IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK ANTHONY LEE, Appellant.	No. 40548-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered a verdict finding Mark Anthony Lee guilty of residential burglary, former RCW 9A.52.025 (1989), and making a false or misleading statement to a public servant, RCW 9A.76.175. Lee appeals, asserting that the trial court committed reversible error by giving the jury an improper permissive inference instruction or, in the alternative, the State failed to provide sufficient evidence supporting either conviction. Because sufficient evidence supports the residential burglary charge and the trial court's permissive inference instruction was appropriate, we affirm Lee's residential burglary conviction. But because sufficient evidence does not support the jury verdict finding Lee guilty of making a false or misleading statement to a public servant, we reverse that conviction. Because reversing Lee's gross misdemeanor conviction does not affect his residential burglary sentence, we also affirm his sentence on the residential burglary conviction.

FACTS

Richard Hamilton left his home around five in the morning on November 23, 2009, to visit his son in Florida. Before the trip, Hamilton arranged for two associates, Richard Haehn and Richard Olson, to "kind of look after [the] house" while he was away. 3 Report of Proceedings (RP) at 99. Haehn had previously performed repair work on Hamilton's home, and Hamilton entrusted Haehn with keys to the property. Hamilton also asked Olson to look after the house because "he's been trustworthy" and Olson was familiar with a former sexual companion of Hamilton's, Alaine Turley. 3 RP at 99. Olson would sometimes report to Hamilton "some of the things [Turley] was doing" because he "didn't trust her" and "she was on drugs." 3 RP at 90, 100.

Turley had stayed at Hamilton's home sporadically for a two-month period approximately six months before Hamilton's Florida trip. Despite the sexual nature of their relationship, Hamilton never entrusted Turley with a key, and Turley never received mail at the house. Hamilton once discovered his spare garage door opener missing and "had the impression that she had been in [his] house when [he] wasn't there." 3 RP at 90. He later confronted her about the missing opener, she returned it, and he disposed of it because he "didn't want the possibility of her getting in [the] house using that spare garage door opener." 3 RP at 106-07. Despite the problems with their relationship, Hamilton allowed Turley to come over the night before his Florida trip to do laundry and to shower because she asked him "in a pleading way." 3 RP at 107. Turley left before Hamilton departed for the airport, and she knew that Hamilton was going out of town.

About three hours after Hamilton left for the airport, Haehn let himself in to repair a bed.

Upon completing the work, Haehn "checked everything, the doors—locked all the doors and everything," and left at about nine in the morning. 3 RP at 143. Haehn testified that, when he left, nothing seemed out of the ordinary in Hamilton's home.

Around noon, Turley borrowed a drill, a Sawzall,[1] and some other tools from Olson. She also borrowed Olson's truck. Turley's own car was broken down on the street in front of Olson's property and Turley had been staying in a room at Olson's warehouse. According to Olson, Turley was going to go over to Hamilton's to do some gardening and fix a door.

On his daily walk at about 1:30 pm, Olson noticed his borrowed truck parked approximately two and a half miles from Hamilton's home in front of Nativity House, a place where "[y]ou can get drugs." 3 RP at 129. He did not see Turley at the time. Shortly thereafter, he had a friend pick up the truck for him. A brief time later, while driving to his own property in Graham, Olson noticed a television on at Hamilton's house. Olson called Hamilton to inform him of this, and Hamilton thanked him for the information but gave him no further instruction. Olson testified that, after speaking with Hamilton, he "checked the house out and made sure that there was [sic] no broken windows or anything" and that "everything appeared to be intact," though he could not be sure because it was his first time visiting Hamilton's home. 3 RP at 131.

Sometime after dark, Olson was again passing by Hamilton's home and noticed lights on in the house and a sport utility vehicle (SUV) parked out front with someone sitting in it. Olson knocked on the home's front door and Lee answered. Olson recognized Lee as they had occasionally met before. Olson testified that he could see Turley in the house and that he asked

[1] A Sawzall is a handheld type of reciprocating saw. At trial, Olson testified that it could be used to "cut sheetrock, wood, or anything with that type of saw blade." 3 RP at 137.

