IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN KENNETH ROBERTS, Appellant.	No. 37922-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On May 29, 2008, a jury found John Roberts guilty of residential burglary, reckless driving, and third degree driving with a suspended license. Roberts appeals only his residential burglary conviction, arguing that sufficient evidence does not support the jury's verdict and that, on the evidence presented, the trial court erred when it instructed the jury on the law allowing, but not requiring, the jury to presume Roberts's criminal intent from the proof of his unlawful entry into Denise Wohlwend's home. In a statement of additional grounds for review (SAG),[1] Roberts argues that his counsel was ineffective based on several alleged deficiencies and the trial court violated his public trial rights by holding "private conversations" with prospective jurors. We hold that substantial evidence supports the jury's verdict and the trial

[1] RAP 10.10(a).

court did not err when it instructed the jury on the law regarding the permissive inference of criminal intent in accord with 11A *Washington Pattern Jury Instructions: Criminal* 60.05, at 8 (2005 Suppl.) (WPIC). In addition, our review of the record reveals that Roberts received effective assistance from his counsel and the trial court spoke with prospective jurors in an open courtroom with Roberts and both counsel present. We affirm.

FACTS

On September 23, 2007, Wohlwend returned home around 3:30 pm to find that her digital video disc (DVD) player and all her DVDs were missing. Numerous broken windows and graffiti marred the home she shared with her three children in South Tacoma. Wohlwend called the police.

Earlier that same day, after Roberts ran a stop sign and unsuccessfully attempted to elude Tacoma Police Officer Christopher Martin by driving at a high speed on the wrong side of the road, Roberts was arrested for reckless driving and driving with a suspended license. Roberts's girl friend, Heather Duffy, and Joseph McCummins were passengers in Roberts's car at the time of Roberts's arrest. Martin saw personal clothing, a DVD player, and DVD movies in Roberts's car. He also noticed that Roberts's left forearm wrapped with a gauze bandage. When asked about the bandage, Roberts told Martin that he had cut his arm on glass the day before.

Approximately two hours after Officer Martin arrested Roberts, the Tacoma Police Department dispatched Martin to Wohlwend's residence to investigate the burglary. On learning that Duffy had been renting a room from Wohlwend for about a month, several windows at Wohlwend's home had been broken, and Wohlwend's DVD player and DVDs had been stolen, Martin suspected that Roberts and Duffy were involved in the burglary. Martin questioned Vestal

Tabor who had been working in Wohlwend's next door neighbor's yard. Tabor told Martin that he had seen Roberts at the Wohlwend residence on September 22, 2007, and that Roberts told him his girl friend had failed to leave a key for him and he needed to break some windows to get in. At no time had Wohlwend ever given a key to her home to either Duffy or Roberts. Tabor heard glass breaking for about 20 minutes and heard Roberts speaking to a female named "Heather." Tabor did not see Roberts leave the Wohlwend property that day. The next day, September 23, Tabor saw Roberts park a maroon car near the house and walk in and out of the Wohlwend's backyard for about 15 to 20 minutes. Later, Tabor identified Roberts as the man he had seen at Wohlwend's home and Wohlwend identified the DVD player and DVDs that Martin retrieved from Roberts's car in the impound lot as her stolen property.

Procedure

On September 25, 2007, the Pierce County Prosecuting Attorney's office charged Roberts with one count of residential burglary, one count of reckless driving, and one count of third degree driving with a suspended license.

Trial commenced on May 27, 2008. Before jury selection, Roberts moved in limine to exclude evidence of his numerous prior bad acts citing ER 404(b), and he challenged the admissibility of his statements to Officer Martin. CrR 3.5. Ruling that evidence that Roberts smelled of alcohol at the time of his arrest was relevant to the charge of reckless driving, the trial court granted Roberts's ER 404(b) motion and excluded all the evidence he requested except for Martin's testimony that he smelled alcohol on Roberts at the time of the arrest. Following the CrR 3.5 hearing, at which Roberts argued that his intoxication precluded a knowing, intelligent, and voluntary waiver of his *Miranda*[2] rights, the trial court ruled Roberts's statements admissible.

