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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

29383-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KORY WARD, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S BRIEF

---

Janet G. Gemberling  
Attorney for Appellant

Jill S. Reuter  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
PO Box 9166  
Spokane, WA 99209  
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in conducting an in-camera review of discovery materials requested by Mr. Ward, in determining that the materials were irrelevant, and in ordering the materials to be filed under seal and not disclosed to Mr. Ward.
2. The trial court erred in finding Mr. Ward guilty of counts III, IV, V, and VII of second degree arson, where the evidence was insufficient.
3. The trial court erred in admitting testimony by State rebuttal witness Scott Lagerquist regarding Mr. Ward's involvement in a fire not charged here.
4. The State engaged in prosecutorial misconduct in its rebuttal closing argument, by shifting the burden of proof to Mr. Ward.
5. The trial court erred in imposing the following condition of community custody: "[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer."
6. The trial court imposed community custody pursuant to an incorrect statute.

## B. ISSUES

1. During discovery, Mr. Ward asked the State to provide him with several police investigation reports. The trial court asked the State for copies of the requested reports, and then conducted an in-camera review of the reports. The trial court withheld one police investigation report and related documents from Mr. Ward, and ordered these documents to be filed under seal. Was Mr. Ward entitled to view these requested discovery documents?
2. The evidence showed that Mr. Ward drove his car to the scene of the fires charged in counts III, IV, V, and VII. There is no other evidence of any involvement in these charged counts. Under these facts, was the evidence sufficient to support a finding that Mr. Ward was a principal or accomplice to second degree arson, as charged in counts III, IV, V, and VII?
3. State rebuttal witness Scott Lagerquist testified, over defense objection, regarding Mr. Ward's involvement in a fire not charged here. Should this testimony have been excluded, under either ER 404(b) or ER 401?

4. In its rebuttal closing argument, the State suggested that Mr. Ward was required to present evidence, and accordingly, prove his innocence. Did the State engage in prosecutorial misconduct in its rebuttal closing argument, by shifting the burden of proof to Mr. Ward?
5. As a condition of community custody, the trial court ordered Mr. Ward to “[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer.” Does allowing a community corrections officer to determine whether a treatment counseling program is necessary and crime-related constitute an excessive delegation of judicial authority?
6. The judgment and sentence states that Mr. Ward shall serve community custody pursuant to RCW 9.94A.701. RCW 9.94A.701 was not in effect at the time Mr. Ward’s offenses were committed. Should the judgment and sentence be corrected to state the community custody statute in effect at the time Mr. Ward’s offenses were committed?

### C. STATEMENT OF THE CASE

Korey N. Ward was part of a skateboarding group known as the “Mayday Mob.” (5 RP 1770, 1773-1774; 6 RP 1935-1936; 14 RP 3117, 3126-3127). The State charged Mr. Ward with one count of first degree arson, and six counts of second degree arson, alleged to have occurred in 2007. (CP 8-10, 27-29, 65-67, 259-261, 519-522). The first jury trial ended with the trial court declaring a mistrial, after determining that the jury was unable to reach a verdict. (CP 68; 8 RP 743-747).

Following the first jury trial, defense counsel filed a motion for an order of production, asking the State to produce several police investigation reports, including Yakima Police Department (YPD) report number 07-15085. (CP 305-306; RP 18-25). Defense counsel stated this report was part of the criminal history information for State’s witness Nicholas Heilman. (CP 305). Defense counsel stated that “Mr. Heilman entered into a Plea Agreement in case # 08-1-00631-5 which included an Addendum wherein he agreed to testify against [Mr.] Ward. The Charging Information in that cause of action lists the YPD cases above-listed for Mr. Heilman.” (CP 306).

At a hearing on the motion for production, defense counsel stated his reason for requesting the various police investigation reports:

The reason for this, that as we pour through the discovery, we find references to these YPD numbers, and they don't all match up.

...  
The reason we're interested in criminal history . . . [o]ne of the alleged victims in this case is a gentleman . . . Mark Kirschenmann<sup>1</sup>. . . . Mr. Kirschenmann was a probation officer and probation supervisor [at the juvenile department]. I want to see if there's some connection between Mr. Kirschenmann, his residence, and some of these kids.