Lee if Turley was there. Olson further testified, without objection from Lee, that Lee told him it was Lee's own home and that Turley was not inside. Olson responded by saying, "Thank you, I'm sorry; have a nice day," and left. 3 RP at 122. Olson then called Hamilton and the police and drove around the area waiting for law enforcement to arrive. As Olson circled back toward Hamilton's house, Lee ran to Olson's truck and asked him where he was going. Olson "did not talk to him [and] just drove around until the cops got there." 3 RP at 124.

Tacoma Police Department Officer Zachary Spangler arrived at Hamilton's home around 9:30 pm. He parked approximately 100 feet away and, before approaching, saw "three individuals coming out of the residence and walking to the back of [an SUV] which was open. One of the individuals had something in their hand." 2 RP at 42. Spangler identified himself as a police officer and asked the three individuals outside of the SUV to put their hands up. One individual put his hands up while the other two, Turley and Lee, returned to the residence, closing the door. Spangler was approximately 30 feet from the front door at this point. As Spangler was talking to the individual who stayed outside, that individual yelled, "Hey, come back out here. The police are here." 2 RP at 49. A few seconds later, Turley and Lee came back outside. About the same time, Tacoma Police Department Officers Nick Jensen, Dave Johnson, and Eric Barry arrived at the scene.

Turley claimed she lived at the house, so Officers Spangler and Jensen took her inside to see if she could locate any mail or other verifying documentation. Walking into the living room, Spangler immediately noticed a flat screen TV off its console, leaning up against the wall. While conducting the search for documents to verify that the home was Turley's residence, Jensen looked in Hamilton's bedroom. "[P]ower tools and garden tools [were] strewn about the floor

and the bed, . . . there was a safe that had been attached to the wall and the electronic key pad which was plastic had been ripped off the wall" and was "broken and in several pieces laying on the floor."[2] 3 RP at 209. In the other bedroom, Jensen noticed a "slightly damp" sweater with "grass clippings and small bits of dirt on it" draped over a heater directly below a window. 3 RP at 210. Jensen also saw handprints that appeared to him to be on the outside of the window and "the streaks from the fingers actually went up toward the top of the window as if someone were pushing up on the window." 3 RP at 211. He also found several "freshly used" needles. 3 RP at 209. Jensen noticed that Turley had "fresh needle marks, on her right arm in the bend of her elbow." 3 RP at 208.

Despite looking in every drawer in the home, the only evidence Officer Jensen could find that supported Turley's claim that she lived there, was a few unframed photographs on the fireplace mantle, lying flat, that Turley pointed out. Because Turley claimed to have a key to the home, Jensen let her try every key on her key ring, "probably 15 to 20," to see if any of them worked in the front door. 3 RP at 207. None fit. Turley also told Jensen that "she typically had a garage door opener, but at this time she did not" and that she thought the key to Hamilton's home "was probably at her house." 3 RP at 207. Jensen arrested Turley.

While Officers Jensen and Spangler were inside with Turley, Officer Barry made contact

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[2] At trial, Olson identified the Sawzall and some "loppers" he loaned Turley in pictures of the crime scene. 3 RP at 128. Hamilton testified that when he left, his television was still bracketed to its stand on the wall and when shown crime scene photographs, noted,

> [E]verything is in complete disarray there. I see an attaché case that I normally keep under the bed has been opened and, it looks like, ransacked. It looks like my closet has been ransacked. There are tools that are laying on the floor on the bedroom floor that are not my tools. The picture of the safe is a wall safe that I had in my closet, and the front of it is missing.

3 RP at 92-93.

with three other individuals, including Lee. One of the individuals, a Mr. Holmes, had a television remote sticking out of his front pant pocket and another, Ms. Lococo, was carrying a crack pipe. Barry handcuffed and gave *Miranda*[3] warnings to all three individuals, including Lee. Following this, Barry escorted Lee to his police vehicle.

Inside the police vehicle, Officer Barry asked Lee if he was ever inside the residence, and Lee responded, "I don't know what you're talking about."[4] 3 RP at 192. Moments later, Lee admitted to having sex with Turley on the couch inside the house and said that, during the interaction, "the girl looked up at the TV and asked . . . if he knew anyone that would want to buy it." 3 RP at 195. Lee maintained that he thought Turley lived there, that he did not know how she got inside the home and, further, that he did not know how *he* got inside the house.

