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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DERRICK LYONS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the State present sufficient evidence to sustain the jury's verdicts for Burglary in the Second Degree, Attempted Theft in the First Degree, and Attempted Theft of a Motor Vehicle?
- B. Did the Deputy Prosecutor commit prosecutorial error by arguing facts not in evidence during his closing argument by arguing Lyons drove the pickup to the scene?
- C. Did the trial court error by admitting irrelevant evidence?
- D. Did Lyons receive effective assistance from his trial counsel?

II. STATEMENT OF THE CASE

On Christmas Day, 2017, Chief Breen from the Lewis County Sheriff's Office was on patrol in the early morning hours. RP 98-99. Around 6:00 a.m., Chief Breen traveled on Hamilton Road North and observed a pickup parked in a gravel turnout alongside the roadway. RP¹ 101. The pickup had no snow on it and Chief Breen could still see the tracks from the tires, which meant the truck had not been parked for very long. *Id.*

None of the businesses in the area were open, therefore, Chief Breen wanted to check on the pickup. RP 101-02. Chief Breen was concerned because it was suspicious where the truck was

¹ The verbatim report of proceedings contains eight volumes. The State will refer to the continually paginated three volume trial, Volume I: 3/5/18, Volume II: 3/6/18, Volume III: 3/7/18, as RP. The two volumes, continually paginated, sentencing hearings, will be cited as SRP, Volume I: 4/16/18, Volume II: 4/17/18. The other verbatim report of proceedings will be cited as RP and the date of the hearing.

parked. RP 101. There were no other vehicles parked in the location with the pickup, on either side of the roadway near the pickup. RP 101-02.

Upon contacting the pickup, which had Oregon plates, Chief Breen found it occupied by a woman in the passenger seat. RP 102-03. Chief Breen spoke to the woman. RP 103. After his conversation with the woman, Chief Breen believed there was at least one other individual in the area. RP 103. Chief Breen headed north from the turnout to check on the businesses. *Id.*

Chief Breen advised dispatch he was out in the area, looking for at least one male on foot. RP 104. Other members of the Sheriff's Office heard Chief Breen was either out with the vehicle or out looking for another individual and responded to the area. RP 152, 176, 192. Reserve Deputy Padgett, Deputy Mauermann, Reserve Deputy Lee, and Deputy Woods, among others, eventually joined Chief Breen. RP 111, 152, 135-36, 176, 182, 192, 199.

Chief Breen went to the Chehalis Livestock Market first to look around. RP 104. Deputy Padgett arrived on the scene and spoke to Chief Breen. *Id.* While speaking with Deputy Padgett they located some foot impressions in the snow and were able to tell someone had walked into Chehalis Livestock Market. *Id.* It appeared there

were footprints in the snow going into Chehalis Livestock Market, then the footprints headed over towards two other businesses north of the Chehalis Livestock Market. RP 105. The footprints went along the fence line. *Id.* The snow in the areas, except the roadways and Chehalis Livestock Market, was firm. RP 106.

Deputy Padgett went to the pickup and saw the woman in the passenger's seat. RP 177. After speaking to the woman, Deputy Padgett believed there was more than one person who walked away from the pickup. RP 177-78. Deputy Padgett began to look in the snow around the parking lot for tracks. RP 178. Deputy Padgett could see three sets of tracks from the pickup. *Id.* There was one set of tracks from the woman, she appeared to have walked up just a little ways from the truck, and then the woman went back into the passenger's side of the pickup. *Id.* The other two sets of tracks left the vehicle, one went one direction down the road, and the other went another direction away. *Id.*

Deputy Padgett advised everyone in the area there were multiple sets of tracks. RP 179. Deputy Padgett advised he had two sets of tracks going behind B&M Logging. RP 179. Other units arrived on scene and began checking the area. RP 111.