On May 27, 2008, the parties began voir dire of the prospective jurors. On May 28, 2008, when the trial court reconvened, the trial court and both counsel questioned prospective jurors 33 and 8 individually in the courtroom without other prospective jurors present. Later that day, after the trial court excused the venire panel for a break, prospective juror 9 addressed the trial court and both counsel questioned prospective juror 9 on the record. The record does not indicate that the courtroom doors were locked or that anyone, other than the other prospective jurors in the venire, was excluded from these proceedings which were held in open court. That same day, the State proposed 22 jury instructions all based on the WPIC. Roberts successfully objected to the trial court's giving of one instruction on the ground that it was irrelevant.

On May 29, 2008, the jury found Roberts guilty as charged. On July 1, 2008, the trial court sentenced Roberts to 70 months confinement on the residential burglary conviction. The trial court also imposed concurrent lesser sentences on the reckless driving and driving with a suspended license convictions. Roberts filed a timely appeal in which he raises numerous issues challenging his residential burglary conviction only. We address each in turn.

ANALYSIS

Sufficiency of Evidence

Roberts argues that sufficient evidence does not support his conviction because the State failed to present evidence that Roberts (1) unlawfully entered the Wohlwend residence or (2) intended to commit a crime in the residence. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a

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

reasonable doubt. *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 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). 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). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In order to prove residential burglary, the State must show that Roberts unlawfully entered or remained unlawfully in Wohlwend's home and that he intended to commit a crime against a person or property in Wohlwend's home. *See* RCW 9A.52.025(1).

Because Roberts challenges the sufficiency of the evidence, he admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. *See Salinas*, 119 Wn.2d at 201. Here, on September 23, 2007, a witness saw Roberts at the scene of the burglary, walking to and from the home across the yard, between the time that Wohlwend left and returned to her home. The witness, Tabor, was working in Wohlwend's neighbor's yard the day before when he saw Roberts get a ladder and climb up to a window in the corner of Wohlwend's home. Tabor heard glass breaking and when Roberts came down from the ladder, he introduced himself and told Tabor that his girl friend had forgotten to leave him a key so he had to break some windows to get into the house. However, Wohlwend never provided Duffy or Roberts with a key to her home and never gave Roberts permission to break windows to enter her home. Wohlwend had only ever given Roberts permission to be in her home with Duffy on select nights, including

one night a few days prior to the burglary. Further, Officer Martin arrested Roberts a short distance from Wohlwend's home around the time of the burglary as established by Tabor's and Wohlwend's testimonies. At the time he was arrested, Roberts had Wohlwend's stolen property in his possession. Sufficient evidence supports the jury's finding that Roberts unlawfully entered Wohlwend's home without her permission and stole her DVD player and DVDs.

Jury Instruction No. 6

Although he did not object to the trial court's giving jury instruction no. 6 as CrR 6.15 requires, Roberts contends that he is entitled to a new trial because the trial court relieved the State of its burden to prove that he intended to commit a crime when he entered Wohlwend's home.

Jury instruction no. 6 provides:

> 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.

Clerk's Papers (CP) at 23; WPIC 60.05.

A legal challenge to the trial court's giving of an inference of intent jury instruction may be raised for the first time on appeal. *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). 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. *Hanna*, 123 Wn.2d at 710. Residential burglary has two elements: (1) unlawfully entering or remaining in a dwelling other than a vehicle and (2) intent to commit a crime against a

person or property in that dwelling. *See* RCW 9A.52.025(1).

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 one of 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 presented by the State. *Hanna*, 123 Wn.2d at 712.

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)).

Deal is a case very similar to Roberts. In *Deal*, our Supreme Court upheld the giving of an instruction similar to the one at issue here and stated:

> [T]he permissive inference contained in the challenged jury instruction was not the sole and sufficient evidence of Deal's intent. As we have observed above, Deal testified at trial that he broke a window in order to enter the premises, and that once inside, repeatedly assaulted Prins. In our judgment, the acts which Deal admitted amply support a conclusion that it was more likely than not that Deal intended to commit a crime against Prins during the time he remained unlawfully

on the premises.