Tacoma Police Department Crime Scene Technician Shea Wiley arrived at the scene after the other four officers. While there, Wiley photographed a "suspected toolmarking or damage" to Hamilton's front door and the window in Hamilton's bedroom because it was "determined as a possible point of entry due to the window screen on the ground." 3 RP at 223. Wiley also collected eight fingerprint impressions. A fingerprint analyst later verified three as belonging to Turley: one on the front of the TV in the living room, one on a bottle of alcohol, and one on the interior closet door of the closet containing Hamilton's safe. None of the identified prints belonged to Lee.

On November 24, the State charged Lee with one count of residential burglary "as an

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] The trial court held a CrR 3.5 hearing and ruled that Lee's post-arrest statements were admissible.

accomplice" and one count of making a false or misleading statement to a public servant. Clerk's Papers (CP) at 1. A jury trial commenced on March 11, 2010. Lee moved pretrial for dismissal alleging that the State failed to state a prima facie case for residential burglary.[5] The trial court denied the motion. On March 17, a jury found Lee guilty of residential burglary and making a false or misleading statement to a public servant. Lee timely appeals his convictions.

DISCUSSION

Residential Burglary

Lee argues that the evidence is insufficient to support his residential burglary conviction because the State failed to prove beyond a reasonable doubt that he entered or remained unlawfully in Hamilton's residence with intent to a commit a crime. We disagree.

Sufficiency of the evidence is a question of constitutional magnitude that the defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, the evidence permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and

[5] In making the motion, the defense neither mentioned *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), nor followed the procedures set out in CrR 8.3(c)(1) ("The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts.").

persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To prove that Lee was guilty of residential burglary, the State needed to show that Lee or an accomplice entered or remained unlawfully in Hamilton's home with the intent to commit a crime. *See* former RCW 9A.52.025(1). At trial, the court gave the following instruction on accomplice liability,

> 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 the 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.

CP at 88.[6]

Here, Lee admitted to having sex inside the home and to Turley asking him whether he knew anyone that wanted to purchase the wide screen television in the living room. Thus, at trial, the State's case focused on whether Lee realized Turley did not actually live at Hamilton's home and that she did not own the television Turley attempted to sell while Lee was at the house with her. A number of facts demonstrate that Lee was aware of Turley's trespassing and criminal

[6] Lee did not object to this jury instruction at trial.

intent: (1) When confronted by Olson, Lee lied and told Olson that the house belonged to him and that Turley was not there; (2) Lee confronted Olson to see where he was going after Olson passed Hamilton's home a second time while driving around waiting for the police to arrive; (3) Lee told Officer Barry that he did not know how either he or Turley got inside the house; (4) according to Hamilton's testimony, the house was "in complete disarray" and the home's safe was in the process of being forcibly removed from the wall (3 RP at 92-93); and (5) Olson acknowledged at trial, without objection from Lee, that Turley travelled from Nativity House, which Lee was known to frequent, to Hamilton's home by means other than Olson's truck, which was recovered at 3:00 pm, and not by her own car, suggesting that she came there with a third person, possibly Lee.

We give great deference to the jury on issues of witness credibility and persuasiveness of the evidence. *Walton*, 64 Wn. App. at 415-16. Accordingly, viewed in the light most favorable to the jury's verdict, we conclude that any rational trier of fact could have found that Lee either knew Turley did not own the home and that the pair gained access unlawfully through the back bedroom window or that, even if Lee originally assumed Turley owned the home, it was unreasonable to sustain that belief in light of the activities taking place inside, including having to pry open the front door and cutting the home's wall safe with a Sawzall. *Salinas*, 119 Wn.2d at 201. Further, it was reasonable for any trier of fact to infer that, by knowing Turley did not own the home, Lee was aware that Turley's attempt to sell the television was criminal. Because substantial evidence supports the jury's verdict, we affirm Lee's residential burglary conviction.

