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Court of Appeals  
Division III  
State of Washington  
8/12/2020 2:09 PM

No. 37142-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

LOUIS EARL SYKES,

Appellant

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

NO. 19-1-00529-03

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS .....1

III. ARGUMENT .....6

    A. The to-convict instruction, the court’s oral instruction, the instructions as a whole, the parties closing arguments, and the verdict form stated the defendant, and only the defendant, was on trial.....6

        1. This Court need not consider the issue because the defendant did not object to the instruction .....6

        2. The issue is without merit .....7

            a. Standard on review .....7

            b. The instructions met this standard .....8

            c. In any event, any mistake was harmless .....9

        3. The trial court did not abuse its discretion in sustaining an objection to the defendant stating something he claimed Mr. Stafford said .....9

            a. Standard on review .....9

            b. The trial court did not abuse its discretion and was correct in sustaining the objection.....9

IV. CONCLUSION.....12

TABLE OF AUTHORITIES

WASHINGTON CASES

*In re Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185  
(1985).....10  
*State v. Blair*, 3 Wn. App. 2d 343, 415 P.3d 1232 (2018).....9  
*State v. Fish*, 99 Wn. App. 86, 992 P.2d 505 (1999).....11  
*State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014).....8  
*State v. Kalebaugh*, 183 Wn.2d 578, 355 P.3d 253 (2015) .....6-7, 9  
*State v. Killingsworth*, 166 Wn. App. 283, 269 P.3d 1064 (2012).....7-8  
*State v. Lee*, 12 Wn. App. 2d 378, 460 P.3d 701 (2020) .....9

REGULATIONS AND COURT RULES

ER 801 (c).....10

## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The to-convict instruction, together with the instructions as a whole, including an oral preliminary instruction, along with the verdict form, required the jury to convict the defendant only if the jurors had no reasonable doubt of his guilt.
- B. The trial court properly sustained an objection to the defendant's unresponsive hearsay statement that one of his passengers suggested going to the scene of the burglary.

## II. STATEMENT OF FACTS

### **Facts produced at trial:**

On April 27, 2019, Judith Jones saw three men hauling contents out of a middle building on property at 1427 Meade Ave., Prosser, WA. RP<sup>1</sup> at 124. Ms. Jones lives next door to the property and watches it when the owner, Robert Nelson, is out of town. RP at 123.

Ms. Jones watched the men for about 15 minutes hauling boxes out of the middle building and putting them in a Honda Accord. RP at 127. She specifically saw the defendant take her rake, which was leaning against the building, and put it in the Honda. RP at 141-42. She had a neighbor call the police. RP at 127.

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<sup>1</sup> Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on October 7-9, 2019 prepared by Renee Munoz.

The defendant challenged Ms. Jones on whether she could see this activity based on the layout of the property, but she remained steadfast that she saw him and the others carrying boxes out of the building:

Q: You didn't see—see me carrying any boxes, but you saw me carrying a rake?

A: Yes. All three of you were carrying stuff out of the building.

Q: Out of the building. You mean out of the courtyard?

A: Out of the residence.

Q: Out of Building B?

A: Right.

RP at 160.

Q: You're not saying you saw us take anything out of the building. You saw us taking boxes that were in the middle building; is that correct? Am I reading that--

A: Yeah.

Q: --hauling out contents--

A: That's where they were coming from

Q: --of the middle building?

A: Right.

RP at 165.

Officer Pottle of the Prosser Police Department stopped the Honda Accord shortly after the dispatch call. RP at 243. The defendant was driving, and Stone Stafford and Joshua Blakely were passengers. RP at 243-44. In the Honda was a computer tower, boxes of candy, a box of tools, a jack stand, painting supplies, a plastic tub with various items, and an onion sack with various items. RP at 244, 261, 270, 275. These items

took up the rear driver's side of the seat, the rear middle seat, and some items were on the floorboards. RP at 280.

Mr. Nelson, the owner of the property, was not living on site at that time, stated he was not renting the property, and no one had permission to be on the property. RP at 181-82. He did not know the defendant. RP at 191. Based on photos the police took of the contents of the Honda Accord, he estimated 85% belonged to him. RP at 202. The jack and the onion or potato sack was his. RP at 193-94.

