

NO. 66192-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN LUBERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. Where the State presents evidence that a defendant entered an apartment window by pulling back a screen and there is unequivocal evidence demonstrating entry was intended, is it error to give an instruction regarding the inference of intent?
2. Where a defense counsel fails to object to a witness' comments on physical evidence found at the scene of an arrest, is the admission of the opinion manifest constitutional error warranting reversal?
3. Is a defense counsel ineffective where he failed to object to a witness' answer but there is little showing that the objection would have been sustained and there was a reasonable tactical reason for allowing the answer to be stated?

B. **STATEMENT OF THE CASE**

At approximately 4:00 a.m. on May 23rd, 2009, Rita Limas was asleep on a recliner in her living room. RP 60, 73. She awoke to the sound of footsteps outside her living room window. RP 60. Soon after, Ms. Limas saw a flashlight beam in that same window. RP 61. She lay still, but after several minutes she went to the back of her apartment and saw a flashlight peering into her bedroom window. RP 62. At this point, Ms. Limas called 911 and told the

operator that she could hear someone trying to enter the front window of her apartment. RP 63-66. The sound was loud enough that the 911 operator could hear it over the phone. RP 71.

Within twenty minutes, police officers arrived to investigate and discovered Lubers crawling on his hands and knees behind some garbage cans approximately thirty feet away from Ms. Limas' apartment. RP 73, 96-98. The police detained and searched Lubers finding gloves, a small flashlight, and two screwdrivers on his person. RP 174, 175. The police described these as "items that are typically used in burglaries." RP 174.

After securing Lubers, the police searched the area around Ms. Limas' apartment. RP 131. The police noted that the screen on Ms. Limas' window was "forcibly broken" and bent upward, and the windowpane behind it was cracked, displaying evidence of impact marks consistent with a screwdriver. RP 131, 136-37. Ms. Limas testified that the screen was not damaged before that night. RP 83. In addition, the police discovered a light bulb had been removed from the socket located above Ms. Limas' apartment entrance; the police found it, unbroken, on the concrete nearby. RP 131, 135. An examination of the other apartments' entrances revealed that only Ms. Limas' entrance light was not illuminated and in place. RP 131.

The State charged Lubers with Attempted Residential Burglary and the case proceeded to trial in front of a jury. RP 1. During cross-examination, the following exchange occurred between defense counsel (DC) and Officer Persun (OP), the police officer who searched Lubers at the scene:

DC: Now, you indicated that there was -- when you searched [Mr. Lubers], there was a flashlight?

OP: Yes.

DC: -- that you recovered. It was a small flashlight?

OP: Yes

DC: Would it -- would you describe it as a flashlight that could be found on a keychain?

OP: I would describe it as a flashlight -- I mean, based upon the setting I would describe it as a flashlight that you would find on somebody who's trying to either, you know, break into cars or break into a house.

DC: So, those flashlights are sold primarily for breaking and entering?

OP: I'm not saying that. I'm saying that based on the situation --

DC: Well, that's not my question.

OP: -- that's what my interpretation of the flashlight was.

DC: That -- that's not my question. My question is with regard to the size, could it be found on a keychain? Despite your speculation.

OP: I don't know . . . I don't carry a flashlight on my keychain.

RP 182-83. Lubers counsel did not object to these answers or to a similar answer during direct testimony. RP 96, 129, 174-76, 184-85.

At closing, the court provided the jury with the following instruction:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

CP 39; WPIC 60.05.

Defense counsel did not object to this instruction. RP 156.

During his closing argument, defense counsel argued that the State had failed to meet its burden of proof and that the police had jumped to conclusions and did not go far enough in their investigation. RP 204-08. The jury returned a verdict of guilty. RP 230.

After the verdict, but prior to sentencing, Lubers filed a pro se motion, requesting a new attorney for sentencing and asserting

that his trial counsel was ineffective. RP 237-38, 240-41. The trial court granted Luber's motion and assigned him new counsel for sentencing. RP 241-41.