Permissive Inference Instruction

Lee also contends that the trial court erred in providing the jury with the following

permissive inference 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 at 85. Lee objected to this instruction at trial and now contends that the instruction "effectively relieved the State from its burden of proving that [he] intended to commit a crime against a person or property once inside [Hamilton's] residence." Br. of Appellant at 15. We disagree; substantial evidence supports giving a permissive inference instruction.

We review error of law challenges to jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Due process requires that the State prove each element of a crime beyond a reasonable doubt. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. *Hanna*, 123 Wn.2d at 710.

Generally, these devices fall into two categories: mandatory presumptions (the jury is *required* to find a presumed fact from a proven fact) and permissive inferences (the jury is *permitted* to find a presumed fact from a proven fact but is not required to do so). *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. *Deal*, 128 Wn.2d at 699 (citing *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)). In contrast, permissive inferences do not relieve the State of its burden because the State is still required to persuade the jury that the proposed inference follows from the proven facts. *Hanna*, 123 Wn.2d at 710.

We evaluate the propriety of a permissive inference instruction on a case-by-case basis in light of the particular evidence the State presented. *Hanna*, 123 Wn.2d at 712. The United States Supreme Court has established "more likely than not" as the standard of proof for permissive inferences. *Ulster County Court v. Allen*, 442 U.S. 165, 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979). In describing the more likely than not standard, the Washington Supreme Court has stated, "When an inference is only part of the prosecution's proof supporting an element of the crime, due process requires the presumed fact to flow 'more likely than not' from proof of the basic fact." *Hanna*, 123 Wn.2d at 710.

Our Supreme Court approved the permissive inference of intent to commit a crime "'whenever the evidence shows a person enters or remains unlawfully in a building.'" *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006) (quoting *State v. Grimes*, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998)). And in *State v. Portee*, our Supreme Court addressed, at length, a number of other circumstances related to burglary that warrant permissive inferences:

> "In prosecutions for burglary the possession of the stolen property is almost invariably accompanied by other incriminating circumstances, such as the character of the explanation of the possession, the secrecy of the possession, a denial of the possession, the presence of the accused near the scene of the crime, flight, etc.; and *it is generally held that proof of such possession, explained falsely or not reasonably, or accompanied by other guilty circumstances, is sufficient to carry the case to the jury and to support a conviction*."

25 Wn.2d 246, 254, 170 P.2d 326 (1946) (quoting 19 Am. & Eng. Ann. Cas. 1281). In addition, Washington courts have consistently held that "'slight corroborative evidence'" is "all that is necessary to establish guilty knowledge." *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097, *review denied*, 138 Wn.2d 1009 (1999); *see State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974 (1967).

Here, Lee was found at the scene of the crime for the burglary for which he is accused, he falsely told Olson that he owned Hamilton's home and then later denied being in the home to police officers; Lee could not explain how he or Turley had entered the home; and his explanation for why the television was off its brackets was that, while having sex on the couch—having not seen any of the abundant evidence of criminal activity strewn about everywhere else in the home—Turley asked if he knew anyone that would buy it. In these circumstances, the trial court met the "more likely than not" standard required to give a permissive inference instruction as any reasonable trier of fact could have concluded that it was likely that Lee entered the home with Turley, either through the rear window or the front door (after it was pried open).

In addition, Lee's claim that he believed Turley owned both the home and the television presented a credibility issue for the jury. The jury is the "sole and exclusive judge of the evidence" and our role as the reviewing court "is not to reweigh the evidence and substitute our judgment for that of the jury." *State v. Notaro*, 161 Wn. App. 654, 671, 255 P.3d 774 (2011). On the testimony presented, the trial court did not err in giving the jury the permissive inference instruction.

Making a False or Misleading Statement to a Public Servant

Lee also contends that the State failed to provide sufficient evidence supporting his making a false or misleading statement to a public servant conviction. Because Lee is correct that the statement in question was not material, we agree with Lee.

Sufficiency of the evidence is a question of constitutional magnitude that the defendant may raise for the first time on appeal. *Alvarez*, 128 Wn.2d at 13. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits *any*

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

To sustain this challenged conviction, the State must show that Lee (1) made a false or misleading statement to a public servant and (2) that, in discharging his or her official duties, the public servant in question would reasonably rely on the false or misleading statement. *See* RCW 9A.76.175.