(RP (Feb. 10, 2010) 19-21<sup>2</sup>).

The trial court then asked the State to provide copies of the various police investigation reports, and conducted an in-camera review to determine whether the reports contained relevant information. (RP (Feb. 10, 2010) 22-25). The trial court conducted the in-camera review on its own, without the presence of the State or defense counsel. (CP 312).

Following the in-camera review, the trial court released all of the requested police investigation reports to defense counsel, except for YPD report number 07-15085 and three interview transcripts related to this report number. (CP 310-312). In a letter ruling, the trial court stated it believed these non-disclosed documents "are irrelevant to the issues in the

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<sup>1</sup> Mr. Kirschenmann is one of the alleged victims in Count VII charged here. (CP 261, 521).

<sup>2</sup> Unlike the rest of the Report of Proceedings, the Report of Proceedings from this hearing is not consecutively paginated. Therefore, the hearing date, February 10, 2010, is included.

instant case.” (CP 312). The trial court ordered that the non-disclosed documents be filed under seal. (CP 310-312). Subsequently, defense counsel filed a motion to unseal these documents. (CP 326-329). Defense counsel stated that YPD report number 07-15085 relates to count IV charged here. (CP 326-327). The State’s declaration of probable cause indicates the same. (CP 6). There is no indication that the trial court ruled on Mr. Ward’s motion to unseal.

At the second jury trial, the only evidence linking Mr. Ward to the charged arson counts was the testimony of Eric Protsman and Mr. Heilman, also members of the Mayday Mob. (5 RP 1768-1786; 6 RP 1854-1923, 1933-1963; 7 RP 1980-2070; 13 RP 3003-3015, 14 RP 3053-3105). Both Mr. Protsman and Mr. Heilman entered into plea agreements regarding some of the arson counts at issue here, in which they agreed to testify against Mr. Ward. (5 RP 1778; 6 RP 1897-1902, 1937, 1962-1963; 7 RP 2027-2029).

Counts I, III, IV, V, VI, and VII charged Mr. Ward with second degree arson. (CP 519-521). In each of these counts, the State alleged that Mr. Ward, “acting as a principal or an accomplice to another participant in the crime, [he] or another participant in the crime knowingly and maliciously caused a fire or explosion” at a specified location, “which damaged a building, a structure, a vehicle, or property.” (CP 519-521).

Regarding Count III, Mr. Protsman testified that the fire was lit by Mr. Heilman. (5 RP 1784-1785). He did not testify that Mr. Ward was involved. (5 RP 1768-1786; 6 RP 1854-1923; 13 RP 3003-3015). Mr. Heilman testified that he lit this fire. (6 RP 1949-1950; 7 RP 2007; 14 RP 3064). He testified that Mr. Ward was driving. (6 RP 1951). Mr. Heilman testified that Mr. Ward “knew what was going on,” and that his role in this fire being set was “[b]eing the mode of transportation. Such things as that.” (6 RP 1951).

Regarding Count IV, Mr. Protsman testified that the fire was lit by Mr. Heilman. (5 RP 1785; 6 RP 1868-1869; 13 RP 3013). He testified that Mr. Ward was the driver. (5 RP 1785-1786; 6 RP 1869). Mr. Heilman testified that he lit this fire. (6 RP 1950-1951; 7 RP 2007; 14 RP 3064). He testified that Mr. Ward was driving. (6 RP 1951; 14 RP 3083). Mr. Heilman testified that Mr. Ward “knew what was going on,” and that his role in this fire being set was “[b]eing the mode of transportation. Such things as that.” (6 RP 1951).

Regarding Count V, Mr. Protsman testified that he lit this fire. (5 RP 1780-1781; 6 RP 1867; 13 RP 3006). He testified that Mr. Ward was the driver. (5 RP 1781). When asked “[d]id [Mr. Ward] know that you were there to start a fire?” Mr. Protsman responded “no.” (5 RP 1782). Mr. Heilman testified that Mr. Protsman lit this fire.