C. **ARGUMENT**

1. THE TRIAL COURT DID NOT ERR BY PROVIDING THE INFERENCE OF INTENT INSTRUCTION

a. The Jury Instruction and Facts in this Case Differ Significantly from the Jury Instruction in State v. Jackson

In State v. Jackson, the defendant was observed taking short running kicks at the Plexiglas window area of a door to a liquor store. State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211. The State charged the suspect with attempted burglary and the jury returned a guilty verdict after receiving a permissive inference instruction. Id The relevant jury instruction in Jackson stated:

A person who *attempts to* enter or remain unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Id.at 872 (emphasis added).

The instruction given varied from the text of 11A *Washington Pattern Jury Instructions: Criminal* 60.05 (2d ed. 1994) (WPIC), the intent instruction used in burglary cases, by adding the italicized words. The question in Jackson was whether the trial court erred in instructing the jury that it could infer the defendant's intent to commit a crime inside a building from the mere fact that he attempted to enter the building. Id. at 872. The Court held that such an instruction was improper in an attempted burglary case where there was no evidence of entry or remaining in a building:

In order to give an instruction that an inference of an intent to commit a crime existed in a burglary case, there must be evidence of entering or remaining unlawfully in a building. The instruction on intent cannot be given without evidence to support it and that must place the defendant within a building.”

Id. at 876.

The Court further explained, “an inference cannot follow that there was intent to commit a crime *within* the building just by the defendants' shattering of the window in the door. This evidence is consistent with two different interpretations; one indicating attempted burglary, a felony; and the other malicious mischief, a misdemeanor.” Id. The Court reversed the conviction, holding WPIC 60.05 may be given properly in a burglary case, but not

where the state pleads and proves only attempted burglary and there no evidence of entry. Id.

In the present case, the jury instruction did not include the term "attempts to" as it did in Jackson. The instruction given in Lubers' trial merely informed the jury that it could infer intent if they determined that the defendant entered or remained unlawfully in the building. In addition, the State provided additional evidence demonstrating entry into the apartment, a large amount of evidence which the jury could use to infer intent, and the evidence was unequivocal that a burglary and not another crime was being committed. Because the permissive inference instruction did not contain any language relating to an attempt to enter the building and there was evidence of entry, the Court's holding in Jackson is inapplicable to the instant case.

- b. The State Presented Sufficient Evidence for the Jury to Infer that the Defendant 'Entered or Remained' in the Building and that Lubers' Behavior was Not Equivocal.

Lubers' reliance on State v. Jackson is misplaced. The basic premise underlying the reasoning of the Jackson court is that there was no evidence of an entry into the building. But the State had

presented sufficient evidence for a finder of fact to conclude that Mr. Lubers did enter Ms. Limas' apartment.

The facts in this case are similar to those in the second case presented in Lubers' appeal, State v. Berglund, 65 Wn. App. 648, 829 P.2d 247 (1992). In Berglund, police received a report of a burglary in progress at ABC Skin & Nails (ABC) in Bellevue. 65 Wn. App. at 649. When the police arrived at the rear of ABC, they discovered a double-pane window broken in the lower left corner. Id. There was a rock on the floor inside the building. Id. The police recovered five fingerprints from the glass that remained; one on the outside of the outside pane, and four on the inside of the outside pane. Id. The fingerprints matched those of Berglund. Id.

The State charged Berglund with attempted burglary in the second degree. Id. At closing, the trial court provided the following jury instruction:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Id. at 650.

Berglund argued there was no evidence from which the jury could find he entered the building, and that the instruction was therefore improper, citing State v. Jackson. Id. The Court disagreed, holding that the fingerprint evidence permitted such a finding. Id.