Here, the charge against Lee stems from a conversation that took place between Lee and Officer Barry after Barry had read Lee his *Miranda* rights and put him in the back of his squad car. At trial, the following exchange occurred between Barry and the prosecutor:

> Q Did you ask [Lee] if he was ever inside the residence?
> A I did.
> Q And what was his response to you?
> A "I don't know what you're talking about."
> Q Did he deny being in the residence?
> A He did.
> Q Was there anything that struck you as odd about the fact that he would deny being in the residence?
> A Yes.
> Q And if you would please explain to the jury, what was it about that?
> A He was on the porch and the front door was open.
> Q Did you confront him with that fact?
> A I did.
> Q And what was his response to you?
> A It was something to the effect of he was there visiting a female who lived there.
> Q Did he concede the fact that he had been inside?
> A He did.

3 RP at 192-93.

Thus, as Officer Barry himself testified, Lee recanted his false statement within seconds of first uttering it. Moreover, Barry seems to have dismissed the statement as false immediately,

thereby undermining the idea that the statement was either material or something that he as a law enforcement officer relied on in the course of the investigation. Because the State has failed to present sufficient evidence to show that Barry relied on Lee's statement, "I don't know what you're talking about," which Barry took to be a denial of Lee being inside the house, substantial evidence does not support the jury's verdict finding that Lee made a false statement to a public servant that the public servant would reasonably rely on. 3 RP at 192. Accordingly, we reverse this conviction.

Prosecutorial Misconduct

In his statement of additional grounds for review (SAG),[7] Lee also contends that the prosecutor engaged in misconduct by suborning perjury from Officer Barry. The record does not support Lee's claim. At trial, Lee did not object to the conduct in question and the prosecutor's conduct was not flagrant or ill intentioned.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Absent a proper objection and a request for curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). If the prosecuting attorney's statements were

[7] RAP 10.10.

improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *Brown*, 132 Wn.2d at 561. And we presume a jury follows the trial court's instruction. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Here, during trial, the following exchange took place between Barry and the prosecutor:

> Q Did you ever ask the defendant how it was that he got into the house in the first place?
> A I did.
> Q And what was his response to you?
> A He didn't know.
> Q Did he elaborate on that at all?
> A Well, I asked him how he got into the house. He said that he didn't know and that the girl lived there, and I said how did the girl get in the house, and he said, "I don't know."

3 RP at 195. In the prosecutor's declaration for determination of probable cause of November 24, 2009, the prosecutor wrote, "When asked how he had gotten into the residence, Defendant Lee stated 'man I don't know, I wasn't paying attention how she got into the door.' Defendant Lee then stated that Defendant Turley lived at the residence." CP at 4.

As Lee points out, there is a minor discrepancy between the probable cause declaration (drafted by a deputy prosecuting attorney) and Officer Barry's trial testimony. Nevertheless, the discrepancy does not rise to the point of flagrancy or ill intentioned conduct.[8]

Because sufficient evidence supports Lee's residential burglary charge and the trial court did not err in giving a permissive inference jury instruction, we affirm Lee's residential burglary conviction. But we reverse Lee's making a false or misleading statement to a public servant charge and remand with directions to dismiss the charge with prejudice. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after . . . a reversal for lack of sufficient evidence."). Because reversal of this misdemeanor charge does not affect Lee's offender score or sentence, we affirm Lee's sentence on his residential burglary conviction. Thus, we remand to the trial court for dismissal of the gross misdemeanor false statement charge and correction of the judgment and sentence to reflect the conviction and sentence of the residential burglary charge only.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

I concur:

WORSWICK, A.C.J.

[8] Lee also contends that prosecutorial misconduct occurred in relation to his conviction for making a false or misleading statement to a public servant. Because we reverse that conviction on other grounds, Lee's arguments in this respect are moot.

Armstrong, J. — I agree with the majority that the State failed to prove that Mark Anthony Lee made a false or misleading statement to a public servant. I disagree with the majority that the State proved Lee's conviction for residential burglary because, even viewed in the light most favorable to the State, the evidence does not support the inference that Lee intended to commit a theft either when he entered or while he remained in Hamilton's house.

