

FILED  
Court of Appeals  
Division III  
State of Washington  
5/13/2020 11:28 AM

COA NO. 37142-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS SYKES,

Appellant.

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

The Honorable Bruce Spanner, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The court erred in giving a to-convict instruction that misstates the law or does not make the law manifestly clear, in violation of due process.

2. The court erred in sustaining the State's hearsay objection to an out-of-court statement, thereby violating appellant's right to present a complete defense under the Sixth and Fourteenth Amendments to the United States Constitution.

**Issues Pertaining to Assignments of Error**

1. Whether the to-convict instruction, in stating "To convict the defendant *or an accomplice* of the crime of Burglary in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt," misstates the law or does not make the law manifestly clear in permitting the jury to return a guilty verdict if it found an accomplice, rather than the defendant, committed the crime?

2. Whether a declarant's out-of-court statement was not an assertion of fact but a command and was relevant for its effect on the listener regardless of its truth and, if so, whether the court erred in sustaining the hearsay objection to that statement, thereby violating appellant's constitutional right to present a complete defense

because the defense theory was that appellant lacked the intent to commit a crime and the excluded statement supported that theory?

**B. STATEMENT OF THE CASE**

The State charged Louis Sykes with one count of second degree burglary. CP 12-13. Sykes represented himself. CP 5-7.

**1. Trial Evidence**

Robert Nelson owned buildings on or adjacent to 1427 Meade Avenue in Prosser. 3RP<sup>1</sup> 180-81. He did not live at the property. 3RP 181. Judith Jones described herself as looking after the property while Nelson was away. 3RP 123. There are three buildings on the property: a rental house, a garage, and a middle building, the latter of which Nelson described as the "photography studio." 3RP 124, 181, 183. Nelson stayed in the middle building when he was in town. 3RP 124.

Jones testified that on April 27, 2019, she saw three men hauling things out of the middle building and putting them in a car parked in front of the garage. 3RP 124, 126, 138. She recognized one of the men as Sykes. 3RP 124-25. She had known Sykes for years as a member of the community. 3RP 125, 162.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP – 8/29/19; 2RP – 9/19/19; 3RP – two consecutively paginated volumes consisting of 10/7/19, 10/8/19; 4RP – 10/17/19.

Jones saw the men coming around the corner of the building, inferring they had been coming out the door of the middle building. 3RP 158-59, 165-66, 168. All of them were carrying boxes. 3RP 153, 160, 173-74. After watching them for 15 minutes, she had a neighbor call police. 3RP 127. Sykes waved to her as they drove off. 3RP 156.

Responding to the call, police initiated a traffic stop of the vehicle about six or seven blocks away. 3RP 209-10, 242-43. Sykes was the driver. 3RP 243. Stone Stafford and Joshua Blakely were passengers. 3RP 210, 212, 244. After being handcuffed, Blakely ran off. 3RP 213. Police quickly caught him. 3RP 214. The vehicle was full of various items. 3RP 244.

Police called Jones to the scene. 3RP 136. She saw a rake in the car that belonged to her, which she kept outside Nelson's building. 3RP 137-38. She had seen Sykes carry the rake. 3RP 141-42. Jones identified boxes of things that used to be in Nelson's garage but had been moved to and then taken from the middle building. 3RP 141-45, 150-51, 162, 174.

According to Officer Pottle, Sykes said he had gone to a location in the 1400 block of Meade Avenue to pick up some plumbing fittings needed for his residence. 3RP 244. He assisted

Blakely in putting the fittings in the car. 3RP 244. He said the fittings were outside the buildings. 3RP 245. "He said he may have entered the shed." 3RP 245.

Nelson was contacted and came out to inspect the property. 3RP 181, 184, 195-96. Items had been removed from the garage and put into the photography studio (middle building). 3RP 184-85. The studio had been trashed by squatters. 3RP 185, 189-90. Nelson identified items found in the vehicle as originally having been stored in the garage. 3RP 192-94.

Officer Orate testified that it appeared someone had been living in the middle building. 3RP 219. The locks to the doors of the garage and middle building had been broken. 3RP 131, 134-36. There were pry marks on both doors. 3RP 214-18. Police did not locate any tool that could have made the pry marks. 3RP 220-21, 231. The buildings had been broken into many times before and Jones did not know when the damage occurred. 3RP 135-36, 170-71. Officer Pottle had served a search warrant on the address in November 2018. 3RP 256. Police removed trespassers and discovered evidence of controlled substances. 3RP 272. Frank Misuraca testified that he and his girlfriend used to party at the building. 3RP 326-27. The police had arrested them for

trespassing. 3RP 327-28. Misuraca claimed the place was clean at the time. 3RP 328-29. He had not been there since November 2018. 3RP 330.

