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Division III
State of Washington
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SUPREME COURT NO. 102870-9

NO. 39096-9-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO CHAMPINE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Harold D. Clarke, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
2200 6TH Ave., Suite 1250
Seattle, WA 98121
(206) 623-2373

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A. IDENTITY OF PETITIONER

Arturo Champine, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Mr. Champine requests review of the Court of Appeals decision in State v. Champine, COA No. 39096-9-III, filed February 8, 2024, and attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

1. Whether trial counsel's failure to object to the prosecutor's repeated misstatements of law regarding a key trial issue denied petitioner his constitutional right to effective representation and a fair trial.

2. Whether the Court of Appeals' harmless error analysis conflicts with this Court's opinions in State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015), and State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984), thereby warranting review under RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

1. Trial Proceedings

The Spokane County Prosecutor's Office charged Arturo Champine with burglary in the second degree, alleging that he entered or remained unlawfully in downtown Spokane's Hotel Ruby while intending to commit a crime. CP 5.

Evidence at trial established that, on November 17, 2021, Lisa Talmud worked as a front desk agent at Hotel Ruby. 2RP 256-257, 263. The hotel lobby is small and contains a reception area where guests can check in, make reservations, and conduct other hotel business. 2RP 262-263. That area consists of a raised counter – approximately 3½ to 4 feet tall – for members of the public to use while interacting with the desk agent. 2RP 170-171, 178, 262. The desk agent is stationed on the other side of that counter at a somewhat lower but attached desk, upon which sits a computer and phone.

2RP 262-263; exhibit 18. This desk area behind the counter is intended only for hotel staff. 2RP 170.

Adjacent to the reception counter/desk is a doorway to the hotel's bar (Sapphire Lounge) and restrooms. 2RP 170, 178-179, 272-274; exhibit 18. To dissuade non-staff from entering the area behind the counter (either from within the lobby or from the door to this hallway), the hotel installed a curtain that can be drawn across the opening to that space. 2RP 170-171, 183-184, 273. There was no evidence of "employees only" signage on the curtain or anywhere else in the lobby. 2RP 184-185. Ms. Talmud testified she always kept the curtain open except for once or twice when intoxicated bar patrons tried to enter the space. 2RP 273.

According to Ms. Talmud, agents dealt with guests over the front counter; there was never a reason for a guest to reach over the counter and guests did not come around to the desk side. 2RP 264-265, 274-275. Desk

agents sometimes left for bathroom breaks or to briefly handle other hotel business. 2RP 263. When stepping away for any significant period, Ms. Talmud would typically place a sign on the counter indicating she would return shortly. 2RP 263, 272.

On the evening of November 17, Ms. Talmud stepped away from the counter and into a nearby office to help another employee with a computer issue. 2RP 265-267. Because she remained close by, no one was in the lobby, and she was gone for only a few minutes, she did not use the sign on that occasion. 2RP 265-266, 274. She left her personal iPhone next to the computer on the desk. 2RP 259, 266.

Hotel surveillance cameras captured what happened next. 2RP 171-177; exhibit 5. Mr. Champine approached the exterior hotel door carrying a large duffel bag and, after briefly lingering outside, entered the small lobby. 2RP 180, 217-218; exhibit 5 (channel 6). Once

inside, he stood at the unattended front counter and waited for assistance. While doing so, he noticed Ms. Talmud's iPhone on the desk and, after waiting a bit longer, reached over the counter, grabbed the phone, placed it in his pocket, and exited the lobby. 2RP 177-180, 216-217; exhibit 5 (channels 1 and 2).

Within a few minutes of returning to the front desk, Ms. Talmud realized her phone was missing. 2RP 267. A supervisor reviewed surveillance footage and discovered the phone had been taken. 2RP 169, 268. Ms. Talmud then called police and reported it stolen. 2RP 268-269. Police recognized Mr. Champine from the surveillance footage and arrested him a week later. 2RP 188-198, 213-214. Ms. Talmud's iPhone was never recovered. 2RP 240.

During closing arguments, the prosecutor conceded that, among the elements of burglary, whether Mr. Champine entered or remained unlawfully was "the hard

one." 2RP 306. Summarizing his theory as to each, it quickly became clear that "entering unlawfully" was based on Mr. Champine reaching over the counter and into the employee area, and "remaining unlawfully" was erroneously based on commission of a crime on the premises, i.e., his successful theft of the phone.

The prosecutor said:

> Now your duty is to determine whether or not Mr. Champine unlawfully entered the employees' side of the check-in counter at the Hotel Ruby to take Miss Talmud's cell phone, or he unlawfully remained in the Hotel Ruby after taking Miss Talmud's cell phone.

2RP 305. And, shortly thereafter, the prosecutor said:

> you should be satisfied beyond a reasonable doubt that Mr. Champine unlawfully entered the employee side of the check-in counter to take Miss Talmud's phone or, again, he unlawfully remained in that hotel after he did take the phone.

2RP 306.

The prosecutor's later arguments were consistent. For "entered unlawfully," the prosecutor told jurors that,

while Mr. Champine initially entered the hotel lawfully, he subsequently entered unlawfully when he reached into and broke the plain between the reception counter and employee-only desk space for the purpose of taking the phone. 2RP 308, 310-312.