The defendant first told Officer Pottle that he went to 1427 Meade Ave., Prosser, WA to look at a vehicle he was thinking of purchasing. RP at 244. Then he said that he went to the address to pick up some plumbing fittings he needed. *Id.* He said that he may have entered one of the buildings on the property in the course of getting the plumbing fittings. RP at 245.

The defendant's testimony was that he wanted plumbing fittings for his residence and borrowed a friend's car to go to the hardware store. RP at 339. Mr. Stafford and Mr. Blakely happened to be present and he offered to take them to the hardware store. RP at 340. One of them informed him that he could pick up the plumbing fittings at 1427 Meade Ave., Prosser, WA. RP at 341-42. He felt he had permission to be at that address. RP at 343. Both Stafford and Blakely got out of the car and both

were out of his sight for 10-15 seconds. RP at 346-47. Blakely had a plastic tote and said, “These are the plumbing fittings . . . .” RP at 348. The defendant took the rake because either Stafford or Blakely said, “Grab my rake.” RP at 354.

All told, according to the defendant they were at 1427 Meade Ave., Prosser, WA for about one minute to 90 seconds, but not more than two minutes. RP at 352.

**Facts regarding to-convict instruction, other instructions and verdict:**

The to-convict instruction, CP 22, is attached in Appendix A. It begins, “To convict the defendant or an accomplice of the crime of Burglary in the Second Degree each of the following elements must be proven beyond a reasonable doubt.” It then sets out the correct elements for Burglary in the Second Degree, stating that the defendant or an accomplice entered 1427 Meade Ave., Prosser, WA, that the entry was unlawful, and was with the intent to commit a crime on the property therein. App. A.

The accomplice instruction, CP 33 attached in Appendix B, is the standard WPIC instruction 10.51. App. B. The verdict form also is a standard form and states, “We, the jury in the above entitled cause, find

*the defendant* guilty of the crime of Burglary in the Second Degree, as charged in the Information.” (Emphasis added.) CP 37; See App. C.

The court’s verbal instructions to the jury before voir dire include the following:

The defendant is charged with the crime of burglary in the second degree. . . . (reading from Information) . . . on or about the 27th day of April 2019, . . . [*the defendant*] did enter or remain unlawfully in a building of Robert Nelson, located at 1427 Meade Avenue, Prosser, WA. . . . The defendant has entered a plea of not guilty. . . . The defendant is presumed innocent. This presumption of innocence continues throughout the entire trial. *The presumption means that you must find the defendant not guilty unless you conclude, at the end of your deliberations, that the evidence has established the defendant’s guilt beyond a reasonable doubt.*

RP at 37-38 (Emphasis added.)

**Facts relating to hearsay issue:**

The defendant claims that the trial court improperly sustained the objection in this colloquy:

Q: So, there is you, there is Mr. Stafford, and Mr. Blakely. Is it—does everybody get into the car---

A: Yeah

Q: --to go to the hardware store?

A: Yep.

Q: Okay.

A: We were headed to---well, actually, as we’re getting in the car, Stone Stafford told me, “Hey, let’s stop by my place.”

Prosecutor: Objection, hearsay.

Court: Sustained.

RP at 341.

A few lines later the defendant testified,

A: I was informed that if I stopped by somebody's house I could pick up the stuff that--that he had there.

Q: Okay, and what--what place was this other place that you stopped off instead.

A: The—the place was 1427 Meade Avenue where--where this situation occurred.

RP at 341-42.

### III. ARGUMENT

**A. The to-convict instruction, the court's oral instruction, the instructions as a whole, the parties closing arguments, and the verdict form stated the defendant, and only the defendant, was on trial.**

**1. This Court need not consider the issue because the defendant did not object to the instruction.**

The defendant had no objection to the instructions. RP at 304. The defendant argues that he should be allowed to raise the issue under ER 2.5(a)(3) as a manifest error of constitutional magnitude.

The error does qualify as “manifest.” *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015).

Manifestness “requires a showing of actual prejudice.” To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Next, “to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.”

*Id.*

In this case if the defendant had spoken up, the trial court could have deleted “or an accomplice” the first sentence of the instruction. (“To convict the defendant or an accomplice of the crime of Burglary in the Second Degree, each of the following elements must be proven beyond a reasonable doubt.” App. A.) However, not every error is of a constitutional magnitude. *Kalebaugh*, 183 Wn.2d at 584 stated that instructions that shift or misstate the burden of proof are of constitutional magnitude. Here, the to-convict instruction’s first sentence should not have included the phrase “or an accomplice,” but that surplus language does not convert the issue into a constitutional one. That phrase did not cause the burden of proof to be misstated or shifted.

**2. The issue is without merit.**

**a. Standard on review:**

Jury instructions are sufficient when they allow counsel to argue her theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. The “to-convict” instruction must contain all elements essential to the conviction and its adequacy is reviewed de novo. When reviewing a challenge to the adequacy of a jury instruction, a reviewing court should read it as an ordinary, reasonable juror would. *State v. Killingsworth*, 166 Wn. App.

283, 288, 269 P.3d 1064 (2012). Jury instructions are reviewed de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

**b. The instructions met this standard:**

The to-convict instruction should not have included the phrase “or an accomplice” in the first sentence. (“To convict the defendant or an accomplice of the crime of Burglary in the Second Degree each of the following elements must be proven beyond a reasonable doubt.” App. A.) But that does not make that instruction, or the instructions as a whole, misleading.

The to-convict instruction correctly states the elements of the crime of Burglary in Second Degree. That instruction links the conduct of Mr. Stafford and Mr. Blakely *if* they were accomplices of the defendant. An “ordinary, reasonable juror” would read this instruction as applying only to the defendant.

If there was any confusion, the preliminary oral instruction by the trial court told the jury the defendant, and no one else, was on trial, and the jurors could convict only if they were convinced of his guilt. RP at 37-38. The verdict form referred to the defendant, and no one else. App. C. Of course, no one else was identified during the trial as the defendant.

The prosecutor’s closing statement properly argued that if Mr. Blakely and Mr. Stafford were accomplices of the defendant, the

defendant would be guilty even if he did not enter a building. RP at 412, 415. The importance of the prosecutor's closing argument in curing ambiguity in multiple act cases was noted in *State v. Lee*, 12 Wn. App. 2d 378, 393, 460 P.3d 701 (2020).

The to-convict instruction had surplus language, but it was not misleading and did not shift any burden from the State.

**c. In any event, any mistake was harmless.**

Harmless error analysis occurs *after* the court determines the error is a manifest constitutional error and is a separate inquiry. *Kalebaugh*, 183 Wn.2d at 585. Here, there is no possible way the jurors thought that someone was on trial other than the defendant. The jury verdict states they were finding the defendant, not Mr. Stafford or Blakely, guilty and no one else was identified as the defendant.

**2. The trial court did not abuse its discretion in sustaining an objection to the defendant stating something he claimed Mr. Stafford said.**

**a. Standard on review:**

Evidentiary issues are reviewed for abuse of discretion. *State v. Blair*, 3 Wn. App. 2d 343, 353, 415 P.3d 1232 (2018).

**b. The trial court did not abuse its discretion and was correct in sustaining the objection.**

To repeat the colloquy, here is the comment at issue:

Q: So, there is you, there is Mr. Stafford and there is Mr. Blakely. Is it--does everybody get in the car--

A: Yeah.

Q: --to go to the hardware store?

A: Yep.

Q: Okay.

A: We were headed to---well, actually as we're getting in the car, Stone Stafford told me, "Hey, let's stop by my place."

Prosecutor: Objection, hearsay.

Court: Sustained.

RP at 341.

First, the defendant's statement is not responsive to any question and could have been objected to on that basis. Second, the statement is clearly hearsay: a statement other than one made by the declarant offered to prove the truth of the matter asserted. ER 801 (c).

The defendant argues that the comment "Hey, let's stop by my place" is not an assertion. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985) discussed when a statement is an "assertion" for hearsay purposes:

Thus, by definition, an utterance, writing or nonverbal conduct that is not assertive is not hearsay. The test is whether it was intended as an assertion or not. Many out-of-court *utterances* fall within such categories as greetings, pleasantries, expressions of joy, annoyance or other emotions when they are not intentional expressions of fact or opinion; hence, they are not assertions for purposes of the hearsay rule.

The defendant cites *State v. Fish*, 99 Wn. App. 86, 992 P.2d 505 (1999) and argues that Mr. Stafford's statement was a command, not an assertion. In *Fish*, the out-of-court witness was a passenger who told the driver to pull over and drop him off. *Id.* at 95. That comment is not an assertion about any fact. This is in contrast to the comment by Mr. Stafford who asserted that "his place" was 1427 Meade. If the out-of-court witness in *Fish* had said something like, "This is my house, please drop me off here," it would have been an assertion.

The defendant also argues that the statement would have been admissible under ER 803 (3) to show his state of mind on why he arrived at 1427 Meade. True, and that is why in the next question this information came out.

Q: Mr. Sykes, without referring or saying what anybody else said--

A. Oh.

Q: --when you and Mr. Stafford and Mr. Blakely are heading to the hardware store, is that what your objective was? That's where you were going? . . .

A: To the hardware store. . . . I was informed that if I stopped by somebody's house I could pick up the stuff that--that he had there.

Q: Okay, and what—what place was this other place that you stopped off instead?

A: The place was 1427 Meade Avenue, where this situation occurred.

RP at 341-42.

The trial court was well aware of the exception to the hearsay rule in ER 803 (3) as illustrated by the following colloquy:

Q: Why did you take the rake?...  
A: [O]ne of the guys said to the other, “Hey, grab my rake”  
Prosecutor: Objection, hearsay. . . .  
Court: Overruled  
A: Which I put in the car.

RP at 354.

It took a question asking why he drove to 1427 Meade for the defendant to state that it was because one of his passengers said there was “the stuff” the defendant wanted—the plumbing fittings—at that residence. But the comment from the witness, Stone Stafford saying, “Hey, let’s stop by my place,” is not responsive to a question and was an assertion that 1427 Meade was his place. The trial court properly sustained a hearsay objection.

Since the information eventually came out—that the defendant drove to 1427 Meade because he thought he had permission to be there and it had the plumbing fittings—eventually came out it is difficult to understand how this impacted the jury.

#### **IV. CONCLUSION**

The defendant had a fair trial. He cross-examined the eyewitness, presented his version of events, was able to put the facts he wanted before the jury, and argued he was not involved in a burglary. The jury saw it

differently. There is no chance the jurors thought Mr. Stafford or Mr. Blakely were on trial. The conviction should be affirmed.

**RESPECTFULLY SUBMITTED** on August 12, 2020.

**ANDY MILLER**  
Prosecutor

A handwritten signature in blue ink, appearing to read "Terry J. Bloor", is written over a horizontal line. The signature is stylized and cursive.

Terry J. Bloor, Deputy  
Prosecuting Attorney  
Bar No. 9044  
OFC ID NO. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Casey Grannis  
Nielsen Koch, PLLC  
1908 East Madison  
Seattle, WA 98122

E-mail service by agreement  
was made to the following  
parties:  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

Signed at Kennewick, Washington on August 12, 2020.

  
Demetra Murphy  
Appellate Secretary

## **APPENDICES**

Appendix A: CP 22

Appendix B: CP 33

Appendix C: CP 37

## Appendix A

CP 22

INSTRUCTION NO. 6

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.

## Appendix B

CP 33

INSTRUCTION NO. 17

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.

## Appendix C

CP 37

**JOSIE DELVIN**  
BENTON COUNTY CLERK

OCT 09 2019

**FILED**

*Am*

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

LOUIS EARL SYKES,

Defendant.

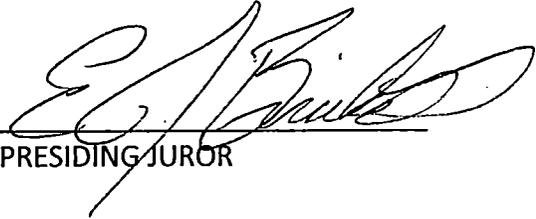
NO. 19-1-00529-03

VERDICT FORM

We, the jury in the above entitled cause, find the Defendant Guilty  
(Guilty or Not Guilty)

of the crime of Burglary in the Second Degree, as charged in the Information.

Dated this 9<sup>th</sup> day of October, 2019.

  
PRESIDING JUROR

**BENTON COUNTY PROSECUTOR'S OFFICE**

**August 12, 2020 - 2:09 PM**

**Transmittal Information**

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