(6 RP 1952-1953). He did not testify that Mr. Ward was involved.  
(6 RP 1933-1963; 7 RP 1980-2070; 14 RP 3053-3105).

Regarding Count VII, Mr. Heilman testified that he lit this fire, along with an individual named Chris. (6 RP 1959-1960; 7 RP 2009). He testified that Mr. Ward was the driver. (6 RP 1960). Mr. Heilman testified that he started the fire with a lighter, but he could not recall who gave the lighter to him, Chris or Mr. Ward. (6 RP 1960). Mr. Protsman did not testify regarding this count. (5 RP 1768-1786; 6 RP 1854-1923; 13 RP 3003-3015).

In addition, Mr. Heilman gave the following testimony regarding fires in general:

[The State:] How would you decide which, which location to start on fire?

[Mr. Heilman:] It was absolutely random. It was driving around and we would see a good bush and somebody would notice it, whether it be [Mr. Ward], myself, Chris, [Mr. Protsman], I mean that was seeing, and then somebody would point it out. And then, it would move on from there.

...

[The State:] Okay. Who decided whether or not to stop at a location where something was set on fire?

[Mr. Heilman:] You mean prior to starting a fire?

[The State:] Yeah, as you're driving along, who decides where you're going to stop?

[Mr. Heilman:] [Mr. Ward].

(6 RP 1951-1952).

Mr. Ward testified in his own defense. (14 RP 3112-3170). He testified that he did not drive anyone to light any fires, that he was not close by or present at any of the charged arson counts, and that he did not participate in any group activity involving lighting fires. (14 RP 3123-3124, 3128, 3151-3152).

During its rebuttal case, the State asked its witness Scott Lagerquist, who met Mr. Ward through skateboarding, “[w]hat’s the first fire that you were aware of involving [Mr. Ward] and [Mr. Heilman] and some of the rest of you?” (14 RP 3178). Mr. Lagerquist began to answer, “[t]here was one in Naches that we were just driving down a road . . . .” (14 RP 3178). Mr. Ward objected, stating “[b]eyond the scope of charges filed here and not relevant.” (14 RP 3179). The trial court overruled the objection, and the State continued to question Mr. Lagerquist:

[The State:] What’s the first fire that you recall being present at where you were with some of the Mayday Mob people, including [Mr. Ward]?

[Mr. Lagerquist:] A fire in Naches.

[The State:] And do you recall approximately when that fire was?

[Mr. Lagerquist:] Sometime during that summer.

[The State:] When you say that summer, are you talking about 2007?

[Mr. Lagerquist:] Yes.

[The State:] And that’s the first fire you were aware of?

[Mr. Lagerquist:] Yes.

. . . .

[The State:] So who was all there, if you recall?

[Mr. Lagerquist:] Me, [Mr. Ward], [Mr. Protsman], [Mr. Heilman], and Chris.

[The State:] Whose car were you in?

[Mr. Lagerquist:] [Mr. Ward's].

[The State:] Okay. What happened with regard to a fire?

[Mr. Lagerquist:] . . . Oh, [Mr. Heilman] said to stop the car when we were driving down this road, and [Mr. Ward] stopped, and then [Mr. Heilman] like went up a hill a little bit and like started sparking his lighter.

[The State:] And did you see a fire start?

[Mr. Lagerquist:] Yes.

(14 RP 3179-3180).

In its rebuttal closing argument, the State argued:

We had the defense expert, the investigator . . . Well, the fire investigator said that he had spent over 1,000 hours on this case. His private investigator said she has spent over 1,000 hours. Have you heard one bit of evidence saying that [Mr. Ward] was anywhere else? One alibi witness saying he was somewhere here, he was out of town, he was doing this, he was doing that, he was home?

(15 RP 3300).

Mr. Ward objected to this argument, stating “[i]t’s not [Mr. Ward’s] burden to come in with alibi evidence.” (15 RP 3301). The trial court overruled the objection, stating that “[y]ou’re to disregard any evidence - - any argument that is not supported by the evidence.”