Deal, 128 Wn.2d at 700.

Here, although Roberts did not testify, Roberts admitted to Tabor that he broke Wohlwend's windows to gain entry to the residence on September 22. In addition, Wohlwend testified that Roberts did not have permission to be in her home on September 22 or 23 and never had permission to break her windows to gain entry to her home or to take her DVD player and DVDs. The evidence was uncontroverted that Roberts had Wohlwend's stolen DVD player and DVDs in his possession when he was arrested for reckless driving and driving with a suspended license on September 23 a short time after the burglary occurred. The State's evidence was overwhelming and clearly established that Roberts unlawfully entered Wohlwend's home and, while inside the home, stole Wohlwend's property. When the permissible inference is only part of the State's proof supporting an element, the State need only show the presumed fact more likely than not flows from the proven fact. *Deal*, 128 Wn.2d at 699-700. Based on this evidence, the jury was entitled, but not required, to infer that Roberts intended to commit a crime in Wohlwend's home either when he broke the windows to gain entry or while he remained inside. RCW 9A.52.040.[3] The State presented sufficient evidence for the jury to find Roberts unlawfully entered Wohlwend's home and the trial court's decision to give the permissive inference of criminal intent instruction was proper.[4]

[3] RCW 9A.52.040 states:

> In any prosecution for burglary, any 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, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

[4] Because the evidence of Roberts's guilt is overwhelming, we decline to further discuss his

Ineffective Assistance of Counsel

In his SAG, Roberts argues that his defense counsel provided ineffective assistance. We begin our ineffective assistance of counsel analysis with the strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The defendant bears the burden of demonstrating ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 335.

To establish ineffective assistance of counsel, Roberts must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn.2d at 334-35. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To show prejudice, Roberts must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

Differences of opinion regarding trial strategy or tactics will not support a claim of ineffective assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at

misplaced reliance on *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989), and *State v. Berglund*, 65 Wn. App. 648, 829 P.2d 247, *review denied*, 119 Wn.2d 1021 (1992), which are clearly inapposite.

691. On direct appeal, we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 335, 338 n.5.

Roberts alleges his counsel's assistance was ineffective for 11 reasons. Although none have merit, we address each briefly.

A. Exclusion of Duffy as a Witness

Roberts alleges that his defense counsel improperly excluded Duffy as a witness. But the record shows that initially Duffy was on the State's witness list but the State was unable to locate her.

B. Excluding Evidence Under ER 404(b)

Roberts argues that his defense counsel improperly prevented testimony relating to an alleged fight between Roberts and Duffy that could explain the broken windows. On direct appeal, we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 335, 338 n.5.

C. Intoxication Defense at the CrR 3.5 Hearing

Roberts next argues that his defense counsel should have raised an intoxication defense at his CrR 3.5 hearing regarding his ability to knowingly, intelligently, and voluntarily waive counsel when making statements at his arrest. But the record shows that defense counsel did raise concerns about Roberts's intoxication and possible confusion regarding his *Miranda* rights and that the judge weighed this issue when determining the admissibility of Officer Martin's testimony.

D. Defense's Omission of an Opening Statement or Presenting of a Case

Roberts argues that his defense counsel's failure to make an opening statement or present a case is ineffective representation. The record shows that defense counsel did not make an opening statement or present a separate case. Instead, the defense counsel cross-examined the

State's witnesses, objected during the State's case, and made a closing argument. The choice to make an opening statement and how to present a defense are tactical ones. Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

E. Cross-Examination of Witnesses

Roberts also argues that his defense counsel deficiently cross-examined the State's witnesses and merely restated the State's case during cross-examination. But the record shows defense counsel asked questions in an attempt to raise reasonable doubt. A defendant cannot argue that he received ineffective assistance of counsel simply because a legitimate trial tactic failed to sway the jury in his favor. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). In addition, even were we to find defense counsel's cross-examination lacked aggressiveness, "a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998) (citing *Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997), *cert. denied*, 522 U.S. 1129 (1998)).