Chief Breen went back southbound down Hamilton Road, observing what appeared to be foot impressions leading up to Labree Road, then headed south back down Hamilton Road, next crossing over the west shoulder opposite of where the businesses are at, and then continuing south. RP 111. Chief Breen observed what appeared to be two different foot impressions. *Id.*

Chief Breen got back in his patrol vehicle and headed further south to see if he could find tracks to any other business. RP 112-13. Chief Breen located a man, Donald Emery, walking northbound in approximately the 200 block of Hamilton Road North, on the side of the street closest to I-5. RP 113. Emery, while clothed, had no shoes on, merely socks, while he walked in the snow and slush. *Id.*

Chief Breen observed no other vehicles on the road Emery could have come from. RP 113-14. Emery told Chief Breen what had happened to his footwear and Chief Breen detained Emery. RP 114.

Chief Breen passed off Emery to Captain Spahn and then began tracking Emery's foot impressions in the snow to figure out where Emery had come from. RP 114-15. Chief Breen was able to identify foot impressions leading out of UPS heading towards Hamilton Road North. RP 115; Ex. 15. These foot impressions do not bear the same telltale dots as the other foot impressions. RP 115.

The foot impressions led from Hamilton Road North, southwest at an angle across UPS property to the southern fence line of UPS. RP 118-19. At the southern fence line Chief Breen discovered A UPS truck where he observed the previously-seen foot impressions which had the dimple type pattern intermixed with foot impressions with no tread pattern. RP 119. At the center around the truck the two sets of foot impressions intermingled. RP 119.

Chief Breen then heard radio traffic from other deputies about another suspect fleeing on foot. RP 119. Deputy Woods had located another suspect hiding in the snow. RP 137-39. Deputy Woods followed the man, later identified as Lyons, who began to run through the brush, refusing to stop when commanded to, over a barb wired fence, through the creek, and ultimately tackled Lyons. RP 137-41.

Once Deputy Woods had Lyons in custody he escorted Lyons to a patrol vehicle of another deputy. RP 141. Lyons had to be transported to the hospital by ambulance because his body temperature was dropping. RP 142. Lyons was wearing a black latex glove on his left hand, it was torn. RP 143. Deputy Anderson followed the ambulance to the hospital, stayed with Lyons, and collected evidence from Lyons. RP 183-84.

Deputy Mauermann who was also tracking around where Emery had been located, the south side of B&M Logging, outside the fenced portion, to see if he could find the dimpled tracks coming out of the area onto the road. RP 198. Deputy Mauermann figured there would have been a point and time Emery had shoes. *Id.* Deputy Mauermann located the dimpled shoe prints, followed the prints, taking photos, all the way down to the UPS area. *Id.* The tracks ended up behind UPS, in between a couple of the semi trucks, up to a truck, the door of the truck, then moved up and around the building. RP 199. The tracks continued to lead south, between a building and a couple more trucks, and a Conex semi trailer on the ground. *Id.*

Chief Breen later was able to find, behind the Conex container, on the southern fence line in the same area as the UPS truck, a pair of coveralls, a pair of shoes with a tread pattern consistent with the dimple tread pattern, and a key fob, keys from a vehicle. RP 119-20. After collecting the evidence, Deputy Mauermann attempted to pick the trail back up from where the prints transitioned from the dimple prints to foot (sock) prints. RP 200. The foot print trail led out of the Conex area, to Hamilton Road North, then proceeded on the freeway side of Hamilton. RP 201.

After speaking with Emery, Deputy Mauermann believed there was another person. RP 203. Deputy Mauermann was now looking for a different show print. *Id.* Deputy Mauermann requested Deputy Anderson take a photo of the sole of Lyons' shoes. *Id.*

Once Deputy Mauermann received a photo, he looked for both shoe prints. RP 203. Deputy Mauermann found two sets of prints consistent with Lyons' and Emery's shoes by the fire hydrant. *Id.* Deputy Mauermann followed the shoe prints and found additional prints from Lyons' shoe in the area of the trucks. RP 204. Deputy Mauermann found more prints in between some vehicles. RP 205.

Deputy Mauermann was led to a spot in front of several vehicles where it appeared as if someone had been standing. RP 206. Deputy Mauermann opened the door to the vehicle and there appeared to be wet spots inside, on the floorboard. *Id.*

Deputy Mauermann next discovered a door that appeared to be damaged and was slightly ajar. RP 206. Deputy Mauermann discovered two sets of shoe prints, Emery's fairly close to the door and Lyons' and Emery's in another area. *Id.* Deputy Mauermann waited until Sergeant Wetzel arrived because he did not want to enter a building without a second unit. RP 207.

Inside the building, there appeared to be things moved around in the bay area. RP 207. Deputy Mauermann observed a shoe print up near the window consistent with Lyons' shoe print. RP 208. The owner of the B&M Logging, Brandon Smith, came in later that day and indicated a number of things had been moved around. RP 208, 295.

B&M Logging has a shop office at one end of the building and then at the south end of the building, works on the trucks, has equipment, a shop area, and trucks. RP 297. Inside the shop there were tools, parts, forklift, welding equipment, cut torch equipment, and shop trucks. *Id.* Mr. Smith noticed one blue toolbox had been moved from the north end of the building towards the south end of the shop. *Id.* Two shop trucks had been moved forward in the bay. *Id.*

The moved toolbox was very expensive, approximately five feet tall, weighing in at about two thousand pounds, and is full of tools. RP 298. The toolbox had been moved about 60 to 70 feet. *Id.* Mr. Smith had never moved the toolbox, and believed it would take a couple guys to move it. *Id.*

A truck and the forklift had been moved. RP 299. The other shop truck had been moved forward between 10 to 20 feet, had

heavy, big tanks, approximately four feet tall, placed in the back of it. RP 299-300. The shop truck that had been moved forward was the truck the key fob belonged to. RP 300.

The oxygen and acetylene tanks had not been in the back of the truck the night before. RP 301. Mr. Smith has moved oxygen and acetylene tanks before, but not into the back of a pickup truck. *Id.* Mr. Smith estimated it would take two people to lift the oxygen and acetylene tanks into the back of the pickup truck. RP 301-02.

The miscellaneous tools in the back of the pickup were worth between \$6,000 and \$8,000. RP 304-05. Mr. Smith did not give anyone permission to be in the building on Christmas Eve or Christmas Day. RP 305. Mr. Smith had never seen Lyons before and Lyons did not have permission to be on the property. *Id.*

The State charged Lyons and Emery as codefendants with Count I: Burglary in the Second Degree, Count II: Attempted Theft in the First Degree, Count III: Attempted Theft of a Motor Vehicle, and Count IV: Attempted Burglary in the Second Degree. CP 13-16. Lyons' case was severed from Emery's prior to trial. RP (2/22/18) 3-5.

Lyons elected to have his case tried to a jury. *See* RP. After the close of the State's case, Lyons' counsel successfully argued for

the dismissal of Count IV, the Attempted Burglary in the Second Degree of the trucking yard at 159 Labree Road. RP 321-22. The jury convicted Lyons on the remaining counts as charged. CP 125, 127-28. Lyons was sentenced to 57 months on Count I and 21.75 months on Counts II and III, all concurrent. CP 188-97. The trial court imposed the \$500 crime victim penalty assessment, \$200 filing fee, and \$100 DNA fee. CP 192-93. Restitution was reserved. CP 193. Lyons timely appeals his conviction and sentence. CP 187-97.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT THAT LYONS COMMITTED THE CRIMES OF BURGLARY IN THE SECOND DEGREE, ATTEMPTED THEFT IN THE FIRST DEGREE, AND ATTEMPTED THEFT OF A MOTOR VEHICLE, EITHER AS A PRINCIPAL OR AN ACCOMPLICE.