(15 RP 3301). The State continued its argument:

Right. And this is a lack of evidence. When [Mr. Ward] puts on evidence, I mean, he has an opportunity to bring in witnesses and say where he was and why he couldn’t have been there, and we don’t have any of that.

...

Yeah, and again the investigator . . . if they spent a total of about five months each working on this case, I mean, what did they produce?

(15 RP 3301).

The jury found Mr. Ward guilty of all six counts of second degree arson, and acquitted him of first degree arson.<sup>3</sup> (CP 560-566; 16 RP 3326-3328). As a condition of community custody, the trial court ordered him to “[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer.” (CP 598; RP 3382). The judgment and sentence states that Mr. Ward shall serve community custody pursuant to RCW 9.94A.701. (CP 597, 603). Mr. Ward appealed. (CP 614-623).

#### D. ARGUMENT

1. MR. WARD WAS ENTITLED TO VIEW REQUESTED DISCOVERY DOCUMENTS THAT THE TRIAL COURT REVIEWED IN-CAMERA AND ORDERED FILED UNDER SEAL.

Defense counsel filed a motion for an order of production, asking that the State produce several police investigation reports, including YPD

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<sup>3</sup> The jury also found the existence of an aggravating factor on one of the counts of second degree arson. (CP 568; 16 RP 3327). Because the trial court imposed a sentence within the standard sentencing range, the aggravating factor is not at issue here. (CP 597, 603; RP 3381-3382).

report number 07-15085. (CP 305-306; RP (Feb. 10, 2010) 18-25). The trial court decided, *sua sponte*, to conduct an in-camera review of the requested police reports, to withhold them from the defense, and to file them under seal. (CP 310-312; RP (Feb. 10, 2010) 22-25). The court rule does not authorize this:

*Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.*

CrR 4.7(h)(6) (emphasis added).

“In general, the scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent a manifest abuse of that discretion.” *State v. Brown*, 132 Wn.2d 529, 626, 940 P.2d 546 (1997) (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). But, “sealing documents is an extraordinary step that Washington courts should be reluctant to take,” and is only “appropriate where the record and individual circumstances of the case clearly establish a ‘good cause’ basis.” *State v. Monschke*, 133 Wn. App. 313, 338, 135 P.3d 966 (2006) (quoting *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540–41, 114 P.3d 1182 (2005)). “Good cause

requires considerations of the public interest in the open administration of justice, whether sealing threatens the defendant's right to a fair trial, and whether sealing is necessary 'to prevent a serious and imminent threat to an important interest.'" *Id.* (quoting *Rufer*, 154 Wn.2d at 540).

Because the State did not request an in-camera hearing, the record is devoid of support for finding good cause to bar discovery or seal these documents. (RP (Feb. 10, 2010) 18-25). The court rule does not authorize the court to limit discovery without some showing of good cause, on the record, or to exclude either party from participation in such a showing. *See* CrR 4.7(h)(6).

There is no indication of a good cause basis for sealing YPD report number 07-15085 and the three related interview transcripts. *See State v. Monschke*, 133 Wn. App. at 338. Mr. Ward advanced several reasons for why these documents could be necessary to his case. (CP 305-306, 326-327; RP (Feb. 10, 2010) 19-21). The State's declaration of probable cause indicates that YPD report number 07-15085 relates to count IV charged here. (CP 6). Accordingly, the trial court should have disclosed these documents to Mr. Ward for preparation of his defense.

The trial court abused its discretion in sealing and not disclosing YPD report number 07-15085 and the three related interview transcripts to Mr. Ward. Mr. Ward's conviction must be reversed and remanded for a new trial.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. WARD'S CONVICTIONS FOR SECOND DEGREE ARSON, AS CHARGED IN COUNTS III, IV, V, AND VII.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, 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) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be

drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In counts III, IV, V, and VII, the State alleged that Mr. Ward, “acting as a principal or an accomplice to another participant in the crime, [he] or another participant in the crime knowingly and maliciously caused a fire or explosion” at a specified location, “which damaged a building, a structure, a vehicle, or property.” (CP 519-521); *see also* RCW 9A.48.030 (defining second degree arson). Among other elements, the to-convict jury instructions for these crimes required the State to prove “[t]hat . . . the defendant or an accomplice caused a fire or an explosion.” (CP 542, 543, 544, 547).