For "remained unlawfully," the prosecutor repeatedly argued that Mr. Champine did so the moment he stole the cell phone, a criminal act the prosecutor argued automatically revoked his license to be in any part of the hotel. See 2RP 308-309 (although initially licensed to enter the hotel, "it's when he committed that theft of [the phone] that that license was revoked, exceeded the scope of his privilege to be there. That is the unlawful remaining aspect that you have to consider."); 2RP 309 ("it didn't matter how long Mr. Champine remained in the Hotel Ruby because when that theft occurred, his license to be present in that hotel was revoked. From the moment of that revocation . . . [h]e remained unlawfully

until he left."); 2RP 312 ("after that phone was taken, he unlawfully remained in the Hotel Ruby because his license to be in that building as a whole was revoked").

Defense counsel did not object to any of these improper arguments concerning "unlawfully remaining."

During the defense closing argument, counsel argued that Mr. Champine had committed a theft and not a burglary. 2RP 312-313. Counsel argued the absence of an "employees only sign" and the fact the curtain had not been drawn closed to separate the area behind the counter demonstrated Mr. Champine did not unlawfully enter or remain in that space when he reached for the phone. Instead, the area on both sides of the counter was a "transactional zone" and not clearly for employees only. 2RP 314-315, 318-321. Thus, Mr. Champine had merely committed an uncharged theft. 2RP 320-322.

In rebuttal, the prosecutor again distinguished entering unlawfully and remaining unlawfully (and again

erroneously equated commission of a crime with revocation of the privilege to be on the premises):

> One thing I want to make sure is clear, I think it is, just to be sure, as to unlawful entry, that is the unit of the employee work area, the unit where the Hotel Ruby had their employees conduct business.
>
> As to the unlawful remaining, that is applied to the hotel as a whole because it was the hotel that implicitly gave Mr. Champine the license to enter. When he committed that theft, that license was revoked by implication. He remained unlawfully thereon.

2RP 324 (emphasis added). As before, defense counsel did not object.

Jurors struggled with sufficiency of the State's proof that Mr. Champine had entered or remained unlawfully in the hotel lobby, focusing their efforts in particular on the possibility Mr. Champine remained unlawfully. During deliberations, they asked:

> Is remaining in space after committing a crime considered, by law, remaining unlawfully or any extended definition of "remaining unlawfully"[?]

CP 64.

After consulting with counsel, the trial judge responded that he was unable to give any further instructions and told jurors to reread the instructions given. CP 64; RP 337. Shortly thereafter, jurors convicted Mr. Champine of burglary. CP 65; 2RP 330-331.

2. Court of Appeals

On appeal, Mr. Champine argued the prosecutor's repeated misstatements of the law were misconduct that denied him a fair trial. Moreover, since defense counsel failed to object to any of the misstatements, counsel was ineffective. See generally AOB, at 13-28; RBF, at 1-5.

On the issue of prejudice, Mr. Champine cited State v. Allen, 182 Wn.2d 364, 378-380, 341 P.3d 268 (2015), and State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984), both of which indicate that – when assessing

the impact of prosecutorial misconduct – questions from the jury are a primary consideration. See AOB, at 24-25; RBF, at 4-5; see also Statement of Additional Authorities (filed 12/4/23) (highlighting this aspect of Davenport).

The State conceded the prosecutor had repeatedly misstated the law, acknowledging, "it is not the intent to commit a crime or the commission of the crime that causes the license to be impliedly exceeded or revoked, but the unlicensed entry of an individual into an area intended only for employees in an otherwise public space." BOR, at 14-15. On the issue of prejudice, the State challenged Mr. Champine's reliance on the jury's question, arguing the question "inheres in the verdict." BOR at 26-27 (citing State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)).

In a decision comprised of three opinions, the Court of Appeals agreed the prosecutor had repeatedly engaged in misconduct by asserting that Mr. Champine's commission of a crime on hotel premises automatically

revoked his license and established burglary. See Slip Op., at 9-12 (citing State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988); State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005); State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998)).

However, the lead opinion (written by Judge Cooney) rejected the misconduct claim under the "flagrant and ill-intentioned" standard applicable because defense counsel failed to object below. Judge Cooney found that a curative instruction could have obviated any prejudice and – because one of the prosecutor's two theories of liability (unlawful entry) was properly argued – Champine could not establish a substantial likelihood the prosecutor's misstatement on unlawful remaining affected the jury's verdict. Slip Op., at 12-15.

On the claim of ineffective assistance of counsel, Judge Cooney agreed defense counsel's failure to object was not the result of any legitimate strategy and that he

had performed deficiently. Slip Op., at 17. But Judge Cooney found no prejudice, reasoning that – in response to the jury's question on unlawful remaining:

> the court directed the jury back to the instructions. The instructions are an accurate statement of the law and support the State's contention that Mr. Champine committed burglary by unlawfully entering a restricted area reserved for employees and snatching an employee's cell phone from the restricted area.

Slip Op., at 19. In other words, like his rejection of the misconduct claim under the flagrant and ill-intentioned standard, for the ineffective assistance claim, Judge Cooney again rejected the possibility jurors relied on the prosecutor's misstatements regarding unlawful remaining when rendering their guilty verdict. Instead, he surmised that jurors may have convicted Mr. Champine for unlawful entry, a theory unaffected by the prosecutor's misstatements or defense counsel's inaction.

Judge Lawrence-Berrey filed a concurring opinion on the issue of prejudice. In particular, he focused on the jury's

question, which had been prompted by the prosecutor's repeated misstatements of the law on unlawful remaining: "Is remaining in space after committing a crime considered, by law, remaining unlawfully or any extended definition of "remaining unlawfully"[?]. CP 64.