Sykes testified in his own defense. 3RP 337. He had lived in Prosser since 1976. 3RP 337. He was a master electrician and electrical contractor. 3RP 338. He owned Lesco Electric. 3RP 338.

Sykes explained he needed to fix a plumbing problem with his kitchen sink on the day at issue. 3RP 338-39. He planned to go to the hardware store using his friend Tom's car. 3RP 339. As he walked out the door, Stafford greeted him outside. 3RP 339. Sykes asked Stafford if he wanted to go to the hardware store with him. 3RP 339. Blakely, a former employee of Lesco Electric, was present as well, working on Tom's car. 3RP 340. The three of them got into the car. 3RP 341.

The court sustained the State's hearsay objection to Sykes's testimony that Stafford said "Hey, let's stop by my place." 3RP 341. Sykes then testified that he was informed that he could pick up the stuff at somebody's house located at 1427 Meade Avenue. 3RP 341-42. Sykes knew the address as a place that people stay at. 3RP 342. He was under the impression he had permission to be there, though not spoken permission. 3RP 342-43.

They arrived at the address. 3RP 343. Stafford said "I'll be back in a second." 3RP 344. Sykes stayed next to the car. 3RP 344-45. He did not see Stafford enter the garage or middle building. 3RP 350. Stafford walked out of Sykes's sight for 10-15 seconds. 3RP 346. Blakely went and looked into the courtyard between the buildings and pointed at something. 3RP 346-47. Sykes did not see Blakely for 10-15 seconds. 3RP 347.

Blakely or Stafford returned to the car carrying a plastic tote from the courtyard area, saying they were the plumbing fittings. 3RP 348, 350-51, 380. Sykes told him to slide the tote into the car. 3RP 348. Sykes was under the impression that the fittings belonged to Stafford. 3RP 349. Sykes did not see Stafford or Blakely with any burglar tools; there were none in the car. 3RP 353. Blakely looked into the open door of the buildings and saw some chrome fittings, but Sykes told him they already had what they needed. 3RP 349-50.

Sykes did not enter the garage or middle building. 3RP 350. He did not open a door to any building. 3RP 358.

Sykes put the rake leaning up against the building in the car because one of the guys said "Grab the rake." 3RP 354. He was under the impression that Stafford lived there, so he believed the

rake was not being stolen. 3RP 355. He thought the property taken from the address belonged to Stafford. 3RP 377. He believed he had permission to take the property or that Stafford or Blakely had permission to remove it. 3RP 382. He contended the "other stuff" in car, besides the tote and rake, was in the car when he borrowed it from Tom. 3RP 355-57. They were at the address two minutes at most. 3RP 352. As he started driving off, he saw Jones and another person and waved at them. 3RP 352, 358-60.

Police pulled the car over about five minutes later. 3RP 362. Sykes told Officer Pottle that the property taken was near a dumpster. 3RP 369. He acknowledged telling Pottle he may have been inside one of the buildings, but he was not referring to that day, but rather sometime in the past when he was at the property to do electrical work for the previous owner. 3RP 376, 381-82.

## **2. Jury Instruction**

Before the jury instructions were read to the jury, the court asked if Sykes had any objection to the State's proposed instructions. 3RP 304, 389-90. Sykes said he didn't. 3RP 304, 389-90. When the court read the instructions to the jury, however, it noticed a "problem" in the first sentence of the to-convict instruction, referring to the presence of the word "accomplice."

3RP 398-99. The prosecutor maintained "that's approved language. I checked the WPICs before I put that in there." 3RP 398. The court asked Sykes if he was "comfortable" with the instruction. 3RP 398. After reviewing it, Sykes responded that the word "accomplice" should be omitted from the first sentence so that it just read "To convict the defendant of the crime of burglary." 3RP 399. The court, though, thought the instruction was "okay" because "it matches up with Jury Instruction Number 17," the general instruction on accomplice liability. 3RP 399; see CP 33 (Instruction 17).

The to-convict instruction given to the jury thus stated:

To convict the defendant *or an accomplice* of the crime of Burglary in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 27, 2019, the defendant or an accomplice entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in Benton County, 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 of 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 22 (Instruction 6) (emphasis added).

