

65275-3

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NO. 65275-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
L.W.,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE MICHAEL TRICKEY

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JAN -5 PM 4:30

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A. ISSUES PRESENTED

1. L.W. was one of four juvenile males detained outside a home after the homeowner reported that three young males had tried to enter her house without permission and had broken out her window. Was there sufficient evidence to find L.W. guilty of the crime of attempted residential burglary?

2. L.W.'s counsel argued to the court that the evidence "at most" reflected the crime of criminal trespass. The court found beyond a reasonable doubt that L.W. was guilty of the crime of attempted residential burglary, and rejected the notion that the evidence supported *only* a finding of the lesser included crime of attempted criminal trespass. Did L.W. receive effective assistance of counsel?

B. STATEMENT OF THE CASE

On the morning of January 7, 2009, Maryjane Fontanilla was home alone at her South Kenyon Street residence in Seattle. RP 75. She was lying down after working the graveyard shift when she heard the doorbell ring. RP 75, 80-81. She checked to see who was at the door, and saw three "young kids." RP 75-76. She did not know who they were and was scared. RP 82. She noticed

that one was a black male wearing a black jacket and black backpack; another was an Asian male wearing grey. RP 77, 82. A few minutes later she saw a shadow at her back door, looked through the blinds and observed the males trying to open her backdoor, by trying the knob. RP 77, 86, 87. She called 911. RP 77-78. After the males unsuccessfully tried to open the door, glass was broken out of her kitchen window. RP 79, 88-89. Ms. Fontanilla testified that all three of the males she saw were trying to get into her house. RP 80. None of them had permission to enter her house. RP 80.

Seattle Police Officer Nicholas Carter arrived at Ms. Fontanilla's house in response to the 911 call. RP 53-54. As he arrived, he observed a black male "coming out of the easement" onto the street. RP 54-55, 64. Officer Carter had other officers detain him, and he continued toward the house. RP 65. He saw an Asian male and detained him. RP 55-56. Carter then observed the defendant in the yard, just north of the house. RP 56, 65, 69-70. As the defendant was being detained, Carter heard glass breaking and then observed a fourth male coming around the corner of the house. RP 57, 65.

Officer Carter observed that the kitchen window had glass broken out of it. RP 60-61, 67. He also observed a bathroom window screen frame with the screen partially ripped out of the frame. RP 60. Carter spoke with Ms. Fontanilla, who appeared frightened and appeared shaken. RP 61-62. She told Officer Carter that neither the kitchen nor the bathroom windows were damaged prior to this incident. RP 63.

Seattle Police Officer McRae also arrived at Ms. Fontanilla's house in response to her 911 call. RP 93. As he arrived, he heard glass breaking and then observed L.W. and another male coming from the rear of the house. RP 96-97, 100-01. L.W. was wearing a black hooded sweatshirt. RP 96, 101. There is no street that runs behind Ms. Fontanilla's house. RP 97.

L.W. testified that he had received a ride home from school with his friend "Maxie" and that there were two other juvenile males with them. RP 105-06. He claimed that Maxie was planning to stop at a "friend's" house on Kenyon, but that he didn't know why he was stopping there. RP 106. L.W. said that Maxie parked the car near the friend's house, by a grocery store. L.W. said he went into the store and purchased cigarettes and then caught up to his three friends who were walking "towards the house." RP 106-07.

L.W. said Maxie rang the doorbell several times, and then L.W. walked toward the back of the house to smoke a cigarette out of the rain. He claimed that "they had a shelter to protect my cigarette." RP 107. L.W. testified that two of his friends went with him to the back of the house while Maxie stayed in front ringing the doorbell. RP 108. L.W. testified that his friends were simply going to join him to smoke the cigarette. He claimed that he left his friends and went around to the front and as he did so, the police arrived and detained him. RP 108. L.W. testified that he assumed his friend Nedi broke the window, but did not know why. RP 111.

The State charged L.W. in Juvenile Court with attempted residential burglary and he was found guilty following a fact-finding hearing. CP 1, 17-19; RP 134.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO FIND L.W. GUILTY OF THE CRIME OF ATTEMPTED RESIDENTIAL BURGLARY.

L.W. argues that the evidence was insufficient to support his conviction for residential burglary. But the evidence, with all inferences drawn in favor of the State, adequately supported the trial court's findings, and L.W.'s adjudication should be affirmed.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980), citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is considered equally as reliable as direct evidence. State v. Delmarter, 94 Wn. App. 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In determining whether there is sufficient evidence, the reviewing court determines not "whether it believes the evidence at trial established guilt beyond a reasonable doubt," but whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221 (emphasis added); State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, rev. denied, 141 Wn.2d 1023 (2000).

Residential burglary is committed when a person enters or remains unlawfully within a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025(1). The trier of fact may infer intent to commit a crime therein from all the facts and circumstances surrounding the defendant's conduct or from conduct "that plainly indicates such intent as a matter of logical probability." State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests such other person to commit it, or aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i) and (ii).

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.

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There was ample evidence by which a rational fact-finder could find L.W. guilty of the crime of attempted residential burglary-- either as a principal or an accomplice. Ms. Fontanilla testified that all three males at her door were trying to enter her residence without permission. RP 80. She testified that there were repeated attempts to enter her home, by both trying to enter her back door, and by breaking out the glass in the kitchen window. RP 77, 79. Officer Carter testified that the screen was partially ripped out of the bathroom window. RP 60. The police officers discovered L.W. coming around from the back of the home when they arrived in response to Ms. Fontanilla's 911 call. RP 100-01. Thus, a reasonable inference to draw from all of the evidence was that L.W. and his friends were attempting to break into Ms. Fontanilla's home.