In addition, the combined testimony of the police who conducted the initial investigation and Won Boon Park, a fingerprint expert employed by the King County police, established the existence of five of Berglund's fingerprints on the broken window remaining in the frame. Id. All of these prints were on the exterior pane of the broken thermal pane (double pane) window. Id. Four of the prints were on the inside of the exterior pane. Id. These were prints from the right index, the right middle, right ring, and left index fingers. Id. The fifth print was a print of the left thumb on the outside surface of the window on the edge where some of the glass had been broken out. Id. The prints were located in a pattern consistent with an effort by one standing outside the building to break out more glass by pulling it outward. Id. The prints on the inside of the pane could not be made without the hands breaking the plane between the inside and outside of the building. Id. From such evidence, the jury could have found that all or portions of

Berglund's hands were inside the building during the effort to break the glass. Id.

In support of its holding, the Court in Berglund relied on State v. Bassett, 50 Wn. App. 23, 746 P.2d 1240 (1987), where there was evidence that the defendant's fingers made smudges on the inside of a window. The Bassett court rejected the defendant's claim there was no evidence of entry and held as follows:

Here, evidence of the insertion of a finger to remove pieces of glass is sufficient to justify the court's conclusion that a rational jury could find that [the defendnat] unlawfully "entered" the [victim's] home. Under these circumstances, therefore, the giving of the inference of intent instruction was not error.

Berglund, 65 Wn. App. 648 (quoting Bassett, 50 Wn. App. at 27).

Further, the Jackson case also holds the instruction permitting an inference of intent cannot be given when the conduct is equivocal. The Jackson court reasoned the defendant's conduct could support two inferences: attempted burglary or vandalism. Jackson, 112 Wn.2d at 876. Much as in Berglund, the objection to the instruction based on equivocal conduct does not apply here. As the court in Berglund stated "[t]hrowing a rock through a window, without more, would support a charge of vandalism. However, in this case, Berglund then proceeded to try to create a larger opening

by breaking away or attempting to break away more window glass. This evidence is reasonably consistent only with an attempt to get into the building." Berglund, 65 Wn. App. at 653. Here, the simple cracking of a window was accompanied by a plethora of evidence pointing toward an individual looking to enter a residence unlawfully. The evidence pointing to burglary included the gloves, screwdrivers, flashlight, the removed light, the timing of the evening, the movement between the front and the back of the apartment, and bending of the screen. Therefore, the jury instruction was correct and not reversible error.

In Jackson, the Court explained that for the fact finder to draw inferences from proven circumstances, the inferences must be rationally related to the proven fact. "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference," 112 Wn.2d at 875 (quoting Tot v. United States, 319 U.S. 463, 467, 63 S. Ct. 1241, 1244, 87 L. Ed. 1519 (1943)), adding:

A presumption is only permissible when no more than one conclusion can be drawn from any set of circumstances. An inference should not arise where there exist other *reasonable* conclusions that would follow from the circumstances.

Id. at 876, 774 P.2d 1211 (emphasis added).

In other words, if the finder of fact concludes an alternative *reasonable* explanation exists for the defendant's actions, then the State has failed to meet its burden of establishing guilt beyond a reasonable doubt.

But in the present case, the State presented evidence that supports only one reasonable conclusion, i.e., that the defendant 'entered or remained' in Ms. Limas' apartment. Entry is defined as the entrance of a person, "or the insertion of any part of his body". RCW 9A.52.010(2). Ms. Limas' widow screen had been pulled up and away from its usual position. The only way that act could have been accomplished was by gripping the screen from the inside, i.e., the side facing the building, and pulling it up and away. In gripping the screen from the inside, someone entered Ms. Limas' apartment. Moreover, Lubers was the only person in the area and was carrying items commonly used in the commission of burglaries. Because this evidence supports only one logical conclusion, i.e., Lubers was the person who pulled on the screen and thereby entered Ms. Limas' apartment, the jury was able to infer Lubers was acting with an intent to commit a crime as instructed by the trial court.

- c. Even if the Instruction was Incorrect, the Error was Harmless.