The trial court defined “accomplice” in jury instruction 19:

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

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or  
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 presence is aiding in the commission of the crime. *However, more than mere presence at the scene and*

*knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.*

(CP 550) (emphasis added); *see also* RCW 9A.08.020(3)(a) (defining accomplice liability).

Mere presence at the scene of the crime is not enough to establish accomplice liability. *State v. Landon*, 69 Wn. App. 83, 91, 848 P.2d 724 (1993). Our Supreme Court “has repeatedly stated that one’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in the commission of the crime, will not subject an accused to accomplice liability.” *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Instead, “[t]o prove that one present is an aider, it must be established that one is ‘ready to assist’ in the commission of the crime.” *Id.* (internal quotation marks omitted) (*quoting In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). “Physical presence and awareness of the transaction alone are insufficient to establish accomplice liability.” *State v. Galisia*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 883 P.3d 329 (1994) (*quoting Wilson*, 91 Wn.2d at 491).

Even under the generous standard for sufficient evidence, the State failed to meet its burden. First, the State did not prove that Mr. Ward acted as a principal in Counts III, IV, V, and VII. The testimony showed

that Mr. Heilman lit the fires charged in Counts III, IV, and VII, and that Mr. Protsman lit the fire charged in Count V. (5 RP 1780-1781, 1784-1785; 6 RP 1867-1869, 1949-1953, 1959-1960; 7 RP 2007, 2009; 13 RP, 3013; 14 RP 3064).

Second, the State did not prove that Mr. Ward acted as an accomplice in counts III, IV, V, and VII.

Regarding count III, Mr. Heilman testified that Mr. Ward was driving at the time he lit the fire. (6 RP 1951). He testified that Mr. Ward “knew what was going on,” and that his role in this fire being set was “[b]eing the mode of transportation. Such things as that.” (6 RP 1951). Regarding count IV, Mr. Heilman testified that Mr. Ward’s role was the same as in Count III. (6 RP 1951; 14 RP 3083). Mr. Protsman also testified that Mr. Ward was driving during the commission of the fire charged in Count IV. (5 RP 1785-1786; 6 RP 1869).

This evidence is not enough to subject Mr. Ward to accomplice liability for counts III and IV. While the testimony shows that Mr. Ward was present in the area of the fires, and also aware of what was going on, there was no evidence presented that he was ready to assist in the crimes. *See Rotunno*, 95 Wn.2d at 933 (*quoting In re Wilson*, 91 Wn.2d at 491).

Regarding count V, the only testimony of Mr. Ward’s involvement came from Mr. Protsman. (5 RP 1781-1782). Mr. Protsman testified that

Mr. Ward was driving at the time he lit the fire, but that Mr. Ward did not know that Mr. Protsman was there to start a fire. (5 RP 1781-1782). This evidence of mere presence is not enough to subject Mr. Ward to accomplice liability for count V. *See Landon*, 69 Wn. App. at 91.

Regarding count VII, the only testimony of Mr. Ward's involvement came from Mr. Heilman, who testified that Mr. Ward was driving at the time he lit the fire. (6 RP 1960). Even assuming that Mr. Ward was aware of what was going on, there was no evidence presented that he was ready to assist in the crime. *See Rotunno*, 95 Wn.2d at 933 (*quoting In re Wilson*, 91 Wn.2d at 491). Therefore, there was not enough evidence to subject Mr. Ward to accomplice liability for count VII.

Mr. Heilman did present testimony regarding fires in general, stating that Mr. Ward decided where to stop before a fire was started. (6 RP 1951-1952). However, this testimony does not address the specific fires charged in counts III, IV, V, and VII. Therefore, it does not address Mr. Ward's presence at, knowledge of, or readiness to assist in the fires charged in counts III, IV, V, and VII. *See Rotunno*, 95 Wn.2d at 933 (*quoting In re Wilson*, 91 Wn.2d at 491).

A rational jury could not have found Mr. Ward guilty, beyond a reasonable doubt, of second degree arson, as charged in counts III, IV, V, and VII. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at

220-22). Thus, the evidence presented at trial was insufficient to support Mr. Ward's convictions for second degree arson under these counts, and these convictions must be reversed and the charges dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating "[r]etrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.") (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)). This court should remand the case to the trial court to determine the correct amount of restitution for any remaining charges.

3. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF STATE REBUTTAL WITNESS SCOTT LAGERQUIST REGARDING MR. WARD'S INVOLVEMENT IN A FIRE NOT CHARGED HERE, UNDER ER 404(b) OR ER 401.

Mr. Lagerquist was permitted to testify, over an objection by Mr. Ward, regarding Mr. Ward's involvement in a fire not charged here. (14 RP 3178-3180). The admission of evidence by the trial court is reviewed for an abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Pursuant to ER 404(b), “prior misconduct is not admissible to show that a defendant is a ‘criminal type’, and is thus likely to have committed the crime for which he or she is presently charged.” *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). It may, however, be admissible for a variety of other reasons. *Id.*

Mr. Ward objected to Mr. Lagerquist’s testimony on the basis that it was “[b]eyond the scope of charges filed here.” (14 RP 3179). The only purpose of this evidence was to show that because Mr. Ward was allegedly involved with lighting a fire in a past, he committed the arson counts charged here. This connection is prohibited by ER 404(b). *See Lough*, 125 Wn.2d at 853.

In order to admit evidence of prior misconduct under ER 404(b), “the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. And “the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually

occurred.” *Id.* The trial court failed to follow these steps required to admit evidence under ER 404(b). The trial court abused its discretion, under ER 404(b), in admitting Mr. Lagerquist’s testimony regarding Mr. Ward’s alleged involvement in a fire not charged here.

Mr. Ward also objected to Mr. Lagerquist’s testimony as irrelevant. (14 RP 3179). The evidence was not relevant to prove any element of the crimes charged here. Pursuant to ER 401, “[r]elevant evidence” means evidence having 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. Testimony regarding facts of an incident not charged here does not meet this standard. Specifically, Mr. Lagerquist’s testimony that Mr. Ward drove to the location of an uncharged fire does not assist in establishing any of the counts charged here.

Even if the evidence were relevant, its prejudicial effect outweighed any such relevance. The prejudicial effect of evidence of prior criminal conduct is well recognized. *See State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) (evidence of two prior instances of drug dealing demonstrated intent only through an inference of propensity); *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (jurors naturally inclined to reason that having previously committed a crime, the

accused is likely to have reoffended). The prejudicial effect is even greater if the prior crimes are similar to the current offenses. *See State v. Hardy*, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997). Because the only possible relevance of the challenged testimony was to achieve the prejudicial effect of showing that Mr. Ward had a propensity to engage in the conduct with which he was charged, the prejudicial effect necessarily outweighed any probative value.

Admission of this testimony was not harmless error. *See State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (stating that in determining whether an evidentiary error is harmless, the trial court “must determine . . . within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred.”). Given the conflicting testimony between Mr. Protsman and Mr. Heilman versus Mr. Ward, the outcome of the trial would have been different without Mr. Lagerquist’s testimony, which placed Mr. Ward as the driver to a fire during the same summer as the counts charged here.

The trial court erred in admitting Mr. Lagerquist’s testimony regarding Mr. Ward’s involvement in a fire not charged here, either under ER 404(b) or ER 401. Accordingly, Mr. Ward’s conviction must be reversed and remanded for a new trial.

4. THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT IN ITS REBUTTAL CLOSING ARGUMENT, BY SHIFTING THE BURDEN OF PROOF TO MR. WARD.