I. Residential Burglary

The State argues that Lee's changing story supports inferences that: (1) he knew the house did not belong to Turley, (2) he knew the objects in the house were not Turley's to dispose of, and (3) he was inside the house to commit a theft. While the evidence supports (1) and (2), it does not support (3), that he intended to commit a theft.

The State can prove a crime either through direct or circumstantial evidence or some combination of both. *See State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). But criminal intent may be inferred only where the conduct of the defendant is "'plainly indicated as a matter of logical probability.'" *State v. Johnson*, 159 Wn. App. 766, 774, 247 P.3d 11 (2011) (quoting *Delmarter*, 94 Wn.2d at 638). An inference must be reasonably based on the evidence presented. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ("A claim of insufficiency admits the truth of the State's evidence and all inferences that *reasonably* can be drawn therefrom." (Emphasis added.)).

Several cases illustrate sufficient facts to infer criminal intent. For example, in *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985), the court affirmed an attempted burglary conviction where the defendant's conduct—breaking out a basement window at 3:15 a.m. and fleeing when police arrived—plainly indicated criminal intent. *Bergeron*, 105 Wn.2d at 20. And

in *State v. Bencivenga*, 137 Wn.2d 703, 705-06, 709, 974 P.2d 832 (1999), where, despite the defendant's claim of an innocent purpose of winning a bet with a friend, the defendant's actions of prying open a store's back door at 3:30 a.m. allowed a logical inference of criminal intent.

In contrast, under some circumstances, the defendant's behavior does not lead to a logical inference of criminal intent. *State v. Woods*, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991). In *Woods*, 63 Wn. App. at 589, two juveniles went to an apartment where one had formerly lived and his mother caught the two boys trying to kick in the door. The boys claimed they went to the apartment to get a rain jacket, they did not steal anything else, and most of the one boy's belongings were still in the apartment. *Woods*, 63 Wn. App. at 589-90. The court found it highly plausible that the boys fled the scene when the mother yelled because they feared her anger rather than because of a foiled criminal plot. *Woods*, 63 Wn. App. at 591. Thus, although Division I held that the defendant there entered the apartment unlawfully, it found the evidence insufficient to support an inference of criminal intent necessary to support the residential burglary conviction. *Woods*, 63 Wn. App. at 591-92.

Here, in contrast to *Bergeron* and *Bencivenga*, the State failed to prove that Lee forced entry or participated in Turley's forced entry of Hamilton's house. Although Lee's false statements to Olson and the police support the inference that he knew he was trespassing in Hamilton's house, the statements do not establish that he intended to commit or participate in a theft in the house. Turley had a personal history with Hamilton. She was 27 and a heroin addict. She had lived with Hamilton, worked for him, and had a sexual relationship with him. Turley moved out of his home six months before the alleged burglary, but she still visited him and had been at the house the night before he left for Florida. On the day of the alleged burglary, Turley

announced to Olsen that she was going to Hamilton's house to do some work. Consistent with this, she borrowed tools and a truck from Olsen.

Later that day, Olsen noticed the television on in the house and called Hamilton in Florida. Hamilton expressed no concern and told Olsen he did not need to call the police. Later that evening, Olsen noticed that the lights were on in the house and saw a sport utility vehicle parked in front of the house. When the police investigated, they found evidence that someone tried to push open a bedroom window, someone had attempted to open a bedroom safe, and someone had removed a television from its stand. Also, the police found evidence that someone, most likely Turley, had used drugs in the house. But the police did not connect Lee to any of this evidence, by forensic evidence or otherwise. Lee explained to the police that while he was having sex with Turley on a couch, she asked if he knew anyone who would want to buy a television. This statement does not support an inference that Lee had helped remove the television from its stand.

The State failed to prove how Lee got to the house, how he entered the house, how long he had been there, or that he had anything to do with the apparent attempts to steal from Hamilton. The State proved at most that Lee was present in the house without permission. And the openness of his presence—the lights and television on, the sex on the couch, the sport utility vehicle parked outside, Lee's flip answers to the police with no attempt to flee, and the drug use—does not plainly indicate as a matter of logical probability that Lee intended to commit a crime while in the house.