Constitutional errors may be so insignificant as to be harmless. Harrington v. California, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 1727-28, 23 L.Ed.2d 284 (1969). Here, even if the court excluded the instruction, there was still strong evidence from which a jury could conclude that Lubers intended to commit a crime within the apartment. That evidence included the flashlight, the removal of the light above the apartment, the movement between the front and rear of the apartment, the bent screen, the cracked window, the time of the crime, and the absence of a rational explanation for the defendant's physical location in the bushes at 4:00 a.m. at night. Moreover, Lubers did not take the stand in his own defense nor offer any evidence that would negate any essential element of the crime. Because the elements of the crime charged were established by a mountain of additional evidence, there is no showing the error was not harmless.

Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt. See Mullaney v. Wilbur, 421 U.S. 684, 702, 95 S. Ct. 1881, 44 L. Ed.2d 508 (1975); Morissette v. United States, 342 U.S. 246, 274, 72 S. Ct. 240, 96 L. Ed. 288 (1952); Tot v. United States, 319 U.S. at 467, 63 S. Ct.

1241 (1943). An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses. State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). That the crime charged here is attempted burglary does not change the analysis. Intent to attempt a crime also may be inferred from all the facts and circumstances. State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). What constitutes a substantial step is also a factual question. State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978).

In State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999), a defendant was seen at 3:30 a.m. trying to pry open the back door of a Kentucky Fried Chicken restaurant. 137 Wn.2d at 705-06. At trial, the defendant was found guilty of attempted burglary in the second degree. Id. at 706. On appeal, the issue was whether the finder of fact could reasonably infer from the evidence that the defendant had intended to commit a crime inside the building. Id. at 707-08. The Court held that although it would be error to *instruct* the jury that it could infer such an intent from the

evidence, the fact finder was nonetheless free to make such a determination if reasonable. Id. at 708. The Court explained:

The reason *Jackson* does not apply to this situation, which does not involve a jury instruction, is that such would invade the province of the fact finder by appropriating to the appellate court the role of factually determining the reasonableness of an inference. Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances.

Id. at 708.

The Court concluded that the facts of the case supported the fact finder's inference that the defendant had intended to commit a crime within the restaurant. Id. at 709.

Similarly, the Court affirmed a conviction for Attempted Second Degree Burglary on like facts in State v. Chacky, 177 Wn. 694, 696, 33 P.2d 111 (1934). There at about midnight a merchant police officer and a companion saw two men drive up to a Piggly Wiggly store in Tacoma. Id. at 695. After both men examined the front of the store, Chacky got a crowbar and pried the padlock off the door of the building. Id. At that time the police officer moved toward the building and Chacky and his companion fled. Id. The officer found in Chacky's car another crowbar and a claw hammer.

Id. Affirming Chacky's conviction, the Court stated the "evidence was enough to take the case to the jury on the questions of criminal intent and overt act." Id.

More recently, the Court affirmed a conviction for Residential Burglary where the defendant had attempted to enter a home through the kitchen window. State v. Brunson, 128 Wn.2d 98, 102, 905 P.2d 346 (1995). When the homeowner screamed, the defendant climbed back out of the window, telling the woman he just wanted to use the phone. Id. Based on the homeowner's description, the defendant was arrested at a nearby bus stop. Id. In the homeowner's yard, the police found property that had been taken from her kitchen and also discovered a tree stump had been pushed up underneath the window. Id. Although the issue before the Court involved the propriety of an inference instruction, it noted that this evidence was sufficient for a jury to find the intent to commit a crime within the residence. Id. at 109.

Criminal intent, of course, resides exclusively within the mind of the criminal, but it may be proved by facts and circumstances more readily perceived by others. See State v. Bergeron, 105 Wn.2d 1, 10–11, 711 P.2d 1000 (1985). In Bergeron, the defendant, at 3:15 a.m., broke a basement window in an occupied

residence and pushed it inward off its track. 105 Wn.2d at 11. Upon the arrival of the police, the defendant ran away but was captured with the aid of a tracking dog. Id. He admitted he intended to enter the house, but not that he intended to commit a crime therein. Id. at 18. The Court affirmed a conviction for attempted burglary in the second degree, concluding that a rational finder of fact could determine that the defendant attempted to enter with the intent to commit a crime therein. Id. at 11.