Judge Lawrence Berrey wrote:

> The jurors' question to the court indicates two things. First, some jurors did not understand the law, likely because of the prosecutor's confusing closing argument. Second, some jurors did understand the law, likely because of the court's clear instructions and because of defense counsel's correct closing argument. Had all jurors misunderstood the law they would not have asked the court to clarify it.
>
> The court's written instructions and defense counsel's closing argument made plain that the question for the jury was whether Mr. Champine, by reaching across the barrier between where he stood and the front desk, entered an area not open to the public. This is the point that differentiates theft from burglary. The court, by redirecting the jurors to its clear written instructions, emphasized the preeminence of those instructions over the prosecutor's closing argument.

Slip. Op. (Lawrence-Berrey, J., concurring), at 1.

Judge Staab dissented. She agreed with the other judges that defense counsel's failure to object established deficient performance but, unlike her colleagues, she also found reversible prejudice. Slip. Op. (Staab, J., dissenting), at 1-2.

Regarding the jury's question during deliberations, Judge Staab reasoned:

> if the jury was not convinced that reaching across the counter constituted burglary then it should have entered a verdict of not guilty. Instead, the jury's question to the court indicates that it considered the State's incorrect argument that Champine's license to be in the hotel was implicitly revoked when he committed theft.

Slip Op. (Staab, J., dissenting), at 3.

Judge Staab found the evidence establishing that Mr. Champine unlawfully entered when he grabbed the phone debatable. Without defense objections to the prosecutor's repeated misstatements on unlawful

remaining, or an explicit judicial response to the jury's question on unlawful remaining, Judge Staab reasoned that Mr. Champine had satisfied his burden of demonstrating a reasonable probability the outcome of his trial would have differed had his attorney lodged timely and proper objections to the prosecutor's misstatements of the law. Slip Op. (Staab, J., dissenting), at 3.

Mr. Champine now seeks this Court's review.

E. ARGUMENT

THE COURT OF APPEALS' DECISION CONFLICTS WITH ALLEN AND DAVENPORT.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Failing to object constitutes ineffective assistance where

(1) the failure was not a legitimate strategic decision; (2) an objection would likely have been sustained; and (3) there is a reasonable probability the jury verdict would have differed with a proper objection. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); In re Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Everyone agrees Mr. Champine's lawyer performed deficiently and there was no legitimate strategy behind failing to object to the prosecutor's repeated misstatements of the law on what constitutes "unlawful remaining" for burglary. The only disputed issues are whether the record demonstrates a reasonable probability jurors may not have convicted with a proper objection and how to make that determination.

The general rule is that "[t]he individual or collective thought processes leading to a verdict 'inhere in the

verdict' and cannot be used to impeach a verdict." State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (citing cases). "'Questions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.'" Id. (quoting State v. Miller, 40 Wn. App. 483, 489, 698 P.2d 1123, review denied, 104 Wn.2d 1010 (1985)).

But this Court has chosen not to follow the general rule when assessing the impact of prosecutorial misconduct.

In State v. Davenport, the defendant was charged with burglary for entering and stealing from a residence. Neighbors saw Davenport at the scene of the crime carrying stolen property to a car driven by Timothy White. 100 Wn.2d at 758. In closing argument, defense counsel suggested White may have been the individual who entered the house, meaning the State had failed to prove that Davenport unlawfully entered. Id. at 759. Although

jurors had not been instructed on accomplice liability, in rebuttal – and over a defense objection – the prosecutor told jurors it did not matter which individual entered the home because both men were accomplices to the crime. Id.

During deliberations, jurors sent a note requesting a definition of "accomplice" and asking if the prosecutor's assertion they could convict Davenport even if he did not enter the home was true. Id. at 759 ("does the defendant have to physically enter and remove the identified items or can he be simply an outside participant?"). The judge responded by directing jurors to "rely on the law given in the Court's instructions to the jury." Id. Jurors then returned a verdict of guilty. Id.

On appeal, the Court of Appeals agreed the prosecutor's argument on the law was improper but deemed the error harmless and affirmed Davenport's burglary conviction. Id. at 760-761.

This Court reversed, finding the prosecutor's conduct very serious because he had unilaterally presented a new theory of criminal liability. Id. at 763. This Court also rejected the notion that simply telling jurors to rely on the instructions already provided sufficed to remedy the prejudice, noting "'we must presume, *absent any contrary showing*, that the jury followed the court's instruction.' (italics ours.) [State v.] Cerny, [78 Wn.2d 845,] at 850, 480 P.2d 199 [1971]. In this case a contrary showing has been made." Id. at 763-764.

An important part of this showing was the jury's inquiry: "the jury requested a definition of accomplice, *i.e.*, can he be an outside participant? This inquiry establishes not only that during deliberations the jury was considering the prosecutor's improper comment, but also, that the jury considered the statement to be a proper statement of the law." Id. at 764.

Moreover, the trial judge's decision to merely tell jurors to rely on the written instructions already provided was insufficient to convince this Court there was no reversible error: "This could not fairly be called a curative instruction. At best, this instruction implicitly directed the jury not to consider accomplice liability, but nevertheless, failed to inform the jury that the State's comment was improper and not to be considered." Id. "The record clearly establishes that the jury was influenced, if not misled, by the prosecutor's comment. Therefore, we are unable to say from the record whether the petitioner would or would not have been convicted, but for the improper comment." Id. at 765. This possibility of prejudice was sufficiently strong that reversal was the only appropriate remedy. Id.

