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NO. 69935-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NELSON D. STRUNK,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

In a prosecution for Residential Burglary, the prosecuting attorney argued the jury did not need to be unanimous as to the means the defendant committed the offense. The defendant has claimed prosecutorial misconduct as the sole issue on appeal.

1. Has the defendant preserved the issue of prosecutorial misconduct for appeal?

2. Did the prosecutor misstate the law in his closing argument?

3. If the prosecutor did misstate the law, was it prejudicial?

II. STATEMENT OF THE CASE

On October 26, 2011, the defendant unlawfully entered the residence of Hillary Hermes located in the Lynnwood area of Snohomish County. Both Ms. Hermes and the defendant testified he entered the home without permission. (RP 26, 32, 36, 90-91, 107-108, 111)[1]. Ms. Hermes was home alone in her family home when a man she did not know entered without knocking, without calling out or otherwise announcing himself. (RP 32, 37) Ms.

Hermes was aware of the entry because she heard the door open and heard footsteps in the kitchen.(RP 36) Ms. Hermes saw the man who had entered her residence and identified him as the defendant.(RP 37, 45-46). Both Ms. Hermes and the defendant testified he took a cellular/smart phone from her bedroom without permission and left the residence. (RP 41, 44-45, 91, 92, 110, 111, 112).

When Deputy Huri confronted him about the phone, the defendant admitted taking the phone; the defendant admitted he did not have permission to take the phone, but claimed he was just using it to try to locate Dave. (RP 70-71). The defendant was three to four blocks from the home and walking in the opposite direction when he was caught. (RP 71).

The defendant was charged with one count of residential burglary. (CP 60-61). At trial, the defendant presented a story that he thought the house he had entered was the residence of an acquaintance named "Dave" and the phone belonged to Dave's girlfriend, "Rachelle". (RP 103-112). The defendant took pains to emphasize he did not know "Dave" well and did not hang out with

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[1] For purposes of this brief, RP stands for the verbatim report of proceedings for the jury trial, dates January 22 & 23, 2013.

him. (RP 96, 103, 108) Neither "Dave" nor "Rachelle" appeared to testify at trial. The defendant claimed he knocked and called out for "Rachelle" multiple times with no answer before he walked into their home without permission. (RP 90, 107). The defendant also admitted taking the phone without permission for the purpose of calling "Dave". (RP 70-71, 90-92, 112-113). During closing argument, the following exchange took place.

> PROSECUTOR:..."See, the jury instructions tell you that a person commits the crime of residential burglary if they either enter or remain with the intent to commit a crime. And, in fact, six of you can come back guilty that he intended to enter the house to commit a crime. Six of you can come back and believe that he remained with the intent to commit to commit a crime. That's fine. It's either/or.
>
> DEFENSE ATTORNEY: Your Honor, I object at this time as to the mischaracterization of the law.
>
> THE COURT: So, ladies and gentlemen, I've given you the instructions on the law and this is argument by counsel. Please proceed.
>
> (RP 138).

III. ARGUMENT

A. THE DEFENDANT HAS WAIVED THE ISSUE OF PROSECUTORIAL MISCONDUCT ON APPEAL.

The defendant has claimed prosecutorial misconduct based on the alleged misstatement of the law during closing argument.

The defendant's trial counsel objected, calling the comments a mischaracterization of the law. The defendant made no further objection, did not request a curative instruction, and did not move for mistrial.

Absent a proper objection to the comments at trial, a request for a curative instruction, or a motion for a mistrial, the issue of misconduct cannot be raised on appeal unless the misconduct was so flagrant or ill-intentioned that the prejudice could not have been obviated by a curative instruction. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420, 422 (1993) (citing State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). "We focus less on whether the prosecutor's misconduct was flagrant and ill-intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). An objection is unnecessary in cases of incurable prejudice only because "there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." Id (citing State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

Our standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery at

761-62, 278 P.3d 653, 664-65 (2012). (Citing, 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice And Procedure § 4505, at 295 (3d ed. 2004) ("If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.")). "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery at 762, 278 P.3d 653, 665 (2012) State v. Weber, 159 Wn.2d 252, 271–72, 149 P.3d 646 (2006) (were a party not required to object, a party " 'could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.' " (quoting State v. Sullivan, 69 Wn. App. 167, 173, 847 P.2d 953 (1993)); State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (" '[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.' ")(alteration in original) (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

Although in the case at bar the defendant did object, there was no request for a curative instruction beyond the court's admonition to the jury. The defendant has therefore waived the issue for appeal.

1. THE PROSECUTOR DID NOT MISSTATE THE LAW IN HIS CLOSING ARGUMENT.

If the court finds the defendant has sufficiently preserved the error for review, he fails to establish prosecutorial misconduct that entitles him to a new trial.

To prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record and all the trial circumstances, the prosecutor's conduct was improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). "Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." State v. Pastrana, 94 Wn. App. 463, 478, 972 P.2d 557, 565 (1999) (quoting, State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The prosecutor's statements here were not improper as they were a correct statement of the law. Our Supreme Court has held, "The constitutional right to an "express verdict" entitles a defendant

to a unanimous verdict on the offense charged, not an express verdict on the particular alternative on which the jury relied." State v. Wright, 165 Wn.2d 783, 802-03, 203 P.3d 1027, 1036 (2009)(citing, State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002) citing State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976) (affirming conviction of second degree rape charged in the alternative, where jury returned a general verdict of guilt)); State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The Supreme Court emphasized this point, stating, "A defendant is not entitled to unanimity on an alternative charge where sufficient evidence supports each charged alternative. The [U.S.] Supreme Court has affirmed the constitutionality of this result. See Schad v. Arizona, 501 U.S. 624, 627, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (affirming first degree murder conviction where jury instructions did not require agreement on the charged alternatives of premeditated murder and felony murder)." Wright at 803, 203 P.3d 1027. (See also, Comments to WPIC 4.23 Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form).