To establish prosecutorial misconduct, a defendant bears the burden of showing improper conduct by the prosecutor and prejudicial effect. *State v. O'Donnell*, 142 Wn. App. 314, 327, 174 P.3d 1205 (2007) (citing *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). To determine whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

If the prosecutor's comments were improper, and the defendant properly objected, the court then considers whether the comments prejudiced the jury. *Id.* "Misconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict." *O'Donnell*, 142 Wn. App. at 328 (internal quotation marks omitted) (quoting *State v. Stith*, 71 Wn. App. 14, 19, 856 P.3d 415 (1993)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*,

150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Brown*, 132 Wn.2d at 561).

The burden of proof rests with the State to prove each element of its case beyond a reasonable doubt. *Winship*, 397 U.S. at 364. “[I]t is flagrant misconduct to shift the burden of proof to the defendant.” *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Prosecutorial misconduct may occur if the prosecutor “mentions in closing argument that the defense did not present witnesses . . . .” *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009).

“[A] defendant has no duty to present any evidence.” *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). In *Traweck*, the court found that the following statement, made by the prosecutor in closing argument, was improper:

Mr. Traweck doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [*sic*] presented if there are explanations, which there aren't?

*Id.* at 106 (alteration in original).

The court reasoned that “[t]he prosecutor’s statement suggested that the defendant was obliged to call witnesses and thus to prove his

innocence.” *Id.* at 107. The court held the defendant had no such duty. *Id.* “[I]t is proper for the State to comment *on its own evidence*. It is not proper for the State to comment on a failure of the defense to do what it has no duty to do.” *Id.*

Here, the State argued, over defense objection, that Mr. Ward failed to present witnesses to prove that he was not present during any of the charged arson counts. (15 RP 3300-3301). This argument was improper, as it suggested that Mr. Ward was required to present evidence, and accordingly, prove his innocence. *See Traweek*, 43 Wn. App. at 106-07; *see also State v. Fleming*, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996) (finding that the prosecutor committed misconduct during closing argument by commenting on the defendants’ failure to present evidence). This suggestion improperly shifted the burden of proof to Mr. Ward. *See Fleming*, 83 Wn. App. at 214 (the State improperly shifted the burden of proof to the defendants, by arguing “that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it.”).

Because Mr. Ward properly objected to the State’s improper argument, this court must next consider whether the State’s comments prejudiced the jury. *See Corbett*, 158 Wn. App. at 594. The State’s

comments here were prejudicial. *See O'Donnell*, 142 Wn. App. at 328 (*quoting Stith*, 71 Wn. App. at 19) (stating that “[m]isconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict.”).

The evidence against Mr. Ward was not overwhelming. *Cf. Traweek*, 43 Wn. App. at 108 (finding that the improper comments by the prosecutor did not require reversal, where, among other reasons, “the evidence against [the defendant] was overwhelming; his guilt was established to a virtual certainty.”). The only evidence linking Mr. Ward to the charged arson counts was the testimony of Mr. Protsman and Mr. Heilman, and both received favorable plea agreements in exchange for their testimony against Mr. Ward. (5 RP 1778; 6 RP 1897-1902, 1937, 1962-1963; 7 RP 2027-2029).

Mr. Ward testified, and denied involvement in any of the charged arson counts. (14 RP 3123-3124, 3128, 3151-3152). Under these circumstances, where the jury had to choose whether to believe Mr. Protsman and Mr. Heilman or Mr. Ward, there is a substantial likelihood that the State’s improper argument that Mr. Ward failed to present witnesses to prove his innocence affected the jury’s verdict. *See O'Donnell*, 142 Wn. App. at 328 (*quoting Stith*, 71 Wn. App. at 19).

Accordingly, Mr. Ward's conviction must be reversed and remanded for a new trial.

5. ALLOWING A COMMUNITY CORRECTIONS OFFICER TO DETERMINE WHETHER A TREATMENT COUNSELING PROGRAM IS NECESSARY AND CRIME-RELATED CONSTITUTES AN EXCESSIVE DELEGATION OF JUDICIAL AUTHORITY.

