IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66192-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
SEBASTIAN LARRY LUBERS,	)	
	)	
Appellant.	)	FILED: March 12, 2012

Grosse, J. — An inference of intent instruction may be given in an attempted burglary case when, as here, there is evidence of a forced entry into the building. Accordingly, we affirm.

FACTS

On May 23, 2009 at approximately 4:00 a.m., Rita Limas was asleep on a chair in her living room when she awoke to the sound of footsteps outside of her living room window. She saw a flashlight beam in that window and several minutes later saw a flashlight shining into her bedroom window. She then called 911 and told the operator that she could hear someone trying to get in through the front window. The sound was loud enough that the operator could also hear it over the phone.

Within 20 minutes, police officers arrived and found Sebastian Lubers crawling on his hands and knees behind some garbage cans about 30 feet away from Limas' apartment. The officers detained Lubers and searched him, finding gloves, a small flashlight and two screwdrivers on his person. Police also examined the screen on Limas' front window and observed that it was "forcibly broken" and "bent out" as if

someone had been "prying at it with something." They also observed on the windowpane evidence of impact marks consistent with those made by a screwdriver. Additionally, police discovered that the light bulb had been removed from the socket located above Limas' apartment entrance, while all other apartment entrances were illuminated. An unbroken light bulb was found in the bushes approximately five feet away.

The State charged Lubers with attempted residential burglary and the case proceed to a jury trial. The jury found him guilty as charged. He appeals.

ANALYSIS

I. Inference of Intent Instruction

Lubers first contends that the trial court erred by giving a jury instruction on the inference of intent because there was insufficient evidence of an unlawful entry to support this instruction. That instruction repeats WPIC 60.05[1] and states:

> 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.

Lubers did not object to this instruction.

A person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.[2] Residential burglary is committed by entering or remaining unlawfully in a dwelling with intent to commit a crime against a person or property

[1] 11A Washington Pattern Jury Instructions: Criminal (WPIC) 60.05, at 15 (3d ed. 2008).
[2] RCW 9A.28.020.

therein.[3] RCW 9A.52.040 creates an inference of intent for burglary cases:

> 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.

To give an instruction on an inference of an intent to commit a crime in a burglary case, there must be evidence of entering or remaining unlawfully in a building.[4] "Entry" is defined as the entrance of a person, "or the insertion of any part of his or her body."[5] Our courts have held that fingerprints found on the inside of a broken window amounted to sufficient evidence of entry to support the inference of intent instruction in attempted burglary cases.[6]

Here, the evidence showed that Limas heard the defendant forcing open her window and the sound was loud enough that even the 911 operator could hear it. The State also presented physical evidence of a forced entry: police testified that the screen on the window was "forcibly broken" and "bent out" as if it had been pried open by someone. Thus, the evidence showed that someone had pried open the window from the inside, establishing an "entry" of that person into the dwelling. Accordingly, the trial court did not err by giving the inference of intent instruction.

Lubers' reliance on State v. Jackson[7] is misplaced. In Jackson, the court held that it was error to instruct the jury that the defendant's intent to commit a crime within

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[3] RCW 9A.52.025.
[4] State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).
[5] RCW 9A.52.010(4).
[6] State v. Berglund, 65 Wn. App. 648, 829 P.2d 247 (1992); State v. Basset, 50 Wn. App. 23, 746 P.2d 1240 (1987).
[7] 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

the building may be inferred from the fact that the defendant *attempted* to enter the building. Unlike here, the inference of intent instruction given in Jackson stated that intent to commit a crime within a building could be inferred by the defendant's *attempt* to enter the building.[8] This was clearly error as it was a misstatement of the law. But the instruction given here did not permit the inference from the fact of an attempted entry; it simply reiterated that the jury may infer intent to commit a crime within the dwelling upon a showing of entry into the dwelling. As discussed above, the evidence was sufficient to establish such a showing.