There was sufficient evidence presented to show beyond a reasonable doubt that Lyons committed the crimes of Burglary in the Second Degree, Attempted Theft in the First Degree, and Attempted Theft of a Motor Vehicle. Contrary to Lyons' assertion, the facts taken in the light most favorable to the State sustain all of the essential

elements of the charged offenses. The Court should sustain the jury's verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved, As It Is Required To, Each Element Of Count I: Burglary In The Second Degree, Count II: Attempted Theft In The First Degree, And Count III: Attempted Theft Of A Motor Vehicle.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable

as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Lyons of Count I: Burglary in the Second Degree the State was required to prove, beyond a reasonable doubt, that Lyons, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building, other than a vehicle or a dwelling. RCW 9A.52.030; CP 13.

The to-convict jury instruction required the jury to find:

To convict the defendant of the crime of Burglary in the Second Degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 25, 2017, the defendant entered or remained unlawfully in a building; and,

(2) That the entering or remaining was with the intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 105 (Instruction 8), *citing* WPIC 60.04.

Attempted Theft in the First Degree, as charged in Count II, required the State to prove, beyond a reasonable doubt, that Lyons with the intent to commit a specific crime, and did act with a substantial step towards the commission of that crime. RCW 9A.28.020(1); RCW 9A.56.020; CP 14. The alleged specific crime was Theft in the First Degree, which required the State to prove Lyons, either in a series of transactions which are part of a criminal episode or a common scheme or plan, or a single transaction, did attempt to commit theft, other than a firearm or motor vehicle, of property or services in excess of \$5,000. RCW 9A.56.010(21)(c); RCW 9A.56.020(1); RCW 9A.56.030(1); CP 14.

The to-convict jury instruction required the jury to find:

To convict the defendant of the crime of attempted Theft in the First Degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 25, 2017, the defendant did an act that was a substantial step towards the commission of Theft in the First Degree; and,
- (2) That act was done with the intent to commit Theft in the First Degree; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 116 (Instruction 19), *citing* WPIC 100.02. The trial court also gave the jury the instructions for elements of Theft in the First Degree,

The elements of the crime of Theft in the First Degree are:

- (1) That on or about December 25, 2017, the defendant wrongfully obtained or exerted unauthorized control over the property of another, other than a motorized vehicle; and,
- (2) That the property exceeded \$5,000.00 in value, and
- (3) That the defendant intended to deprive the other person of the property; and

(4) That this act occurred in the State of Washington.

CP 114 (Instruction 17), See WPIC 70.02.

Similarly, Attempted Theft of Motor Vehicle, as charged in Count III, also required the State to prove beyond a reasonable doubt, that Lyons with the intent to commit a specific crime, and did act with a substantial step towards the commission of that crime. RCW 9A.28.020(1); RCW 9A.56.020(1)(a); RCW 9A.56.065 CP 14. The alleged specific crime was Theft of a Motor Vehicle, which required the state to prove Lyons to wrongfully obtain or exert unauthorized control over a motor vehicle belonging to another. RCW 9A.56.020(1)(a); RCW 9A.56.065.

The to-convict jury instruction required the jury to find:

To convict the defendant of the crime of attempted Theft of a Motor Vehicle, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 25, 2017, the defendant did an act that was a substantial step towards the commission of Theft of a Motor Vehicle; and,

(2) That act was done with the intent to commit Theft of a Motor Vehicle; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 121 (Instruction 24), *citing* WPIC 100.02. The trial court also gave the jury the instructions for elements of Theft of a Motor Vehicle,

The elements of the crime of Theft of a Motor Vehicle are:

- (1) That on or about December 25, 2017, the defendant wrongfully obtained or exerted unauthorized control over a motorized vehicle of another; and,
- (2) That the defendant intended to deprive the other person of the motor vehicle; and
- (3) That this act occurred in the State of Washington.

CP 119 (Instruction 22), *See* WPIC 70.26.