As a condition of community custody, the trial court ordered Mr. Ward to “[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer.” (CP 598; RP 3382). Although Mr. Ward did not object to the imposition of this condition, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Whether the trial court has statutory authority to impose a community custody condition is reviewed *de novo*. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A trial court's sentencing authority is limited to that granted by statute. *In re Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The trial court here was authorized to impose community custody conditions set

forth in RCW 9.94A.700(5). *See* former RCW 9.94A.715(2)(a) (2007). These conditions included, among others, that “[t]he offender shall participate in crime-related treatment or counseling services.” Former RCW 9.94A.700(5)(c) (2007).

Although “[s]entencing courts have the power to delegate some aspects of community placement to the DOC [Department of Corrections] . . . sentencing courts may not delegate excessively.” *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

“A sentencing court may not ‘wholesaledly abdicate [ ] its judicial responsibility for setting the conditions of release.’” *Id.* (internal quotation marks omitted) (alteration in original) (*quoting United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001)).

The trial court here had the authority to directly order that Mr. Ward participate in “crime-related treatment or counseling services.” Former RCW 9.94A.700(5)(c) (2007). The trial court did not have the authority to delegate to the community corrections officer the determination of whether crime-related treatment or counseling services were necessary, or the determination of whether such treatment or services were crime-related. *See* former RCW 9.94A.700(5)(c) (2007); *see also Sansone*, 127 Wn. App. at 642.

This court should remand this case with an order that the trial court strike the offending community custody condition. *See State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

6. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO STATE THE COMMUNITY CUSTODY STATUTE IN EFFECT AT THE TIME MR. WARD’S OFFENSES WERE COMMITTED.

The judgment and sentence states that Mr. Ward shall serve community custody pursuant to RCW 9.94A.701. (CP 597, 603). RCW 9.94A.701 was not in effect at the time Mr. Ward’s offenses were committed. *See* Laws of 2008, ch. 231, § 7 (enacting RCW 9.94A.701, effective August 1, 2009); *see also* RCW 9.94A.345 (stating that “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”). At the time Mr. Ward’s offenses were committed, community custody was governed by RCW 9.94A.715. *See* former RCW 9.94A.715 (2007). Therefore, the judgment and sentence should be corrected to state the community custody statute in effect at the time Mr. Ward’s offenses were committed, former RCW 9.94A.715 (2007).

## E. CONCLUSION

First, the trial court abused its discretion in sealing and not disclosing YPD report number 07-15085 and three related interview transcripts to Mr. Ward. Mr. Ward's conviction must be reversed and remanded for a new trial.

Second, there was insufficient evidence that Mr. Ward was a principal or an accomplice in counts III, IV, V and VII. This court should reverse the convictions, dismiss the charges with prejudice, and remand the case to the trial court to determine the correct amount of restitution for any remaining charges.

Third, the trial court abused its discretion in admitting the testimony of State rebuttal witness Mr. Lagerquist regarding Mr. Ward's involvement in a fire not charged here. Mr. Ward's conviction must be reversed and remanded for a new trial.

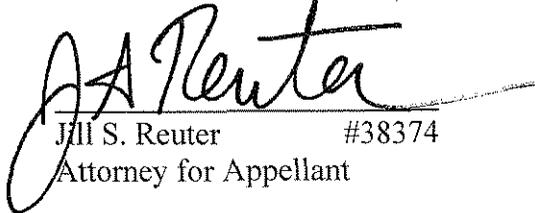
Fourth, the State engaged in prosecutorial misconduct in its rebuttal closing argument, by shifting the burden of proof to Mr. Ward. Mr. Ward's conviction must be reversed and remanded for a new trial.

Fifth, this court should remand this case with an order that the trial court strike the community custody condition requiring Mr. Ward to "[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer."

Finally, this court should remand this case with an order that the judgment and sentence be corrected to state the community custody statute in effect at the time Mr. Ward's offenses were committed, former RCW 9.94A.715 (2007).

Dated this 27th day of June, 2011.

GEMBERLING & DOORIS, P.S.

  
Jill S. Reuter #38374  
Attorney for Appellant