### **3. Outcome**

The jury returned a guilty verdict. CP 37. The court sentenced Sykes, who had no felony criminal history, to two months of confinement. CP 39, 41. Sykes appeals. CP 50.

### **C. ARGUMENT**

#### **1. THE COURT ERRED IN GIVING A TO-CONVICT INSTRUCTION THAT INCLUDED ACCOMPLICE LANGUAGE IN THE FIRST SENTENCE, RESULTING IN A MISSTATEMENT OF THE LAW OR AN INSTRUCTION THAT FAILED TO MAKE THE LAW MANIFESTLY APPARENT.**

This case contains an unusual error in the jury instructions. The first sentence of the to-convict instruction, by giving the jury the option "to convict the defendant *or an accomplice*," permitted the jury to find Sykes, the defendant, guilty if it found Stafford and Blakely committed the burglary, even if Sykes himself did not commit the crime either as a principal or an accomplice. The to-convict instruction must make the law manifestly apparent to the average juror. It did not do so here. Reversal is required because this constitutional error is presumed prejudicial and the State cannot prove it was harmless beyond a reasonable doubt.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). The to-convict instruction is of singular importance because it "serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). This Court reviews the legal sufficiency of a to-convict instruction de novo. State v. Anderson, 3 Wn. App. 2d 67, 69, 413 P.3d 1065 (2018).

Jury instructions "must more than adequately convey the law." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). "Jury instructions must make the relevant legal standard manifestly apparent to the average juror." State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). To-convict instructions must comply with this standard. State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785, review denied, 178 Wn.2d

1008, 308 P.3d 643 (2013). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) (grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's determination that jury could have applied the erroneous standard), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

The law is that the defendant, accused of a crime, cannot be found guilty of a crime unless and until the trier of fact finds the defendant committed it based on proof of each element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The accused cannot be convicted of a crime committed exclusively by someone else. See State v. Israel, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002) (reversing conviction for kidnapping because sufficient evidence did not establish guilt to kidnapping as an accomplice), review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003).

In light of this axiomatic proposition, the constitutional flaw in the to-convict instruction reveals itself. The first sentence of the to-convict instruction, in referring to an accomplice, authorized the jury

to find guilt if it found an accomplice, rather than the defendant, committed the crime. CP 22. Stated in the converse, the instruction did not make the law manifestly clear that the jury could find guilt *only* if Sykes, as the defendant, committed the crime through proof beyond a reasonable doubt of each element.

There were three people at the scene of the charged burglary: Sykes, Stafford and Blakely. On the facts of this case, the first sentence of the to-convict instruction, in referring to "the defendant or an accomplice," is referring to Sykes as the defendant and Stafford and Blakely as the accomplice. The first sentence uses the disjunctive "or," signaling to the jury that it was being asked to decide whether the defendant (Sykes) or an accomplice (Stafford and Blakely) committed the crime. CP 22.

Element one of the instruction, meanwhile, required the jury to find "the defendant *or an accomplice* entered or remained unlawfully in a building," while element two required the jury to find "the entering or remaining was with intent to commit a crime against a person or property therein." CP 22 (emphasis added). The reference to "or an accomplice" in element one refers to Stafford and Blakely.

Reading the first sentence of the "to-convict" instruction in conjunction with element one, the to-convict instruction permitted the jury to return a guilty verdict by deciding Stafford and Blakely committed the crime as accomplices to one another so long as each element of the crime was proven, without necessarily finding that Sykes committed the crime either as a principal or an accomplice. The to-convict instruction nowhere states that the jury can return a guilty verdict only if Sykes, as the defendant, committed the crime as shown by proof beyond a reasonable doubt of the elements listed in the instruction.

In defending its insertion of the phrase "or an accomplice" in the first sentence of the to-convict instruction, the State maintained it simply followed the pattern instruction. 3RP 398. There is no pattern instruction for a to-convict instruction that includes the phrase "to convict the defendant *or an accomplice*" in the first sentence. The pattern instruction for second degree burglary does not include the accomplice language. WPIC 60.04.<sup>2</sup> The generic

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<sup>2</sup> WPIC 60.04 provides in full:

"To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about(date), the defendant entered or remained unlawfully in a building [other than a dwelling];

form of the to-convict instruction does not include such language either. WPIC 4.21.<sup>3</sup> This is unsurprising because, as explained, insertion of "accomplice" language in first sentence results in a misstatement of the law or, at the least, a confusing instruction that does not make the law manifestly apparent.