The evidence presented by the State was sufficient to sustain convictions for all three counts. Lyons was found hiding, outside, in snow, behind a closed business that had been broken into on Christmas Day. RP 136-41, 206-08. Lyons' boot prints were intermixed with Emery's shoe prints throughout B&M yard, going in and out of trucks. RP 203-05. Lyons' boot print was found, with Emery's shoe print, within 10 yards of the back door, which was the point of entry into B&M Logging shop building. RP 248-50; Ex. 63.

Deputy Mauermann described finding Lyons' boot print inside B&M Logging's building, up near the windows towards the front of

the building. RP 207-08. Further, Mr. Smith, the owner of B&M, explained how it would have taken two people to move the items that had been moved around inside the shop. RP 298-302.

There were two trucks moved inside the shop. RP 297. The items placed inside the back of one of the pickup trucks were worth between \$6,000 and \$8,000. RP 304-05. Mr. Smith had not given anyone permission, including Lyons, to be on B&M property Christmas Day. RP 305.

The evidence presented, as outlined above, is sufficient to prove in the light most favorable to the State, all the essential elements of each crime charged. RCW 9A.28.020(1); RCW 9A.52.030(1); RCW 9A.56.020; RCW 9A.56.030(1); RCW 9A.56.065; *Salinas*, 119 Wn.2d at 201. Lyons entered into B&M's shop building with the intent to commit the crime of Theft in the First Degree and Theft of a Motor Vehicle. Lyons took a substantial step, with the aid of Emery, to steal over \$5,000 worth of property from B&M Logging. Lyons and Emery gathered up a welder, miscellaneous tools, oxygen and acetylene tanks, CBs, and more. Lyons took a substantial step to steal a Motor Vehicle from B&M Logging. The shop trucks were moved, one of the trucks had the key

fob removed, and the fob was stashed with Emery's shoes and coveralls for later retrieval. RP 119-20, 300.

Further, the trial court also gave the jury an instruction regarding accomplice liability.

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of 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.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 102 (Instruction 5), *citing* WPIC 10.51. "A person aids or abets a crime by associating himself with the undertaking, participating in it

as in something he desires to bring about, and seeking by his action to make it succeed.” *State v. Knight*, 176 Wn. App. 936, 949, 309 P.3d 776 (2013) (internal citations omitted). To be an accomplice in the crime, a person need not have specific knowledge of each element of the participant’s crime, but rather general knowledge of the crime is sufficient for criminal liability. *State v. Dreewes*, Supreme Court No. 95571-9, Slip. Op. at 12 (Jan. 10, 2019), citing *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

Therefore, even if the jury could not find Lyons was principally responsible for the three crimes, the State presented sufficient evidence that together with Emery, Lyons was an accomplice. The two men, at a minimum traveled to the area from Oregon. There was only one vehicle found in the area, it was from Oregon, Lyons was driving, and Lyons’ driver’s license indicated he was a resident of Oregon. RP 224-25; Ex 84. Lyons’ driver’s license was found in the driver’s side top visor above the driver’s seat. RP 224. Further an intact rubber glove, matching the one Lyons was wearing when he was apprehended, was found on the driver’s side floorboard of the pickup. RP 224-25.

Then there was the evidence of Lyons’ entry into the shop building. Lyons’ boot print was located inside the building, indicating

he was present and able to lend assistance. Also, the back door was forced open, therefore, Lyons necessarily had to have knowledge they did not have permission to be inside the building. Finally, Lyons flight from the scene can be considered an admission of guilty by conduct by the jury. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010).

This Court should find as presented to the jury, the State met its burden to prove each element of Counts I-III as charged beyond a reasonable doubt. This Court should affirm the jury's verdict.

B. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR DURING CLOSING ARGUMENT BY ARGUING FACTS NOT IN EVIDENCE.

Lyons claims the deputy prosecutor committed prosecutorial error (misconduct)² by arguing Lyons owned the pickup and drove

² “Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa.