In the present case, the evidence showed that Lubers, while carrying a flashlight, gloves, and two screwdrivers, pried open Ms. Limas' window screen, entering her apartment. Unlike in Jackson, there it was not equivocal whether the defendant was committing a burglary or malicious mischief. All the circumstantial evidence pointed to only the single crime as a conclusion. After reviewing all the evidence and listening to all the witnesses, the jury found, beyond all reasonable doubt, that Lubers' actions constituted a substantial step in the commission of burglary. Viewing all of this evidence the Court cannot say this determination, based on the evidence in this record, is not an overwhelmingly rational inference supported by the facts which were presented at trial. Any error related to the instruction was harmless.

**2. OFFICER PERSUN'S STATEMENTS WERE NOT IMPERMISSIBLE COMMENTS ON THE DEFENDANT'S GUILT AND EVEN IF SO, WERE MERELY HARMLESS**

**a. Officer Persun's Statements Were Not Explicit Opinions of Lubers' Guilt.**

Lubers' argument centers on two statements made at trial by Officer Persun. First, when asked about the flashlight and screwdrivers recovered from Mr. Lubers' person, Officer Persun described them as "items that are typically used for burglaries" RP 174. Second, when asked to describe the flashlight specifically, Officer Persun stated, "I would describe it as a flashlight . . . that you would find on somebody who's trying to either . . . break into cars or break into a house." RP 182. Defense counsel did not object to either of these statements. Mr. Lubers argues that these statements were explicit opinions of Lubers' guilt (i.e. because Mr. Lubers was carrying these items, he was guilty of Attempted Residential Burglary).

Lubers' argument is flawed logically, syntactically and legally. His argument confuses correlation with causation -- a logical error, and reciprocal statements with non-reciprocal -- a syntactical error. Further, defense counsel did not object to the statements and because they do not constitute manifest

constitutional error, therefore even if they were inadmissible, they were harmless.

Lubers infers from Officer Persun's statements that the items found on his person are only found on burglars, i.e., there is a causal relationship between those items and burglary commissions. Put simply, Lubers draws the inference that the only reason to carry screwdrivers and a flashlight would be to commit a burglary. However, the relationship between these items and burglaries, as described by Officer Persun, is a correlative one.

The correct inference to draw from Officer Persun's statements is that those who commit burglaries are often found with these types of items on their person. In other words, more often than not, screwdrivers and flashlights are found on burglars. Because there are also instances where these items are found on persons not committing burglaries as well as instances where persons committing burglaries are found without these items, the relationship between them is correlative, not causative. For example, there is a correlation between attorneys and carrying briefcases. This relationship is not causative because there are attorneys who do not carry briefcases, just as there are non-attorneys who do carry briefcases.

Lubers argues that Officer Persun's statements imply that, because flashlights and screwdrivers are typically found on burglars, only burglars typically have these items. Officer Persun himself flatly rejected that interpretation, but it is, nevertheless, a basis of Lubers' appeal. RP 182. Lubers' interpretation is based, incorrectly, on the theory that Officer Persun's statements are reciprocal when, in fact, they are non-reciprocal. Reciprocal statements are true regardless of whether the subject or the object precedes the verb.

Ultimately, Officer Persun's statements did not describe the nature of Lubers' culpability; they described the nature of the flashlight and screwdrivers. Officer Persun was asked about the *items* found on Lubers, not Lubers himself. Because Officer Persun's statements did not describe Lubers, they did not amount to explicit opinions of Lubers' guilt.

- b. Even if the Statements were Impermissible, they did not Constitute Manifest Constitutional Error.

Should the Court determine that Officer Persun's statements did amount to explicit opinions to Lubers' guilt, those statements did not constitute manifest error and therefore did not violate of Lubers' Sixth Amendment right to have a jury decide this issue.