The similarities between Davenport and Mr. Champine's case are apparent. In both cases, the prosecutor argued an impermissible theory of criminal

liability. In both cases, jurors asked whether the prosecutor's argument was correct. And in both cases the court failed to provide a definitive answer, instead simply telling jurors to rely on the written instructions already provided. Davenport got a new trial. Champine did not.

In State v. Allen, at defendant's murder trial, the prosecutor repeatedly misstated the standard for accomplice liability. Although Washington law required proof that Allen had actual knowledge the person he drove to and from the murder scene intended to shoot four police officers, prosecutors repeatedly told jurors they could convict Allen if he "should have known" the killer's intent. 182 Wn.2d at 369-372. During deliberations, jurors sent a note to the judge asking, "If someone 'should have known' does that make them an accomplice?" Id. at 372. By agreement of the parties, the court responded by

merely referring jurors back to the jury instructions already provided. Id. at 373-373.

In finding reversible prejudice, this Court noted the misstatement pertained to a key issue in the case, the prosecutor misstated the law several times (including during rebuttal argument), and the trial court overruled defense objections. Id. at 375-378. However, the factor deemed "perhaps most important" was the jury's question, which "reveals that the jury was influenced by the improper statement of law during deliberations" and revealed the possibility jurors would have acquitted if not misled. Id. at 378-379.

Like Davenport, the similarities between Allen and Mr. Champine's case are apparent. The prosecutor's misstatement on "unlawful remaining" pertained to a key issue in Mr. Champine's case, it was repeated several times (including in rebuttal argument), and the jury's question reveals jurors were influenced by the improper

statement of the law during deliberations. The only circumstance missing in Mr. Champine's case is an objection from defense counsel. *Which is why Mr. Champine brings his claim as one of ineffective assistance of trial counsel.*

Despite Mr. Champine citing both Davenport and Allen in the Court of Appeals, Judge Cooney's lead opinion does not mention either. Nor does Judge Lawrence-Berrey's concurrence. There is no indication either judge accorded the jury's question during deliberations in Mr. Champine's case the importance this Court's decisions in Davenport and Allen require. In fact, counterintuitively, the concurrence treats the jury's question as proof some jurors were *not* misled by the prosecutor's repeated misstatements of the law. See Slip Opinion (Lawrence-Berrey, J., concurring), at 1.

Only the dissent treated the jury's question (and the other circumstances) consistent with Davenport and

Allen. In finding that defense counsel's failure to object resulted in reversible prejudice, Judge Staab properly reasoned, "if the jury was not convinced that reaching across the counter constituted burglary then it should have entered a verdict of not guilty. Instead, the jury's question to the court indicates that it considered the State's incorrect argument that Champine's license to be in the hotel was implicitly revoked when he committed the theft." Slip Op. (Staab, J., dissenting), at 3.

Because the Court of Appeals' opinion conflicts with Allen and Davenport, and because Mr. Champine was denied his right to effective assistance of counsel, review is appropriate under RAP 13.4 (b)(1).

F. CONCLUSION

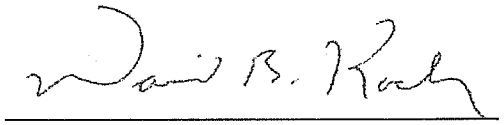
Mr. Champine respectfully asks this Court to grant his petition and reverse the Court of Appeals decision based on a violation his constitutional right to effective representation.

I certify that this petition contains 3,708 words excluding those portions exempt under RAP 18.17.

DATED this 11th day of March, 2024.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC



DAVID B. KOCH, WSBA No. 23789
Attorneys for Petitioner

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ARTURO JEROME CHAMPINE, Appellant.	)	No. 39096-9-III UNPUBLISHED OPINION

COONEY, J. — Arturo Champine was convicted by a jury of second degree burglary after he entered the lobby of a hotel, reached over the front desk, and took an employee's cell phone. On appeal, Mr. Champine asserts the prosecutor committed misconduct during summation by improperly arguing that his license to remain in the hotel was implicitly revoked when he took the employee's cell phone. Mr. Champine further claims his trial attorney was ineffective for failing to object to the prosecutor's misstatement of the law. Lastly, Mr. Champine challenges the court's imposition of the $500 victim penalty assessment (VPA).

Mr. Champine has failed to demonstrate that the prosecutor's mischaracterization of the law ascended to the level of misconduct that was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. He has also failed to establish the result of the trial would have been different had his attorney timely objected

the prosecutor's mischaracterization of the law. Therefore, we affirm his conviction and remand for the trial court to strike the VPA from the judgment and sentence.

BACKGROUND

The facts underlying Mr. Champine's conviction are undisputed. On November 17, 2021, Mr. Champine entered the lobby of the Hotel Ruby. The hotel employee assigned to the front desk had temporarily left the area to assist a bartender in the back of the office, leaving her cell phone at the front desk. The front desk is a raised counter that separates the lobby area from the receptionist desk. The area can be closed off by a curtain located to the right of the receptionist desk. In the employee's absence, surveillance video captured Mr. Champine reach over the front desk, grab her cell phone, place it in his pocket, and exit the lobby.

The employee reviewed video from the surveillance camera and discovered her phone had been purloined. The employee then called the police and reported her phone

stolen. Mr. Champine was arrested a little over a week later for second degree burglary after police recognized him from the surveillance video.