Emery to the scene without facts in evidence to support the argument. Brief of Appellant 18-22. Lyons minimizes the evidence presented, mischaracterizes the Deputy Prosecutor's arguments in part, and purposely cuts off the Deputy Prosecutor's statement at one point to make it out of context. The Deputy Prosecutor's discussion regarding Lyons being the driver of the pickup truck was permissible and not improper.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor's Comments During Closing Arguments Were Permissible, As The Arguments Made Reasonable Inferences From The Evidence Admitted.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an

639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted). Lyons did not object to any of his now alleged prosecutorial error. See RP 360-67.

To prove prosecutorial error, it is the defendant’s burden to show the deputy prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor’s conduct, full trial context includes, “the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when “there is a substantial likelihood the misconduct affected the jury’s verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

“[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant’s attorney in closing argument. *Id.* (citation omitted).

Lyons first argues the Deputy Prosecutor committed error by arguing the pickup, with Oregon plates, belonged to Lyons despite the State failing to present evidence Lyons owned the pickup. Brief of Appellant 19, *citing* RP at 358. Yet, this is not the full context of what the Deputy Prosecutor stated at this point in his closing argument.

And they searched his truck, found Mr. Lyons' driver's license, showing he was actually in that vehicle... This guy's from Oregon. His license says he's from Oregon. You'll see the pictures of the truck. It was an Oregon plate. The obvious conclusion there is that these guys were rolling up Interstate 5.

RP 358. The Deputy Prosecutor does call the truck, “his truck” referring to Lyons, but it is not a statement made without evidence to rely upon.

The State presented evidence of Lyons’ driver’s license, found clipped into the driver’s side visor above the driver’s seat of

the pickup truck. RP 224; Ex. 96. A glove, matching the one Lyons was discovered wearing when he was apprehended, was found on the driver's side floorboard of the truck. RP 216, 224-25. The truck had Oregon plates and Lyons is from Oregon. RP 102-03; Ex. 96. Common sense lends one to the natural conclusion only the driver would secure his or her license to the visor above the driver's seat in a vehicle. The glove is further evidence Lyons was sitting in the driver's seat, another reasonable inference the Deputy Prosecutor could make and argue from the evidence presented.

Next, Lyons argues the Deputy Prosecutor stated, "How did Mr. Lyons aid Mr. Emery? One, drove him there[.]" Brief of Appellant, *citing* RP 360. The Deputy Prosecutor gave a list of a number of things Lyons aided Emery with, one of which was driving the men to the location.

How did Mr. Lyons aid Mr. Emery? One, drove him there, two, walked with him back behind the building because he's had two sets of footprints back there. Three, and this is important, you heard from Mr. Smith who talked about the types of tools and toolboxes that were moved around in the back.

RP 360-61. The Deputy Prosecutor then explains all the items it would have taken two people to move per Mr. Smith. RP 361. Later in his closing argument, the Deputy Prosecutor, when highlighting all the evidence does state two more times Lyons drove Emery to the

scene, along with summarizing all the other evidence that places Lyons at and inside the shop building. RP 366-67.

The Deputy Prosecutor may not submit evidence to a jury in his or her argument that has not been admitted during the trial, to do such is error. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012) (citation omitted). As argued above, the Deputy Prosecutor here engaged in no such conduct. It was reasonable from the evidence presented to deduce Lyons was the driver of the pickup truck. The Deputy Prosecutor did not commit error during his closing argument by arguing Lyons drove Emery to the scene or Lyons is the owner of the pickup.

While not admitting there was any error, *arguendo*, Lyons has not met his burden to show he was prejudiced by any improper comments made by the Deputy Prosecutor. If Lyons simply drove Emery to the area and nothing more, without knowledge of what was occurring, there would be insufficient evidence to support the convictions. Yet, in the closing argument, the Deputy Prosecutor never stated just simply because Lyons drove to the scene he was an accomplice. RP 358, 360-61, 364, 366-67. It was always Lyons drove and then another piece of evidence, e.g. “[w]hat other reason would they be behind that building?” RP 364. This Court should find

Lyons has not met his burden to show the Deputy Prosecutor's alleged error was prejudicial and therefore the error was harmless. Lyons' convictions should be affirmed

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE BOLT CUTTERS.