The judge thought inclusion of "accomplice" language in the first sentence of the to-convict instruction was "okay" because of the presence of Instruction 17, the general accomplice instruction. 3RP 399. Although unnecessary, it is not error to include the "or

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(2) That the entering or remaining was with 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 of 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."

<sup>3</sup> WPIC 4.21, the generic form of the to-convict instruction, states:

"To convict the defendant of the crime of\_\_\_\_\_, each of the following elements of the crime must be proved beyond a reasonable doubt:

(5) That any of these acts occurred in the [State of Washington] [City of ] [County of ].

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."

an accomplice" language in the *elements portion* of the to-convict instruction. State v. Teal, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004) (unnecessary so long as there is general liability instruction); State v. Haack, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997) (not error to include), review denied, 134 Wn.2d 1016, 958 P.2d 314 (1998). But there is no authority for the proposition that insertion of the "or an accomplice" language *in the first sentence* of the to-convict instruction is proper.

The presence of the general accomplice instruction does not alleviate the problem caused by insertion of the "accomplice" language in the first sentence of the to-convict instruction. Rather, it exacerbates the problem. The general accomplice instruction generically defines what it means to be an accomplice. CP 33. Stafford and Blakely meet that definition. The to-convict instruction, through its insertion of the "accomplice" language in the first sentence, thus allowed the jury to return a guilty verdict if it found Stafford committed the crime as an accomplice to Blakely, or vice-versa. The to-convict instruction, in permitting the jury to find an accomplice committed the crime in association with another accomplice, permitted the jury to return a guilty verdict even if it did not find Sykes committed the crime as a principal or an accomplice.

"When the record discloses *an error in an instruction* given on behalf of the party in whose favor the verdict was returned, the error is *presumed to have been prejudicial*, and to furnish ground for reversal, unless it affirmatively appears that it was harmless." State v. MacMaster, 113 Wn.2d 226, 234, 778 P.2d 1037 (1989) (quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). The conviction must be reversed unless the State proves the error was harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 15, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). "From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344.

The State cannot overcome the presumption of prejudice here because there is evidence that Stafford and Blakely committed the burglary as accomplices to one another. There was conflicting evidence on whether Sykes committed the crime. Jones said she saw the men hauling boxes from the building and items from Nelson's building were located in the car. 3RP 153, 158-60, 173-74. But Sykes testified he did not enter any building, he did not see Stafford or Blakely enter any building, he believed Stafford owned

the things that were taken, and he did not think the property was being stolen from another person. 3RP 347-47, 349-50, 355, 377, 382. Whether the State proved that Sykes intended to commit theft as the "crime against property" was controverted. The error in the to-convict instruction, by permitting the jury to find guilt by finding Stafford and Blakely committed the crime, may have contributed to the verdict. The conviction should therefore be reversed.

**2. THE COURT ERRED IN SUSTAINING THE STATE'S HEARSAY OBJECTION TO AN OUT-OF-COURT STATEMENT AND THE EXCLUSION OF THIS STATEMENT VIOLATED SYKES'S RIGHT TO PRESENT A COMPLETE DEFENSE.**

On direct examination, Sykes explained the circumstances surrounding how he wound up at the Meade Avenue property that day, including his encounter with Stafford and Blakely outside his house as he prepared to go to the hardware store. 3RP 338-41. Sykes testified: "We were headed to -- well, actually, as we're getting in the car, Stone Stafford told me, 'Hey, let's stop by my place.'" 3RP 341. The court sustained the State's hearsay objection to Stafford's statement. 3RP 341.

Stafford's statement was not hearsay because it was not an assertion of fact but rather a request. Moreover, Stafford's statement was relevant for its effect on Sykes's mind regardless of

its truth. For both reasons, the court erred in excluding the statement as hearsay. The exclusion of this statement violated Sykes's constitutional right to present a defense because it undermined his ability to present evidence to the trier of fact supporting his argument that he did not have the culpable mental state necessary to convict him of burglary.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

The question on appeal is whether the trial court violated Sykes's right to present a defense in excluding Stafford's out-of-court statement as hearsay. "This court reviews whether a

statement was hearsay de novo." State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016). A claimed violation of the Sixth Amendment right to present a defense is also reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a).