Prior to trial, Mr. Champine filed a *Knapstad*[1] motion to dismiss the burglary charge, arguing that the allegations failed to establish a prima facie case that he entered or remained unlawfully in a building. The court denied the motion.[2] The case later proceeded to trial. At the conclusion of the State's case, Mr. Champine moved to dismiss the charge, arguing that no reasonable jury could find beyond a reasonable doubt all the elements of the crime. Specifically, Mr. Champine argued that he was in a public place, therefore not unlawfully on the premises. The court denied the motion and defense counsel rested without producing additional evidence.

The court then instructed the jury. Relevant to this appeal are the following instructions:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark,

---

[1] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

[2] The *Knapstad* procedure is akin to a summary judgment motion in civil cases. In both instances, the court refrains from passing judgment on the facts. *Knapstad*, 107 Wn.2d at 355-56. In its order denying Mr. Champine's *Knapstad* motion, the trial court limited the impact of its ruling: "The Court's findings and conclusions of law contained herein are solely for the purpose of ruling on the Defendant's Motion to Dismiss Pursuant to *State v. Knapstad*." Clerk's Papers (CP) at 16 (emphasis omitted).

> statement, or argument that is not supported by the evidence or the law in my instructions.

Clerk's Papers (CP) (Jury Instruction (JI) 1) at 48;

> To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 17, 2021, the defendant entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP (JI 8) at 56;

> A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
>
> A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.

CP (JI 9) at 57; and

> The term enter includes the entrance of the person, or the insertion of any part of the person's body, or any instrument or weapon held in the person's hand and used or intended to threaten or intimidate another person, or to detach or remove property.

CP (JI 10) at 58.

After the jury was instructed, the State presented its closing argument. Because this appeal concerns the prosecutor's alleged mischaracterization of the law during summation, a recitation of portions of his argument is warranted. The prosecutor began his closing argument by explaining that his statements were not the law.

> I want you to know, though, what I'm telling you right now is merely argument. I'm not the law, nor are my words. The instructions that you have each been provided and had read to [you] by the Judge, that's what you have to make your analysis on. Those instructions tell you what the law is.

Rep. of Proc. (RP) at 305.[3]

The prosecutor then proposed two means by which Mr. Champine may have committed second degree burglary: one by unlawfully remaining in the hotel and the second by unlawfully entering (reaching into) a restricted area within the lobby of the hotel.

With respect to the first means, the prosecutor argued:

> [I]t's when he committed that theft of [the employee]'s iPhone 13 Pro Max that that license was revoked, exceed[ing] the scope of his privilege to be there. This is the unlawful remaining aspect that you have to consider.
>
> . . . .
>
> From the moment of that revocation, Mr. Champine was unlawfully in the Hotel Ruby. He remained after having license to originally be there. That license was revoked. He remained unlawfully until he left.

RP at 308-09;

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[3] The report of proceedings cited in this opinion are from proceedings dated February 10, 2022.

> [A]fter that phone was taken, he unlawfully remained in the Hotel Ruby because his license to be in that building as a whole was revoked.

RP at 312; and

> When he committed that theft, that license was revoked by implication. He remained unlawfully thereon.

RP at 324.

In advancing the unlawful entry means, the prosecutor argued:

> As you're also instructed, it does not matter that Mr. Champine's arm—excuse me—it does not matter that only Mr. Champine's arm broke that plain dividing the countertop to the employee area as [sic] and enter, the definition of enter, again, includes the insertion of any part of Mr. Champine's body to remove property. Again, all of you have seen the surveillance.

RP at 309;

> Now your duty is to determine whether or not Mr. Champine unlawfully entered the employees' side of the check-in counter at the Hotel Ruby to take [the employee]'s cell phone.
>
> . . . .
>
> . . . [Y]ou should be satisfied beyond a reasonable doubt that Mr. Champine unlawfully entered the employee side of the check-in counter to take [the employee]'s phone . . . .

RP at 305-06;

> Mr. Champine exceeded the scope of his license by entering the employee side of that check-in counter to take the phone.

RP at 309; and

> Because it's clear Mr. Champine both unlawfully entered that employee work station by sticking his arm across that countertop for the purpose of taking that phone while he was within the Hotel Ruby.

RP at 312.

The prosecutor concluded his argument by equally promoting both theories.

> Again, it is not Mr. Champine's burden, but remember your common sense, also. Why? Because it's clear Mr. Champine both unlawfully entered that employee work station by sticking his arm across that countertop for the purpose of taking that phone while he was within the Hotel Ruby. Additionally, after that phone was taken, he unlawfully remained in the Hotel Ruby because his license to be in that building as a whole was revoked.

RP at 311-12.

Defense counsel did not object to the State's arguments. Defense counsel then presented a closing argument to the jury. Defense counsel acknowledged that Mr. Champine had taken the employee's cell phone, thereby committing theft.

> There is no[ ] conflicting evidence at trial. The evidence is consistent. Mr. Champine is seen on a video camera entering a public hotel lobby. Mr. Champine enters and goes to the counter and waits and looks, waits and looks, and takes a phone from across the counter and immediately departs.

RP at 313; and

> Defense's position is, it's a theft. If a reasonable person can't understand these boundaries, if a reasonable person doesn't know when they're in that situation, it's a theft.

RP at 320.

In response to the State's argument, defense counsel accurately applied the law to the evidence.

> The defense is arguing this is a transactional zone. How would one know that is an employee work space only area if it's not clearly labeled employee work space area?