The trial court did not abuse its discretion when it admitted relevant evidence, the bolt cutters, over Lyons' objection. Lyons argues the bolt cutters were not relevant evidence, as they are not tied to B&M Logging, therefore the trial court used its discretion when it admitted the bolt cutters. Brief of Appellant 22-25. Lyons' argument fails and this Court should affirm the trial court's ruling and Lyons' convictions.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). (internal quotations and citation omitted). A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403 (citations omitted).

2. The Trial Court's Admission Of The Bolt Cutters Was Not An Abuse Of Its Discretion.

Contrary to Lyons' assertion, the State established the relevance of the bolt cutters to Count IV, the Attempted Burglary in the Second Degree. RP 226-27. The State is permitted to introduce relevant evidence in an attempt to substantiate the charges against the defendant to secure a conviction. The fact the State was unable, in hindsight, to secure the conviction, does not make the evidence inadmissible.

The proponent of evidence must establish its relevance, materiality, and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). "Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more

or less likely than without the evidence.” *State v. Thomas*, 150 Wn.2d 821, 858, 83 P.3d 970 (2004), *citing* ER 401.

Under ER 403, evidence that is relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...or needless presentation of cumulative evidence.” There is a danger of unfair prejudice, in the context of ER 403, “[w]hen evidence is likely to stimulate an emotional response rather than a rational decision[.]” *State v. Powell*, 126 Wn.2d 244, 264 893 P.2d 615 (1995).

Lyons, in his briefing, continually focusses on how there was no nexus between the bolt cutters and B&M Logging, the charges for Count IV, the Attempted Burglary in the Second Degree of Dietrich Trucking, were later dismissed, and this made the trial court’s reasoning for admitting the evidence no longer supported. Brief of Appellant 23-25. Under Lyons’ reasoning, any time the State submitted evidence to the trial court for a count that was later either dismissed for lack of sufficient evidence or even an acquittal of the count, it would be an abuse of the trial court’s discretion to admit the evidence, because it would not have been relevant in retrospect.

The State submitted evidence of the bolt cutters because it was attempting to submit sufficient evidence to substantiate the

charge of Count IV: Attempted Burglary in the Second Degree for the yard at Dietrich Trucking. RP 226-27. The State's understanding of the yard at Dietrich Trucking, prior to Chief Breen's testimony, was it was fully fenced. RP 322. Therefore, the State was presenting evidence throughout the trial, including after Chief Breen's testimony, in hopes it would be able to recover the charged count, prior to having to concede the issue. RP 321-22. There was evidence the lock had been cut at the gate of Dietrich Trucking. RP 228. The bolt cutters were located in the back of the pickup truck after the execution of a search warrant. RP 225-26. Count IV: Attempted Burglary in the Second Degree was still pending at the time of the admission of the bolt cutters. RP 225-26, 321-22. The State made the requisite showing the evidence was material and relevant at the time of the bolt cutters admission. RP 225-27. Therefore, the trial court did not abuse its discretion when it admitted the bolt cutters.

3. Any Error In Admitting The Bolt Cutters Was Harmless.

While the State maintains there was no error in the admission of the bolt cutters, arguendo, any error was harmless. Lyons was not prejudiced by the admission of the bolt cutters.

Unless an error resulted in prejudice to the defendant, this Court does not reverse due to an error by the trial court in admission

of evidence. *Thomas*, 150 Wn.2d at 871. A reviewing court does not use the more stringent harmless error beyond a reasonable doubt standard when there is an error from violation of an evidentiary rule. *Id.* The court applies “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.*, citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Therefore, “[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.*, citing *State v. Bourgeois*, 133 Wn.2d at 403.