Stafford's statement is not an assertion of fact, but rather a command to do something: "Hey, let's stop by my place." 3RP 341. A declarant's request to do something is not hearsay. In State v. Fish, 99 Wn. App. 86, 95, 992 P.2d 505 (1999), review denied, 140 Wn.2d 1019, 5 P.3d 9 (2000), for example, a declarant's request to "pull over and drop them off" was not an assertion of fact but rather a command and thus did not qualify as hearsay. Stafford's request to "stop by my place" is not an assertion of fact either but rather a command that they do so. As such, it is not hearsay. The court therefore erred in sustaining the State's hearsay objection to Stafford's statement.

Further, evidence of an out-of-court statement may be pertinent to prove the mental state of the person who heard it. State v. Haga, 13 Wn. App. 630, 637, 536 P.2d 648, review denied, 86 Wn.2d 1007 (1975). In that instance, "[t]he statement is not introduced to prove its truth but to support an inference concerning its effect on the hearer regardless of its truth." Id. (quoting 5 R. Meisenholder, Wash. Prac. s 381, at 374 (1965)). Thus, "[o]ut-of-court statements offered to show their effect on the listener, regardless of their truth, are not hearsay." State v. Heutink, \_\_\_Wn. App. 2d\_\_\_, 458 P.3d 796, 807 (2020) (quoting Henderson v. Tyrrell, 80 Wn. App. 592, 620, 910 P.2d 522 (1996)).

Here, Stafford's statement was offered to prove its effect on Sykes, *i.e.*, Sykes did not think he was committing a crime against someone's property because Stafford referred to the property as his place. The effect on Sykes was not dependent on whether Stafford's statement was true. Sykes's testimony relaying Stafford's statement was therefore not hearsay.

To be admissible on this basis, "the listener's state of mind must be relevant to some material fact." Heutink, 458 P.3d at 807. Sykes's state of mind was a central issue at trial. This was made clear to the trial court before it excluded Stafford's statement. In his

opening statement, Sykes paraphrased what Stafford said and told the jury he did not intend to steal anything and that the evidence would show he did not enter a building with criminal intent. 3RP 114, 117-18. In his motion for a directed verdict after the State rested its case, Sykes argued the evidence did not establish his intent to commit a crime. 3RP 308.

The State needed to prove intent to commit a crime against property in unlawfully entering or remaining in a building as an element of its case. CP 22 (element 2). In closing argument, the State argued "I think the important thing this turns on is we have to look at intent, and Mr. Sykes' intent was to go in and take that property that didn't belong to him." 3RP 411. In terms of accomplice liability, the State argued Sykes knew he was assisting in the commission of a crime. 3RP 412-14; see Cronin, 142 Wn.2d at 579 ("for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged."). Sykes, for his part, argued in closing that he did not have criminal intent and did not know anyone else intended to commit a crime. 3RP 424, 441-42, 445, 447.

Because Sykes's state of mind was relevant to a material issue at trial, Stafford's out-of-court statement was admissible to show its effect on him. Heutink, 458 P.3d at 807. This is consistent with the constitutional right to present evidence in support of a defense. Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The defense theory was that Sykes did not intent to commit a crime and did not know others were committing a crime. Stafford's out-of-court statement supported that theory. As a matter of constitutional law, that statement was admissible.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724. "Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt." State v. Chambers, 197 Wn. App. 96, 128, 387 P.3d 1108 (2016), review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017). Even under a non-

constitutional standard, evidentiary error requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

The court's erroneous exclusion of Stafford's statement was not harmless. After the court sustained the State's hearsay objection, Sykes testified "I was informed that if I stopped by somebody's house I could pick up the stuff that -- that he had there." 1RP 341. But Sykes was unable to present admissible evidence of the identity of that person to the jury because the court sustained the hearsay objection identifying Stafford as the one who told him this and identified the place as his own. Without that context, Sykes's assertion that he was told by some unidentified person that he could pick up stuff as "somebody's house" rings hollow because the source of the information and the identity of the person claiming the house was their house remains unknown. The believability of Sykes's assertion is compromised.

The evidence against Sykes was not so overwhelming that the result was impervious to error. Sykes, testifying in his own defense, believed he was doing nothing criminal in taking the

property. The mens rea element of the crime was disputed. Stafford's statement, had it been admitted into evidence, would have supported the defense theory of the case. The error is not harmless. The conviction should be reversed.

**D. CONCLUSION**

For the reasons stated, Sykes requests reversal of the conviction.

DATED this 13<sup>th</sup> day of May 2020

Respectfully Submitted,

  
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**May 13, 2020 - 11:28 AM**

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