> The other argument that the State is effectively trying to articulate is what is called the invisible plain argument, which is where does this area start and stop where the hand crosses over to know you've gone from one area to the other. If you were—if a person were to be in a hotel and there's a door that says "employee only area," and they open that door and stick their hand through it, well, in that situation there's a clearly identified area. In the area where somebody is standing at the public hotel counter lobby, how is a reasonable person to know where this invisible plain is that they can or can't move their hand across? The entire time Mr. Champine stood in the public area of the hotel lobby.

RP at 319. Defense counsel then concluded his argument, reaffirming to the jury the importance of the court's instructions on the law.

> Discuss the evidence, discuss the elements and ask questions. Please be rigorous and scrutinize the language of the jury instructions and challenge these definitions. Do not overlook any key aspects of the jury instructions or critical evidence that was presented at trial.

RP at 322.

During deliberations, the jury asked the court, "Is remaining in [a] space after committing a crime considered, by law, remaining unlawfully or any extended definition of 'remaining unlawfully'[?]" CP at 64. After consulting with counsel, the judge responded that he was unable to provide further instructions and informed the jurors to reread the instructions. Following deliberations, the jury convicted Mr. Champine of second degree burglary, and this appeal followed.

ANALYSIS

On appeal, Mr. Champine claims the prosecutor mischaracterized the law in his summation to the jury, thereby depriving him of a fair trial. He contends the

mischaracterization of the law amounted to prosecutorial misconduct and his trial attorney was ineffective for failing to object. The State maintains that the arguments were an accurate statement of the law and that Mr. Champine has failed to show prejudice.

We conclude the prosecutor mischaracterized the law when he argued Mr. Champine's privilege to remain in the hotel lobby was implicitly revoked when he took the employee's cell phone. However, the prosecutor's argument did not rise to the level of misconduct that was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. We further conclude that Mr. Champine has failed to establish that the result of the trial would have been different had his trial counsel timely objected to the prosecutor's misstatement of the law.

PROSECUTOR'S MISCHARACTERIZATION OF THE LAW

We first address whether the prosecutor misstated the law during closing argument.

A person commits the crime of second degree burglary when, with the intent to either commit a crime against a person or property, "he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). A person "enters or remains unlawfully" when they are not licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(2). If only part of the building is open to

the public, the license or privilege does not extend to those areas not open to the public. RCW 9A.52.010(2).

Here, the alleged misconduct relates to the "remains unlawfully" element. "A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary." *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005). Consequently, the lawful entry or remaining in a business open to the public is not rendered unlawful solely by the defendant's intent to commit a crime. *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998). Rather, the criminal intent must be accompanied by an unlawful presence for a burglary to occur. *Allen*, 127 Wn. App. at 137. Accordingly, one may commit second degree burglary when he or she lawfully enters a building but later exceeds the scope of an implied or express privilege by intruding into areas that are not open to the public. *Id.* at 135. It is for the trier of fact to infer limitations on the scope of a person's privilege to be on the premises based on the particular facts of the case. *State v. Collins*, 110 Wn.2d 253, 261-62, 751 P.2d 837 (1988).

During summation, the prosecutor repeatedly argued that Mr. Champine's privilege to remain in the lobby was implicitly revoked when the theft occurred. On appeal, the State cites *Collins* to support its contention that committing a crime within a building revokes the privilege to remain, and thus constitutes a burglary. In *Collins*, the defendant was invited into a person's home for the purpose of using a telephone. 110 Wn.2d at 255. After using the telephone, Mr. Collins grabbed two individuals within the

home and pulled them into a bedroom where he raped one and assaulted the other. *Id.* Among other charges, Mr. Collins was charged with first degree burglary. *Id.*

On review, the Supreme Court held that from the facts in that case a jury could infer that Mr. Collins' license to enter was limited to a specific area of the home and for a single purpose. *Id.* at 261. The High Court held that a reasonable person would not construe the invitation to enter as a general invitation to access all areas of the house. *Id.* The court further held that where entry was granted for a limited purpose and the homeowner thereafter resists aggressive behavior by the invitee who demonstrated an ulterior motive, "a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case." *Id.* The court explained that its holding on implicit revocation was limited, and should be applied on a case-by-case basis to avoid turning every indoor crime into a burglary. *Id.* at 261-62.

The holding in *Collins* does not apply to the circumstances of this case. Unlike a business that is open to the public, one has an enhanced expectation of privacy in their home. Thus, an invitation into one's home for a single reason, by its very nature, is highly restrictive. A minor incursion beyond the bounds of the invitation could implicitly revoke the invitation. Were we to adopt the State's argument, that commission of any crime in a building revokes the privilege to remain, a misdemeanor theft in a store might be charged as a burglary.

Here, to the extent the prosecutor argued that Mr. Champine unlawfully remained at the hotel by taking the phone, rather than by entering an area not open to the public, he mischaracterized the law.

PROSECUTORIAL MISCONDUCT

We next address Mr. Champine's contention that the prosecutor engaged in misconduct when he repeatedly mischaracterized the law to the jury.

Prosecutorial misconduct is grounds for reversal if "'the prosecuting attorney's conduct was improper and prejudicial.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). The defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). A prosecutor's argument must be confined to the law stated in the trial court's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). When a prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the prosecutor's actions are considered improper. *Id.*

When examining a prosecutor's alleged misconduct, the improper conduct is not viewed in isolation. *Monday*, 171 Wn.2d at 675. Instead, the conduct is looked at "in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). The

purpose of viewing the conduct in this light is to determine if the prosecutor's conduct was prejudicial to the defendant, and it will only be viewed as prejudicial when there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* Therefore, when viewing misconduct, the court should not focus on what was said or done but rather on the effect that flowed from the misconduct. *Emery*, 174 Wn.2d at 762.