F. Failure to Request a Jury Direction After a Motion to Strike

Roberts argues ineffectiveness of counsel due to a failure to request a jury direction after successfully moving to strike Wohlwend's testimony referencing Roberts's recent release from jail. The decision to request a jury direction instruction after a motion to strike is a matter of trial tactics. Frequently an attorney will decline to request an instruction that will cause the jury to focus undue attention on evidence successfully excluded. Jury instruction no. 1 states, "[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in

reaching your verdict." CP at 16. The jury is presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

G. Lesser Offense Instructions

Next, Roberts claims that his defense counsel failed to request jury instructions for malicious mischief, stolen property, and accomplice liability. Under the *Workman*[5] test, a defendant is entitled to a lesser-included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong). The statutory requirements for malicious mischief and possession of stolen property require evidence of the value of damaged property. *See* former RCW 9A.48.070 (1983); former RCW 9A.48.080 (1994); former RCW 9A.48.090 (2003); RCW 9A.56.140; former RCW 9A.56.150 (2007); former RCW 9A.56.160 (2007); former RCW 9A.56.170 (1998). These elements are not part of the charged crimes of residential burglary, reckless driving, or third degree driving with a suspended license, therefore Roberts was not entitled to instructions on malicious mischief or possession of stolen property charges. Nor was counsel ineffective for failing to request accomplice liability instructions. Accomplice liability is merely an additional analysis under which a defendant may be criminally liable for an offense committed with others. RCW 9A.08.020.

We note that the failure to give a lesser-included offense instruction is not an error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). Moreover, the decision not to request a lesser-included offense instruction is a tactical decision that is insufficient to support a finding of ineffective assistance of counsel. *See Lord*, 117 Wn.2d at 883.

[5] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

H. Jury Instructions

Roberts also argues that his defense counsel failed to object to most of the State's proposed jury instructions. The record shows that the State offered 22 jury instructions of which the State withdrew one and defense counsel successfully objected to the relevancy of another. All the jury instructions were modeled from or identical to the WPIC. It is not unreasonable, nor unlikely, for a defense counsel to not raise objections at trial as to their content.

I. Investigatory Duties

Roberts next alleges that his defense counsel failed to interview a community corrections officer and present related testimony. On direct appeal, we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 335, 338 n.5. As there is nothing in the record to allow us to assess this allegation, we cannot review this claim on this record.

J. Counsel's Admission of Guilt

Roberts argues that his defense counsel prejudiced him by conceding guilt during closing arguments on the driving with a suspended license charge. Where the evidence of guilt on a particular count is overwhelming and there is no reason to suppose that any juror doubts it, conceding guilt on that count in closing can be a sound trial tactic. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (quoting *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)), *review denied*, 145 Wn.2d 1012 (2001). This approach may help win the jury's confidence, preserve the defendant's credibility, and lead the jury toward leniency by conceding that the defendant is guilty of a lesser charge. *See Silva*, 106 Wn. App. at 596 n.37 (quoting *Underwood*, 939 F.2d at 474). The concession is a matter of trial strategy or tactics and does not indicate deficient representation. *Silva*, 106 Wn. App. at 599.

K. Pretrial Motions and the CrR 3.5 Hearing

Finally, Roberts argues that his defense counsel inappropriately focused on pretrial exclusionary motions during the CrR 3.5 hearing rather than trying to suppress Officer Martin's testimony. This claim is without merit. The record shows that the defense counsel filed both pretrial motions and requested a CrR 3.5 hearing and the trial court considered the issues raised at different times.

Voir Dire Right to Public Trial

Last, Roberts asserts that the trial court held "private conversations" with prospective jurors during the voir dire process in violation of his right to a public trial. The record does not support Roberts's claim. Our review of the record reveals that jury selection took place on the record in an open courtroom with Roberts, defense counsel, and the prosecuting attorney present.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, A.C.J.