Lyons argues “the error not harmless because of the singular lack of evidence against Mr. Lyons.” Brief of Appellant 24. Lyons asserts there was a lack of physical evidence connecting him to the burglary of B&M Logging. Lyons conveniently ignores Deputy Mauermann’s testimony about finding Lyons’ boot print inside the shop building. RP 208. Lyons also overlooks that his boot prints are found intermixed with Emery’s, whom he argues throughout his briefing did commit the burglary, as close as 10 yards from the door that was the point of entry into B&M Logging’s shop. RP 248-50.

Further, the circumstantial evidence linking Lyons to the burglary and attempted thefts is substantial. Lyons was wearing a glove commonly used to obscure DNA and fingerprints, not to protect him from the cold, frigid temperature. RP 143, 159, 216-17. Lyons was hiding in the snow, behind B&M Logging on Christmas Day. 136-41, 206-08. Lyons ran from the police and attempted to evade capture. RP 137-41. There is also Lyons' shoe prints found throughout B&M's yard with Emery's. RP 203-05. Further, Lyons was likely the person who drove the three people to the scene. RP 224-25; Ex. 84. Contrary to Lyons' argument, it is unlikely the jury placed any great significance in a pair of bolt cutters that cut a lock at Dietrich Trucking, a count later dismissed. Any error in admitting the evidence was harmless. Lyons' convictions should be affirmed.

D. LYONS RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Lyons' attorney provided competent and effective legal counsel throughout the course of his representation. Lyons argues his trial counsel was ineffective for failing to request a mistrial after trial counsel successfully argued at the close of the State's case for a dismissal of Count IV. Lyons focusses on the admission of the bolt cutters once again as a reason for the mistrial, arguing the bolt cutters and State's case for Attempted Burglary in the Second

Degree was improper 404(b) evidence. This argument is simply absurd. Lyons' counsel was effective and this Court should affirm his convictions.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Lyons' Attorney Was Not Ineffective During His Representation Of Lyons Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Lyons must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate

whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Lyons' argument appears to be premised on the admission of the bolt cutters is purely 404(b) evidence due to the ultimate dismissal of Count IV. Yet, Lyons fails to brief 404(b), with the exception of mentioning the rule in passing. As argued above, the State sought the admission of the bolt cutters in its case in chief for substantive evidence of Count IV, the Attempted Burglary in the Second Degree of Dietrich Trucking. Lyons' focus on the later in time dismissal of the count does not make the bolt cutter evidence at the time inadmissible. The State did not seek to admit evidence of an

uncharged criminal conduct or other wrongs, and to assert such is without merit.

If, this Court finds Lyons' counsel should have requested a mistrial, it still must find he was prejudiced by his attorney's lack of action. A trial court's granting of a mistrial is an extraordinary remedy. *Rodriguez*, 146 Wn.2d at 270. A trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." *Id.* (internal quotations and citation omitted). A reviewing court will only overturn a trial court's denial of a motion for a mistrial "when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict." *Id.* at 269-70.

As argued above, the admission of the bolt cutters was permissible or at worse, harmless. Therefore, there is no showing a mistrial was warranted. Therefore, if Lyons' counsel is found to be deficient, Lyons cannot show he was prejudiced by the deficient performance and his claim of ineffective assistance of counsel fails. This Court should affirm Lyons' convictions.

IV. CONCLUSION

There was sufficient evidence presented to sustain all three convictions, Burglary in the Second Degree, Attempted Theft in the

First Degree, and Attempted Theft of a Motor Vehicle. The Deputy Prosecutor did not commit prosecutorial error by arguing facts not in evidence. The trial court did not abuse its discretion when it admitted the bolt cutters into evidence, as they were relevant to Attempted Burglary in the Second Degree as charged in Count IV. Finally, Lyons received effective assistance from his trial counsel. Therefore, This Court should affirm Lyons' convictions.

RESPECTFULLY submitted this 15th day of January, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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