If a defendant fails to object at trial to the prosecutor's misconduct, then the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2012)).

Here, Mr. Champine fails to meet this heightened standard. Although, the prosecutor misstated the law, the misstatement must be viewed in the context of the entire argument, the evidence presented in the case, and the court's instructions to the jury. Additionally, Mr. Champine is unable to establish that no curative instruction would have obviated any prejudicial effect on the jury and that the improper argument resulted in prejudice.

As a preliminary matter, Mr. Champine does not assign error to the jury instructions. Jury instructions are proper when they do not mislead the jury and properly inform the jury of the applicable law. *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), *abrogated on other grounds*, *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020). We presume that jurors follow instructions, and here, there is no evidence to the contrary. *Hizey v. Carpenter*, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992).

Mr. Champine is unable to demonstrate that the prosecutor's mischaracterization of the law resulted in prejudice that had a substantial likelihood of affecting the jury verdict. The prosecutor advanced two theories by which Mr. Champine may have committed burglary. One of the two theories comported with the jury instructions, the second did not.[4] The argument conforming to the jury instruction was clearly articulated by the prosecutor as evidenced by defense counsel choosing not to respond to the improper argument.

Moreover, defense counsel agreed that "Mr. Champine enters and goes to the counter and waits and looks, waits and looks, and takes a phone from across the counter

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[4] Instruction 9 states in part, "A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public." CP at 57.

Instruction 10 states, "The term enter includes the entrance of the person, or the insertion of any part of the person's body, or any instrument or weapon held in the person's hand and used or intended to threaten or intimidate another person, or to detach or remove property." CP at 58.

and immediately departs." RP at 313. Mr. Champine's concession invited the jury to apply the law from the instructions to the agreed facts. Specifically, the jury was tasked with deciding whether Mr. Champine's brief intrusion into the employee area of the hotel lobby constituted an unlawful entry. Viewing his concession in light of instruction 9 and instruction 10, Mr. Champine is unable to show the prosecutor's mischaracterization of the law resulted in prejudice that had a substantial likelihood of affecting the jury verdict. The stipulated evidence supports the jury's verdict.

Mr. Champine fails to persuade us that the prosecutor's mischaracterization of the law prejudicially affected him. This is because the court referred the jury back to its clear instructions that explain the right to remain can be revoked by entering an area not open to the public, and that entering can occur even if only a body part enters the area. We are confident the jury based its decision on these clear instructions.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Champine argues that his trial attorney was constitutionally ineffective for failing to object to the prosecutor's misstatement of law during summation. The State argues that regardless of any deficiencies in representation, Mr. Champine is unable to show prejudice.

Defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue

of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Ineffective assistance of counsel claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his or her counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A defendant alleging ineffective assistance of counsel bears the burden of showing deficient representation. *McFarland*, 127 Wn.2d at 335. In reviewing the record, there is a strong presumption that counsel's performance was reasonable. *Id.* The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's conduct can be characterized as a legitimate trial strategy or tactic, their performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

Even if we find that counsel's performance was deficient, a defendant must affirmatively prove prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This requires more than simply showing that "the errors had some conceivable

effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant demonstrates prejudice by showing that the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337.

Here, Mr. Champine has demonstrated that his trial attorney's failure to object to the prosecutor's improper arguments was not part of a legitimate trial strategy. Through his attorney, Mr. Champine stipulated to reaching over the front desk and taking the employee's cell phone. Consequently, the only debatable issue at trial was whether his actions were sufficient to support a conviction for burglary.

The jury viewed a security video that depicted Mr. Champine entering the lobby of the hotel, reaching over the front desk, grabbing the phone, and departing the hotel. Mr. Champine's trial counsel appositely recognized the narrow legal issue presented by the facts of the case. Both prior to trial and at the conclusion of the State's case at trial, defense counsel challenged the sufficiency of the State's evidence. Given the narrow issues presented by this case, there is no legitimate trial strategy for failing to object to the State's mischaracterization of the law that a theft implicitly rescinds one's privilege to remain in a business that is generally open to the public. Defense counsel's failure to object constitutes performance that falls below an objective standard of reasonableness.

However, Mr. Champine is unable to demonstrate he was prejudiced by his attorney's failure to object. Prejudice exists if there is a reasonable probability that, but

for counsel's errors, the result of the trial would have been different. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *Strickland*, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

During summation, the State advanced two theories of burglary, one of which misstated the law and was unsupported by the court's instructions to the jury. Mr. Champine's trial counsel conceded that a theft occurred, but argued that the front desk was a "transactional zone" that was not clearly marked or delineated as an employee-only area and thus the State had failed to prove that reaching into this area constituted a burglary. RP at 319. Although Mr. Champine's trial counsel did not address the State's theory of implicit revocation of his license to remain in the building, he urged the jurors to scrutinize the State's second theory.

> At a countertop where you return an item in Walmart, there's a variation in the countertop height. And there's a computer on the other side normally and a phone on the other side where the employees are at. If you take an item—if a person takes an item from the top part of the counter and leaves the store, they have stolen it. But if it's on the other side of the counter, according to the State, it's second degree burglary because you have breached the plain of an employee only area. That is what they're trying to argue.

RP at 321.