The right to a jury trial contained in the Sixth Amendment and article 1, § 21 of the Washington Constitution includes the right to have the jury be “the sole judge of the weight of the testimony.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crotts, 22 Wash. 245, 250–51, 60 P. 403 (1900)). Thus, no witness may express an opinion about the defendant's guilt or credibility because such evidence violates the defendant's constitutional right to an impartial fact finder. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Courts will consider a claim of improper opinion testimony raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926, 155 P.3d 125. “Manifest error” requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. Kirkman, 159 Wn.2d at 926–27 (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). In the case of improper opinion testimony, a defendant can show manifest constitutional error *only* if the record contains “an explicit or almost explicit witness statement on an ultimate issue of fact.” Kirkman, 159 Wn.2d at 938 (emphasis added). The Courts construe this exception narrowly in part because the decision not to object to

such testimony may be tactical. Kirkman, 159 Wn.2d at 934–35. Important to whether opinion testimony prejudices a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues: State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (citing Kirkman, 159 Wn.2d at 937).

Here, because Lubers did not object to the testimony at trial, he must demonstrate a manifest constitutional error. Even if the Court deems Officer Person's comments to be explicit statements on Lubers' guilt, his testimony does not constitute a manifest error because Lubers has not shown actual prejudice. There was a mountain of additional evidence demonstrating Lubers presence outside Rita Limas' apartment was for a criminal purpose. Lubers was found crouched down behind some bushes at 4:00 a.m. at night. He was found to be in possession of a flashlight, gloves, and several screwdrivers. The light above Limas' door had been removed, her window was cracked and the screen protecting the window was bent back seemingly to allow access to the apartment. Further, there was no one else out on the street at the time of the burglary. This case surely did not rise or fall on an aside from one of the three police officers who testified at trial.

In Kirkman, the Supreme Court rejected the defendant's claims of prejudice on the grounds that the jury was instructed that they alone decide credibility issues. Kirkman, 159 Wn.2d at 937. Here too, the court instructed the jurors that they were the sole judges of the credibility of the witnesses. RP 191. See State v. Davenport, 100 Wn.2d 757, 763–64, 675 P.2d 1213 (1984) (jurors are presumed to follow the court's instructions absent evidence proving the contrary). In the present case, Lubers argues that Kirkman is inapplicable because Officer Person's opinion went to Mr. Lubers' guilt, not Officer Person's credibility. Brief for Petitioner at 11-12. Lubers' argument is flawed.

The jury received instructions as to how to measure the credibility of Officer Person, not the guilt or innocence of Lubers. If Officer Person's statements did go to Lubers' guilt, it was not that guilt the jury decided when it followed the instruction, but the credibility of the person who made those statements, i.e. Officer Person.

Moreover, courts have held that an expert opinion based solely upon inferences from the physical evidence and the expert's experience, and not based upon the credibility of the defendant or other witnesses, does not constitute an impermissible opinion on

guilt. See, e.g., City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). In Heatley, a police officer testified that the defendant "was obviously intoxicated" and "could not drive a motor vehicle in a safe manner." 70 Wn. App. at 577. The court held that these statements did not constitute an opinion on guilt and were properly admitted because they were "based solely on [the officer's] experience and his observation of [the defendant's] physical appearance and performance." Id. at 579.

Officer Persun's testimony is similar to that given by the officer in Heatley. Officer Persun testified only about the physical evidence, i.e., the screwdrivers and flashlight. He did not express a personal belief regarding Mr. Lubers' guilt or innocence. At no time did the Officer opine about whether the defendant actually committed a burglary. He was not asked to comment on any particular factual scenario and merely stated that the items found on Mr. Lubers were consistent with those usually found on burglars.