The defendant has claimed he is entitled to a unanimous jury as to the alternative means as well as offense. This is not an accurate statement of the law. In general, the court has found unanimity is not required when there are sufficient facts to support each alternative means alleged. "The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." Ortega-Martinez at 707-708, citing, State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982); State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

With respect to burglary charges, the court has held the requirement for unanimity generally does not exist, even if there were not facts to support one of the alternative means of committing the offense. "In common factual situations, however, a jury instruction requiring the State to prove the defendant entered

or remained unlawfully in a building raises no unanimity concerns, even if there is no evidence to support one of the alternative means." State v. Allen, 127 Wn. App. 125, 126, 110 P.3d 849, 850 (2005). In Allen the unanimity of the jury became an issue because the prosecutor incorrectly characterized lawful entry with intent to commit a crime as a burglary. "But, because the deputy prosecutor mischaracterized long-established Washington law governing burglary during closing argument, we cannot be confident the jury was unanimous." Id at 127.

In the case at bar, even under the general rule this case does not require unanimity as to means as there is substantial evidence to support both means of committing residential burglary. The evidence in this case clearly shows the defendant unlawfully entered the residence and while he was in the residence, stole a phone then immediately left and walked away. The defendant admitted unlawfully entering the home and remaining in the home, taking the phone and leaving. The defendant's did not have license or privilege to enter the home from anyone, including "Dave" and his girlfriend. He did not have permission to enter or remain.

A juror who believed the defendant had the intent to commit a crime upon entering the home, would by necessity also believe

the defendant had that intent while he remained in the home since the defendant completed the crime. The intent would have carried through from entering to the completion of the crime.

> "For example, in the common situation where a stranger breaks into a building, the entry is not then licensed, invited, or otherwise privileged and is therefore clearly unlawful. Having entered in this manner, the defendant cannot be said to have any license or privilege to be in the building at all. Consequently, the defendant's continuing presence in the building satisfies the statutory definition of unlawfully remaining."

Allen 127 Wn. App. at 133.

The prosecutor's argument did not misstate the law or call for a verdict that was contrary to the law.

2. IF THE PROSECUTOR DID MISSTATE THE LAW, IT WAS NOT PREJUDICIAL.

Even if the prosecutor misstated the law, the defendant was not prejudiced. To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the jury verdict. Thorgerson at 442–43, 258 P.3d 43 (2011); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). "We consider the prosecutor's alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." State v. Anderson, 153 Wn.

App. 417, 430, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

In the case at bar, the issue for the jury was not whether the defendant unlawfully entered or unlawfully remained in the residence. The issue at trial was whether the defendant intended to commit a crime, specifically to steal Ms. Hermes' phone. This was the focus of the defendant's entire closing argument. "He [the defendant] goes into the house that's not his. He thinks it's where his buddy is staying, and he takes a phone....His only intent...only when you're trying to commit a crime does legal intent come into play. Grabbing that phone, he did not intent to commit a crime. He is not guilty of residential burglary..." (RP 144).

The uncontroverted physical evidence was the defendant entered a home he did not have license, invitation or privilege to enter, took a phone he did not have permission to take and walked away with it. The defendant had made it three blocks from the home when he was stopped by law enforcement. The phone was in the defendant's pocket when the first deputy contacted him. Under these facts, it would be very difficult, if not impossible, to imagine the prosecutor's comments could have prejudiced the defendant since the defendant's intent upon unlawfully entering the

house would have carried through to the completion of that intent when he took the phone while he was unlawfully remaining in the home. Based on the facts in this case there was no prejudice to the defendant.

Even if the prosecutor's argument had not correctly stated the law and the court found it was prejudicial to the defendant, it was not so prejudicial that it was not cured by the court's instruction to the jury. The court advised the jury to refer to its instructions immediately following the defendant's objection. The judge directed the jury to the jury instructions. The jury is presumed to follow the court's instructions. State v. Imhoff, 78 Wn. App. 349, 351, 898 P.2d 852, 853 (1995) citing State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). The judge does not reference one instruction alone, but directed the jury to the instructions as a whole. The first instruction to the jury states, "It is important 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, statement, or argument that is not supported by the evidence or the law in my instructions." (CP 31, Court's Instruction

to the Jury no. 1). The last instruction to the jury emphasizes the need for unanimity of the jury, repeating the need for unanimity twice before the final paragraph which states, "Because this is a criminal case, each of you must agree for you to return a verdict." (CP 46-47, Court's Instruction to the Jury no. 15). There is nothing in the "To Convict" instruction indicating the jury did not need to be unanimous. The court directing the jury to the instructions was sufficient to cure any alleged misstatement made by the prosecutor.

If the defendant felt the court's instruction to the jury was insufficient, he could have requested a more specific curative instruction directing the jury that they needed to be unanimous as to the means of committing the offense, or moved for mistrial. He did not do so. The defendant's failure to do so demonstrated the comments did not appear prejudicial to him in the context of the trial. Pastrana, 94 Wn. App. At 480.

The overwhelming evidence in this case supports conviction under each alternative means of committing residential burglary. The portion of the closing in question consists of less than one half inch of the transcript (or five lines) in the entire trial. (RP 138). The limited nature of the alleged impropriety weighs against the unsupported allegation that it impacted the jury's verdict. See State

v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993) (The isolated nature of the prosecutor's comment demonstrated, in part, that the appellant had not established by a substantial likelihood that it impacted the jury's verdict.)

IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted on December 19, 2013.

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