During deliberations, the jury submitted a question demonstrating they considered the State's misstatement of the law on implicit revocation to remain in the building. In

response, the court directed the jury back to the instructions. The instructions are an accurate statement of the law and support the State's contention that Mr. Champine committed burglary by unlawfully entering a restricted area reserved for employees and snatching an employee's cell phone from the restricted area.

Based on Mr. Champine's concession that he took the cell phone from the employee area and that the law was contained in the jury instructions, he has failed to demonstrate that, had trial counsel properly noted an objection to the State's mischaracterization of the law, there is a reasonable probability that the result of the trial would have been different. The jury instructions supported the narrow issue argued by the State and Mr. Champine's counsel that Mr. Champine's minimal entry into a restricted area reserved for employees to take the cell phone met the unlawful entry element of second degree burglary.

VICTIM PENALTY ASSESSMENT

Mr. Champine challenges the imposition of the $500 VPA as part of his sentence because he is indigent. Under former RCW 7.68.035(1)(a) (2018), trial courts were required to impose a $500 VPA on one convicted of a felony or gross misdemeanor. In 2023, the statute was amended. *See* LAWS OF 2023, ch. 449, § 1. Effective July 1, 2023, a trial court was no longer authorized to impose the VPA if it found a defendant indigent at the time of sentencing. *See* RCW 10.01.160(3). Recently, we held that the amendment applies to cases pending on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 530 P.3d

1048 (2023). Because the sentencing court previously found Mr. Champine indigent and his case is currently pending direct review, the $500 VPA fee must be struck from the judgment and sentence.

We affirm Mr. Champine's conviction but remand for the trial court to strike the VPA from his judgment and sentence.

A majority of the panel has determined 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.

Cooney, J.

No. 39096-9-III

LAWRENCE-BERREY, A.C.J. (concurring) — I concur with the lead opinion, but write separately to emphasize why I disagree with our dissenting colleague. In my view, Arturo Champine fails to establish he was prejudiced either by the prosecutor's erroneous legal argument or by his trial counsel's failure to object to it.

The jurors' question to the court indicates two things. First, some jurors did not understand the law, likely because of the prosecutor's confusing closing argument. Second, some jurors did understand the law, likely because of the court's clear instructions and because of defense counsel's correct closing argument. Had all jurors misunderstood the law, they would not have asked the court to clarify it.

The court's written instructions and defense counsel's closing argument made plain that the question for the jury was whether Mr. Champine, by reaching across the barrier between where he stood and the front desk, entered an area not open to the public. This is the point that differentiates theft from burglary. The court, by redirecting the jurors to its clear written instructions, emphasized the preeminence of those instructions over the prosecutor's closing argument.

Even if the question of prejudice is close—and I do not believe it is—Mr. Champine bears the burden of establishing prejudice on a more-likely-than-not basis. In this respect, he fails.

Lawrence-Berrey, A.C.J.

Lawrence-Berrey, A.C.J.

No. 39096-9-III

STAAB, J. (dissenting) — The events in this case are undisputed. Arturo Champine reached across a raised counter in a hotel lobby and took a cell phone from the desk and walked out of the hotel. The legal consequences of that action were disputed. Defense counsel admitted the conduct constituted theft but argued that the State failed to prove the charge of burglary because it was not clear where the public space ended and the restricted space began. The State argued two theories of criminal liability. First, that Champine exceeded the scope of his license to enter when he reached into a restricted area and committed a crime. Second, the State argued that once Champine committed the crime of theft, his license to be anywhere in the hotel was implicitly revoked.

I agree with the majority that the second theory was legally inaccurate. I also agree with the majority that defense counsel's failure to object to the prosecutor's incorrect argument was deficient. However, unlike the majority, I would find that Champine has demonstrated prejudice from his attorney's failure to object.

Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the trial would have been different. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The majority determines that defense counsel's deficient performance did not cause prejudice because the evidence was overwhelming. I disagree.

Whether Mr. Champine entered a restricted area by reaching his hand across a raised counter is debatable. The hotel manager testified that employees were trained that if they needed to leave the front desk, they should put a sign in the middle of the raised counter indicating that someone would be back shortly, but no sign was on the counter when Mr. Champine entered the empty lobby. He also testified that to the side of the desk was a curtain that could be closed off to restrict access to the desk, but was not closed on this occasion. The curtain did not contain signage indicating "employees only," and guests could use the nearby hallway to access restrooms or the hotel lounge. The manager also testified that certain doors near the lobby were marked with "employee only" signs.

The hotel clerk who was working that night also testified. She described the lobby as small. While she would generally put a sign on the counter if she left, she did not do so on this occasion. She described the raised desk and indicated that there would be no reason for a guest to reach over the counter onto the desk.

In closing, defense counsel pointed out that the raised counter was clearly public and there was nothing explicit to indicate that the desk behind the counter was restricted

to employees only. Instead, one would have to infer this restriction. Counsel provided an analogy of a guest reaching over and grabbing a cookie from the desk.

Finally, if the jury was not convinced that reaching across the counter constituted burglary then it should have entered a verdict of not guilty. Instead, the jury's question to the court indicates that it considered the State's incorrect argument that Champine's license to be in the hotel was implicitly revoked when he committed the theft.

Given the State's argument, the failure to respond to the jury's question, and defense counsel's concession that a theft had occurred, the jury was left with no option except a guilty verdict. Had defense counsel objected and thereby precluded the State from making the incorrect argument at trial, there is a reasonable probability that the outcome of the trial would have been different.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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