II. Opinion on Guilt

Lubers next contends that one of the police officer's testimony at trial amounted to an impermissible opinion on his guilt. Specifically, he challenges Officer Terry Persun's testimony that the flashlight and screwdrivers recovered from Lubers were "items . . . typically used in burglaries," and that the flashlight was one "that you would find on somebody who's trying to . . . break into cars or break into a house." The State contends that because Lubers failed to object to this testimony as an impermissible opinion at trial, he may not now challenge it on appeal because he fails to show it is a manifest constitutional error. We agree.

Lubers may only challenge the testimony as an impermissible opinion for the first time on appeal if he demonstrates that it is a manifest constitutional error.[9] To so do, he must identify a constitutional error and show how the alleged error actually affected his rights at trial. "It is this showing of actual prejudice that makes the error 'manifest,'

[8] 112 Wn.2d at 872.
[9] State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

allowing appellate review."[10]

Allowing impermissible opinion testimony about the defendant's guilt violates the right to an independent determination of the facts by the jury.[11] But "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. Rather, "'[m]anifest error' requires a nearly explicit statement by the witness."[12] As our Supreme Court has explained:

> Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.
>
> Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt.[13]

As the State contends, Lubers fails to show that any of the challenged comments amounted to an explicit personal opinion of his guilt. The officer did not offer an opinion or personal belief of Lubers' guilt or innocence or comment directly on the credibility of a witness. Rather, the testimony was simply about the physical evidence, was based on the officer's experience, and still left to the jury the question of whether the burglary was caused by the defendant.[14] Thus, Lubers fails to demonstrate any

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[10] Kirkman, 159 Wn.2d at 926-27 (citations omitted).
[11] 159 Wn.2d at 927.
[12] 159 Wn.2d at 936.
[13] 159 Wn.2d at 936-37 (citations omitted).
[14] State v. Sanders, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992) (officer's opinion that lack of drug paraphernalia in defendant's home indicated that occupants did not regularly use drugs not an impermissible opinion on guilt in a prosecution for possession of cocaine with intent to deliver; opinion was inference based solely on physical evidence and officer's experience and did not express opinion on defendant's guilt or credibility); State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); State v. Toennis, 52 Wn. App. 176, 185, 758 P.2d 539, review denied, 111 Wn.2d 1026 (1988) (testimony in child abuse cases that particular behavior or injuries were consistent with abuse not impermissible opinion on guilt

error, much less manifest constitutional error that may be raised for the first time. Consequently, his claim of ineffective assistance of counsel based on the failure to object to this testimony is also without basis.

III. Statement of Additional Grounds for Review

Nor is there merit to the arguments raised by Lubers in his Statement of Additional Grounds for Review. He first contends that the trial court should have granted him a new trial based on ineffective assistance of counsel because trial counsel threatened him not to testify when in fact he wanted to testify. In denying the motion, the trial court considered a declaration by trial counsel stating that Lubers had expressed his intent not to testify both orally and by letter. We will not disturb the trial court's credibility determinations.

Lubers next contends that trial counsel was ineffective by failing to move to suppress evidence of a flashlight and gloves because there was conflicting testimony about whether these items were recovered or found on Lubers. Again, these are issues of fact that are for the jury to resolve and we will not disturb those factual determinations on appeal.

Lubers also contends that his conviction lacks support because there was no eyewitness testimony that he was actually seen committing the crime and there was no DNA (deoxyribonucleic acid) evidence connecting him to the crime. But direct evidence is not necessary to support a conviction and, as detailed above, there was

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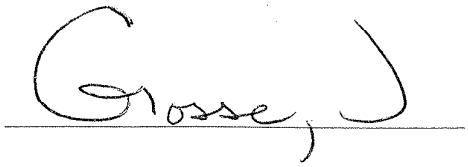
because such testimony still leaves to the jury the question of whether the abuse was caused by the defendant).

sufficient circumstantial evidence that he committed the crime.

Lubers further contends that he should have received credit for time served while he was booked on an unrelated charged before being booked on this charge. But because Lubers fails to show that the court had authority to apply credit for time served on one matter to an additional unrelated matter that occurred after the booking on the initial matter, the court properly declined to grant this request. Finally, Lubers reiterates similar arguments raised in the brief, which, as explained above, lack merit.

We affirm the judgment and sentence.



WE CONCUR: