because the evidence was irrelevant and prejudicial.

A. Standard of Review

Courts review a trial court's decision to admit evidence for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court also abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Lord*, 161 Wn.2d at 284.

Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). However, irrelevant evidence is not admissible. ER 402. A trial court may also exclude relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403. An evidentiary error that

is not of constitutional magnitude requires reversal only if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

The court's error was compounded because the charge of attempted second degree burglary was dismissed on defense motion after the State rested. 3RP at 321. The dismissed charge related to Dietrich Trucking located at 159 Labree Road. 3RP at 321. Therefore, the court's reasoning that the bolt cutters were relevant was based on the charge of attempted burglary at Dietrich Trucking, was no longer supported after dismissal of Count IV.

Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thomas*, 150 Wash.2d at 871. Here, the error was not harmless because of the singular lack of evidence against Mr. Lyons. After dismissal, the irrelevance of the bolt cutters became even more prominent in that the bolt cutters now applied solely to a dismissed charge. Due to the lack of physical evidence linking Mr. Lyons to the burglary, it is reasonable to conclude that the

jury attached significance on the bolt cutters and that the outcome of the trial was affected thereby.

4. MR. LYONS' COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO MOVE FOR MISTRIAL FOLLOWING DISMISSAL OF COUNT IV (ATTEMPTED BURGLARY OF DIETRICH LOGGING)

The appellant argues his trial counsel was ineffective for failing to request a mistrial following the court's ruling dismissing Count IV, following the court's admission of the bolt cutters. The bolt cutters were admitted by the court pursuant to a cut lock at Dietrich Logging. An attempted burglary at Dietrich Logging was the basis of the charge of attempted burglary alleged in Count IV.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). A court reviews ineffective assistance of counsel claims de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation prejudiced him. *Grier*, 171 Wn.2d at 32–33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To establish prejudice, a defendant must show a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

To show prejudice here, Mr. Lyons must show there is a reasonable probability that had trial counsel moved for a mistrial, the trial court would have granted that motion. See *Grier*, 171 Wn.2d at 34. A trial court should grant a mistrial when, in light of all the evidence, the defendant has suffered prejudice such that nothing short of a new trial will ensure that he receives a fair trial. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002).

Following the court's ruling of dismissal, it was impossible to un-ring the bell regarding the bolt cutter evidence, which had already been admitted, to support the State's allegation that Mr. Lyons attempted to burglarize Dietrich Truckinwg. Nonetheless, counsel did not take the final and necessary step to protect Mr. Lyons' right to a fair trial: moving for a mistrial. Counsel's failure to move for a mistrial was deficient representation and prejudicial because the evidence regarding the bolt cutters was not subjected to evaluation under ER 403, and not admitted under ER 404(b), or for any other reason.

After the court's ruling, the evidence was not relevant to prove an element of the remaining charges—which pertained solely to B & M Logging.

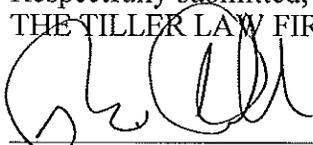
Mr. Lyons was unquestionably prejudiced by the erroneous admission of the bolt cutters. As argued supra, virtually no physical evidence supported the State's contention that Mr. Lyons participated in the burglary at B & M Logging as either a principal or accomplice. The evidence, which consisted of a morass of footprints, was equivocal at best. The evidence of the bolt cutters in the truck permitted the prosecution to link Mr. Lyons to the burglary, an argument that was clearly adopted by the jury. Because the evidence had already been admitted, a limiting instruction would have not been adequate; it was incumbent of trial counsel to move for mistrial and Mr. Lyons was prejudiced by his counsel's failure to do so.

E. CONCLUSION

for the reasons stated above, this court should vacate Mr. Lyons' convictions and remand for dismissal of the charges, or in the alternative reversal and remand Count I for entry of a conviction for second degree criminal trespass, and dismissal of Counts II and III.

DATED: October 26, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Derrick Lyons

CERTIFICATE OF SERVICE

The undersigned certifies that on October 26, 2018, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Ms. Sara Beigh
Lewis County Prosecutor's Office
345 W Main St. Fl 2
Chehalis, WA 98532-4802
appeals@lewiscountywa.gov

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Derrick Lyons
DOC # 407365
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 26, 2018.



PETER B. TILLER

THE TILLER LAW FIRM

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