Because it was Officer Persun's credibility as a witness that the jury decided when it followed the jury instruction, Kirkman is applicable to the present case. Because the jury was instructed that they alone were to decide issues of credibility, and there was a

large amount of additional evidence demonstrating the defendant's guilt, there was no prejudice. Because Officer Persun's statements were based solely upon inferences from the physical evidence and his experience, and his testimony and opinion was of minimal value when compared the vast amount of other evidence in the case, those statements did not constitute manifest error.

c. Even if the Trial Court Erred in Allowing the Opinion Testimony, the Error was Harmless.

Even if the trial court erred in admitting the opinion testimony, the error was harmless because it is not reasonably probable that the trial's outcome would have been materially different. Here, even if the court excluded evidence of Persun's opinion, there was still strong evidence from which a jury could conclude that Lubers intended to commit a burglary. That evidence included the flashlight, the removal of the light above the apartment, the movement between the front and rear of the apartment, the bent screen, the cracked window, the time of the crime, and the absence of a rational explanation for the defendant's physical location in the bushes at 4:00 a.m. at night. Moreover, Lubers did not take the stand in his own defense nor offer any evidence that would negate any essential element of the crime.

Because the elements of the crime charged were established by other evidence and each element had several pieces of evidence supporting it, there is no doubt that the case would have been proven beyond a reasonable doubt without Person's ancillary comment.

3. DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE.

To establish a claim of ineffective assistance of counsel, a defendant must prove both that the trial attorney's representation was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The court must give a strong presumption that the counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Lastly, the Court need not address both prongs of the Strickland test if Lubers fails to make a sufficient showing on either prong. State v. Thompson, 69 Wn.App. 436, 440, 848 P.2d 1317 (1993). In order for the appellant to prevail he must show not only that there was error, but also that he would have prevailed. Here, he cannot possibly show either.

First, it is unlikely that the defense counsel's objection would have been sustained. As stated above, in Heatly an officer was

allowed to make a statement based solely on "[the officer's] experience and his observation of [the defendant's] physical appearance and performance." 70 Wn.App at 579. And even if the objection had been sustained, it was not prejudicial. As explained above, there was a plethora of additional evidence demonstrating both the defendant's intent and the substantial step he took toward committing a burglary.

Lastly, and perhaps most importantly, even if the Court finds it likely the objection would have been sustained and the evidence was prejudicial, there was a reasonable tactical use for the evidence, a rationale that the defense attorney actually employed during cross-examination and closing. Defense counsel focused much of his closing, as it typical in cases with a good amount of physical and circumstantial evidence, on trying to prove all of the things the police did not do. He consistently painted the prosecution and police department as "jumping to conclusions". Specifically he referred to officer Persun's description of the flashlight as commonly used in burglaries and stated "anyone who was buying that, perhaps this type of flashlight, must be buying with the intent to commit a crime. They -- have some sort of guilty intent." RP 212. Officer Persun was painted as young and

overzealous, "trying to make it [the evidence] fit, trying to help you jump to that conclusion." Id. Defense counsel was faced with a client found in a difficult situation with very few rational explanations for his presence outside the apartment and the items in his possession. One of, if not the most, reasonable tactical approaches to that challenge was to make the officers seem overly zealous and opinionated. Lubers' counsel was not ineffective; he simply made the best tactical decision he could when faced with a very difficult set of facts.

**D. CONCLUSION**

The trial court did not err in providing an inference of intent instruction to the jury or in allowing opinion testimony from an officer during trial. Even if either of these decisions were errors, they were certainly harmless given their relative lack of importance in the trial and the evidence arrayed against the appellant. Finally, Lubers was provided effective assistance of counsel despite his client's extreme predicament factually. Accordingly, this Court should affirm Lubers' conviction.

DATED this 19<sup>th</sup> day of July, 2011.

RESPECTFULLY submitted,

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Certificate of Service by Delivery

Today I deposited with a delivery service, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief in Cause No. 66192-2-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.

  
\_\_\_\_\_  
Name Jeff Spencer  
Done in Seattle, Washington

7/19/2011  
Date