IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27098-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JUAN LUIS SANCHEZ,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows a conviction for residential burglary. The defendant assigns error to the testimony regarding statements made by a third party to a police officer witness. We conclude that the testimony was not offered to prove the truth of the matter asserted and, therefore, was not hearsay and did not violate the defendant's constitutional right to confrontation. The defendant also asserts that the evidence is not sufficient to support the unlawful entry element of residential burglary beyond a reasonable doubt. We conclude that the State met its burden of production and that the evidence was sufficient. We, therefore, affirm the conviction for residential burglary.

FACTS

Jose and Maria Ortiz rented a house to Jennifer Sterling. The Ortizes live next door. Juan Sanchez broke into the rental home. A neighbor reported the break-in to the Ortizes. The Ortizes went to the rental and found one of the windows open. Ms. Ortiz encountered Mr. Sanchez coming out of the back door carrying a black backpack. Ms. Ortiz asked him who he was. He said he was Ms. Sterling's cousin. Ms. Ortiz said she did not believe him. Mr. Sanchez began yelling at her and calling her names. Ms. Ortiz went to her house to call the police. Mr. Ortiz stayed with Mr. Sanchez. Mr. Ortiz stepped away to close a gate. And Mr. Sanchez fled. The police arrived. Mr. Ortiz speculated to the police that the man was likely in one of the nearby vacant homes. Ms. Sterling returned to her home and told police that no one had permission to be at her house.

Officer Thomas Radke took a description of Mr. Sanchez from Mr. Ortiz and went to search neighboring vacant residences. Officer Radke entered one of the houses through an unlocked door and heard a male voice calling for someone named "Big John." Report of Proceedings (RP) at 115-16. Officer Radke followed the sound of the voice to find a man, Jose Olvera, in the bathroom sitting on a toilet and smoking a cigarette. Officer Radke called Mr. Olvera out of the bathroom and took him into custody. Officer Radke then discovered Mr. Sanchez hiding in the corner of the utility room in the same

house. The officer arrested Mr. Sanchez and returned to search the house. He found a backpack filled with DVDs in one of the bedrooms. The Ortizes arrived at the house and identified Mr. Sanchez as the man they had encountered at Ms. Sterling's home. And Ms. Sterling advised Officer Radke that the DVDs were from her home. He returned the backpack and DVDs to Ms. Sterling.

The State charged Mr. Sanchez with residential burglary. Ms. Ortiz testified at trial. She identified a photograph of Mr. Olvera as the man she saw leaving Ms. Sterling's home. Ms. Sterling refused to testify at trial. The jury found Mr. Sanchez guilty of residential burglary.

DISCUSSION

Right To Confrontation – Hearsay Identification

The police officer testified that Ms. Sterling told him that no one had permission to be at her house. Mr. Sanchez contends that this was hearsay, should not therefore have been admitted, and that its admission violated his constitutional right to confront witnesses. The State urges us not to review Mr. Sanchez's assignment of error since he did not object to the admission of the testimony at trial. The State also argues that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain why police searched nearby houses.

Failure to raise an issue at trial generally waives the issue for appeal. *See* RAP 2.5(a). But Mr. Sanchez maintains that the testimony violated his right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22. And an appellant may raise a "manifest error affecting a constitutional right" on appeal. RAP 2.5(a)(3).

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). The testimony does not violate the constitutional right to confrontation if it is not hearsay. *State v. Neslund*, 50 Wn. App. 531, 556, 749 P.2d 725 (1988). And an out-of-court statement is hearsay only if it is "offered in evidence to prove the truth of the matter asserted." ER 801(c).

Officer Radke testified:

> Earlier, before I checked [the vacant house], [Ms. Sterling] showed up to her house and said that no one had permission to be at her house. I advised her, check your house, tell me what was missing. She went in there while the officers went to check the area for the suspect.

RP at 122.

The State argued to the jury that Ms. Sterling's statement prompted the search of neighboring vacant houses. The statements were, then, not hearsay since they were introduced to show something other than that no one had permission to be in Ms. Sterling's house. They were offered to explain why police set about searching the neighboring houses—a permissible purpose.

Neslund, 50 Wn. App. at 556.

Moreover, any error in the admission of the statement was harmless. *See State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87 (2006) (harmless error analysis applies to violations of the confrontation clause), (Chambers, J., concurring). Such an error is harmless if there is "[overwhelming] untainted evidence" that necessarily leads to a finding of guilt. *Id.* Other evidence easily shows that Mr. Sanchez committed the crime of residential burglary. And we take that up next.

Sufficiency of the Evidence

Mr. Sanchez recaps the evidence, or absence of evidence, and then argues that the State failed to prove "beyond a reasonable doubt" that he illegally entered Ms. Sterling's house. Br. of Appellant at 8-9.

His argument is flawed for two reasons:

First, we must view the evidence in a light most favorable to the State when he challenges the sufficiency of the evidence to support his conviction. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). Mr. Sanchez instead recaps the evidence in a way that tends to support his theory that it is insufficient to show he entered the house.

Second, his argument appears to confuse the State's burden of production with the State's burden of persuasion. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170

(2007). Substantial evidence, our standard of review for any challenge to the sufficiency of the evidence, "describes the burden of production in all cases." *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992). The phrase "'beyond a reasonable doubt' describes the burden of persuasion in all criminal cases." *Id.* We always decide whether the State met its burden of production when we apply the "substantial evidence" standard of review. *Id.* And the jury decided whether the State met its burden of persuasion when it considered the strength of the State's circumstantial evidence here. *Id.* It follows then that we will review the record, including the verbatim report of proceedings here, to determine whether the State met its burden of production. *Henjum,* 136 Wn. App. at 810.

A person commits residential burglary if, with intent to commit a crime against a person or property therein, that person enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025(1). Circumstantial evidence is sufficient to show unlawful entry. *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215 (2005); *State v. Couch*, 44 Wn. App. 26, 720 P.2d 1387 (1986).

Here, the State presented evidence that Ms. Ortiz encountered Mr. Sanchez leaving the rental house with a backpack. RP at 158-60. Mr. Ortiz arrived and saw Mr. Sanchez talking to or hollering at Ms. Ortiz. RP at 140. And Mr. Sanchez left the house with a backpack and DVDs that did not belong to him, so the element of intent to commit a

crime against property therein is also supported. RP at 119, 122, 143, 158-60; RCW 9A.52.025(1). The State met its burden of production by producing evidence, which if believed by the jury, would support the elements of the crime of residential burglary.

We then affirm Mr. Sanchez's conviction for residential burglary.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Brown, J.

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Korsmo, J.