L.W. argues that the State did not prove he or his friends intended to commit a crime inside Ms. Fontanilla's home. However, since they had no permission or business being there, it is also reasonable to infer from all of the facts and circumstances that they

planned to commit a crime therein.¹ Their actions were not patently equivocal; they indicated that L.W. and his friends' intentions were to commit a crime as a matter of logical probability. There was simply no legitimate reason for them to ring Ms. Fontanilla's doorbell repeatedly, try to open her back door, break her kitchen window or smash out her bathroom screen in an effort to break in, unless they intended to commit a crime against person or property once inside.

Additionally, L.W.'s version of events--that he simply went around the back of a stranger's residence to smoke a cigarette--was specifically rejected by the court. RP 134. Credibility determinations are for the trier-of-fact. State v. Camarillo, 115 Wn.2d at 71.

As the court found, L.W. was present at the time of the attempted break-in, and if not directly responsible, he was by his presence ready, willing and able to assist. RP 134. The evidence, and all of the inferences reasonably drawn from it, taken in the light

¹ L.W. argues that the permissible inference of intent in RCW 9A.52.040 cannot be relied on in this case because he did not enter the house. Brf. of Respondent at 7. But that is not the relevant question, as the statutory inference was not referred to or relied upon in this case. The trier of fact is free to infer intent from all the facts and circumstances surrounding the attempted entry. State v. Bergeron, 38 Wn. App. 416, 420, 685 P.2d 648 (1984).

most favorable to the State, clearly supports a finding of guilt.

L.W.'s conviction should be affirmed.

2. L.W. DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY ASKED THE COURT TO CONSIDER THE LESSER CRIME OF CRIMINAL TRESPASS AND THE COURT REJECTED IT.

L.W. argues that he received ineffective assistance of counsel, claiming that his attorney failed to ask the court to consider the lesser crime of attempted criminal trespass. But L.W.'s counsel argued to the court that the evidence "at most" supported a finding of criminal trespass. Moreover, even if L.W.'s attorney was deficient, the court considered the evidence, and specifically rejected the lesser-included offense of attempted criminal trespass. Therefore the outcome of the proceeding would not have been different and there was no resulting prejudice to L.W.

A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his counsel's actions, such that the defendant was

deprived of a fair hearing. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Jeffries, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986) (adopting the Strickland standard in Washington). There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant bears the burden of overcoming the presumption of effectiveness by a clear showing derived from the record as a whole. McFarland, 127 Wn.2d at 335.

A defendant must show that his counsel's "representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Furthermore, a defendant claiming ineffective assistance of counsel bears the burden of demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." McFarland, 127 Wn.2d at 336. Prejudice results when it is reasonably probable that, "but for counsel's unprofessional errors,

the result of the proceeding would have been different.” Lord, 117 Wn.2d at 883-84.

A defendant may be found guilty of the crime with which he was charged, or any offense the commission of which is necessarily included within the charged crime. RCW 10.61.006. A two-part test is used to determine if one crime is a lesser included offense of another. First, each of the elements of the lesser offense must be a necessary element of the crime charged (the legal prong). Second, the evidence must support an inference that only the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). Thus, Workman’s factual prong must be satisfied before a lesser included offense instruction is appropriate. A requested jury instruction on a lesser included offense should be given only “[i]f the evidence would permit a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater.” State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000), quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). In other words, “the

evidence must affirmatively establish the defendant's theory of the case-it is not enough that the jury might disbelieve the evidence pointing to guilt." Id., citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

a. L.W.'s Counsel Specifically Argued That The Evidence, At Most, Supported A Finding Of Criminal Trespass.

During the fact-finding hearing, the court mentioned the possibility of the lesser included offense of attempted criminal trespass and pointed the attorneys to a case on point. RP 104. L.W. argues that his counsel was deficient for not requesting a finding on the lesser included offense of attempted criminal trespass. However, during closing argument, L.W.'s counsel specifically stated that "at the most the State has proven criminal trespass, your Honor." RP 118. Thus, his counsel did proffer a lesser included offense and was not ineffective.

b. Even If Counsel Was Deficient, There Was No Prejudice Because The Court Found L.W. Guilty Of The Charged Offense And Rejected The Lesser Included Offense.

Here, the court specifically addressed the lesser included offense of attempted criminal trespass in its oral findings. Therefore, even if L.W.'s counsel was deficient for not requesting a finding on attempted criminal trespass, there was no resulting prejudice and L.W.'s conviction should be affirmed.

Following the fact-finding hearing, the court found that all of the evidence pointed to L.W.'s guilt for the charged crime of attempted residential burglary. RP 134-35. In other words, the court found that L.W. attempted to enter unlawfully into Ms. Fontanilla's home with the intent to commit a crime inside (either as a principal or an accomplice). The court specifically stated that because it found the elements of the charged offense beyond a reasonable doubt, it did not "reach" the lesser included crime of attempted criminal trespass. RP 134-35. Therefore, whether L.W.'s counsel specifically proffered the lesser offense or not, the court considered it and rejected it. L.W. cannot show that more probably than not, the outcome of the proceeding would have been different. His conviction should be affirmed.

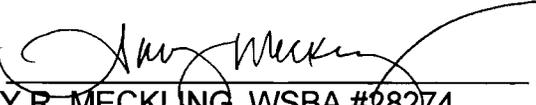
D. **CONCLUSION**

For the above reasons, the State respectfully requests that the Court affirm L.W.'s conviction for attempted residential burglary.

DATED this 5 day of January, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. L.W., Cause No. 65275-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston
Name
Done in Seattle, Washington

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