II. Accomplice Liability

The majority reasons that the State proved Lee had acted as an accomplice to Turley's wrongdoing. Specifically, the majority contends that Lee should have known Turley did not own the home and, thus, must have been aware that her attempt to sell the television was criminal.

A person is guilty as an accomplice if he or she knowingly "solicits, commands, encourages, or requests" or "aids or agrees to aid" in commission of a crime. Former RCW 9A.08.020(3) (1975-76).[9] To be guilty as an accomplice, one must associate with and participate in the criminal undertaking as something he desires to bring about and seeks to make succeed. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973) (holding modified on other grounds)). Physical presence at the scene and knowledge of the crime are not enough. *Wilson*, 91 Wn.2d at 491. The State must prove the defendant was "'ready to assist.'" *Wilson*, 91 Wn.2d at 491 (quoting *State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10 (1967), *vacated on other grounds by Wheat v. Washington*, 392 U.S. 652, 88 S. Ct. 2302, 20 L. Ed. 2d 1357 (1968)). An accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he or she has general knowledge of *the* crime committed. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000).

The majority's reasoning regarding accomplice liability, even if accepted, would prove only that Lee was present and knew Turley intended to commit one or more crimes. This is insufficient to prove him criminally liable as an accomplice. *Wilson*, 91 Wn.2d at 491.

[9] In 2011, the legislature amended this statute to be gender neutral. This amendment did not affect the substance of the statute.

III. Permissive Inference Instruction

I also disagree with the majority's conclusion that the trial court properly instructed the jury that it could infer Lee's criminal intent from his presence in the home.

The State must prove the essential elements of the charged crime beyond a reasonable doubt, but it may use evidentiary devices, such as presumptions and inferences, in meeting its burden of proof. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). To use the inference, there must be a "'rational connection'" between the facts shown by the prosecution and the ultimate fact presumed. *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995) (quoting *County Court of Ulster County v. Allen*, 442 U.S. 140, 165, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)). The State must present sufficient evidence to conclude that the inference flows "more likely than not" from the proven facts. *Brunson*, 128 Wn.2d at 110-11. Whether the court gives a permissive inference instruction is determined on a case-by-case basis. *Hanna*, 123 Wn.2d at 712.

In *State v. Sandoval*, 123 Wn. App. 1, 6, 94 P.3d 323 (2004), Division III of this court reversed the trial court because it used a permissive inference instruction in a burglary case. There, Sandoval, drunk at the time, kicked the back door in on a house and when the homeowner confronted him, Sandoval shoved the homeowner. *Sandoval*, 123 Wn. App. at 3. Division III reasoned that the intent element of burglary did not flow "more likely than not" from the facts shown by the prosecution because Sandoval did not sneak in, was not carrying burglary tools, nor did he try to flee the scene. *Sandoval*, 123 Wn. App. at 5-6.

By contrast, our Supreme Court upheld giving the instruction where the defendant broke into a guest house and assaulted his wife's new boyfriend. *State v. Deal*, 128 Wn.2d 693, 696,

911 P.2d 996 (1996). The defendant testified that he broke a window to enter the guest house and repeatedly assaulted the boyfriend. *Deal*, 128 Wn.2d at 697. The court ruled that this "amply support[ed]" the conclusion that Deal "more likely than not" intended to commit a crime after breaking into the guest house. *Deal*, 128 Wn.2d at 700.

Here, the State did not meet the standard for giving a permissive inference instruction. Lee's presence in the home under these facts does not lead "more likely than not" to the conclusion that he intended to commit theft; rather, it is equally plausible that he intended simply to trespass. *See Sandoval*, 123 Wn. App. at 5-6; *see also Deal*, 128 Wn.2d at 700. I would hold the trial court erred in giving the permissive inference instruction.

In conclusion, the evidence here is insufficient to support Lee's conviction for residential burglary, and the trial court erred in giving the permissive inference instruction. I would reverse and remand for the trial court to dismiss the burglary charge with prejudice; thus, I dissent.

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Armstrong, J.